PERSONAL AND CORPORATE INSOLVENCY UPDATE

Holly Doyle & Simon Passfield, Guildhall Chambers

1 Introduction

1. It has been another year of widespread development for insolvency lawyers. In the corporate context, a strictly obiter consideration by the Chancellor as to the requirements for directors appointing an administrator to serve notice of intention to appoint on a company has lead to a seemingly endless run of cases considering the validity of out of court appointments which has disclosed a marked divergence of opinion amongst the Judges of the Chancery Division, whilst the Supreme Court has had recourse to revisit the anti-deprivation principle and the rule in *Cherry v Boultbee*.

2. In the personal context, the long awaited decision of the Supreme Court on the proper interpretation of Stack v Dowden has finally been handed down, and regrettably raises as many issues as it clarifies, the consideration of IVA irregularities have been at the forefront of the court's mind and the Court of Appeal have corrected Peter Jackson J's over exuberance in suggesting that the family court should adjourn bankruptcy proceedings in favour of spousal ancillary relief claims.

3. In these notes, we have attempted to identify and consider the consequences flowing from the decision of the Supreme Court in *Jones v Kernott* [2011] UKSC 53, as well as summarising some of the more important, interesting and influential cases from the past 12 months.

2 *Jones v Kernott*

The Facts

4. A property was purchased in the joint names of Ms Jones and Mr Kernott in 1985 but there was no declaration of trust specifying the shares in which the property was to be held. Initially, the parties shared the household expenses. However, in 1993, Mr Kernott moved out of the property whereupon Ms Jones remained in occupation with their two children and paid all of the household expenses herself. The parties subsequently cashed in a joint life insurance policy in order to enable Mr Kernott to put down a deposit on a house of his own.

5. In 2006, Mr Kernott initiated correspondence with a view to claiming his 50% beneficial interest in the property. Ms Jones contended that the parties' intentions as to the beneficial ownership of the property had changed following their separation.

The Decisions Below

6. HHJ Dedman sitting in the Southend-on-Sea County Court found that the beneficial interests of the parties had changed over time such that Ms Jones was now entitled to a 90% beneficial interest in the property.

7. In the High Court ([2009] EWHC 1713 (Ch), [2010] 1 WLR 2401), having concluded that the majority speeches in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 indicated that the court was entitled to impute an intention to the parties (i.e. "a common intention which they did not have, or at least did not express to each other"), Nicholas Strauss QC upheld the decision at first instance, concluding that a change in intention could be readily inferred or imputed from the parties' conduct.

8. The Court of Appeal ([2010] EWCA Civ 578, [2010] 1 WLR 2401) by a majority allowed Mr Kernott's appeal finding that the decision of the House of Lords in *Stack v Dowden* did not enable the court to impute a common intention where it was not possible to infer one. Accordingly, it was held that the property should be split equally, although the court left open the question of whether Ms Jones would be entitled to charge Mr Kernott's share by way of equitable accounting with any part of the mortgage payments discharged by her since 1993.

The Supreme Court

9. The Supreme Court unanimously overturned the decision of the Court of Appeal, finding that the parties had changed their intention in respect of the beneficial ownership of the property such that Ms Jones was now entitled to 90% of the net equity.

10. However, the unanimity of the Justices is belied by a seismic divergence in the reasoning underpinning their conclusions which it is submitted has left the law as unclear as ever in a number of respects.

(i) Imputation

11. Many of the difficulties caused by the decision of the majority of the House of Lords in *Stack v Dowden* arose from perceived inconsistencies in the speeches of Lord Walker and Baroness Hale.

12. In particular, there are two passages of the oft-cited speech of Baroness Hale which on their face would appear to be mutually inconsistent:

> "The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in light of their whole course of conduct in relation to it (at [60])."
>
> "The search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended...it does not enable the court to abandon that search in favour of the result which the court itself considers fair (at [61])".

13. The failure by Baroness Hale to draw a distinction between the concepts of inference and imputation has caused much confusion.

14. It should be borne in mind that in any case where a party is asserting that the beneficial ownership of property is different to the legal ownership, the questions which the court is required to determine are two-fold: (i) did the parties have a common intention that the beneficial ownership of the property should be different (the 'first stage') and (ii) if so, what did the parties intend that their respective shares should be (the 'second stage').

15. The suggestion that the court is entitled to have regard to fairness in order to quantify the beneficial entitlements of the parties where a common intention to own property jointly can readily be established (i.e. at the second stage) is wholly uncontroversial. However, applying the yardstick of fairness to the first stage task of ascertaining whether such common intention exists through the mechanism of imputation would be a wholly novel development. The elision of the concepts of inference and imputation cast significant doubt as to whether or not such imputation was now permissible.

16. In contrast, in his very clear dissenting judgment, Lord Neuberger opined that whilst an intention could be inferred (i.e. objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements) it could not be imputed (i.e. attributed to the parties even though no such actual intention could be deduced from their actions and statements, and even though they had no such intention). The former involves concluding what the parties intended; the latter what they would have intended.

Lord Walker and Baroness Hale JJSC

17. In the Supreme Court, Lord Walker and Baroness Hale presented a united front by delivering a joint judgment intended to clarify any ambiguities arising from *Stack v Dowden*.

18. On the question of whether it was permissible for the court to impute a common intention, the Justices considered that the court's primary search was to ascertain the parties' actual shared

intentions, whether express or to be inferred from conduct, but that there were at least two exceptions:

(1) Where the presumption of resulting trust arises (whereby the court imputes to a party who contributes in whole or in part to the purchase of a property in the name of another an intention to acquire a beneficial interest therein;

(2) Where it was clear that the beneficial interests are to be shared but it is impossible to divine a common intention as to the proportions in which they are to be shared (i.e. at the quantification stage).

19. It was made explicitly clear that where the court can deduce the parties' actual intentions "it is not possible for the court to impose a solution upon them in contradiction to those intentions, merely because the court considers it fair to do so" [46], but that if it cannot deduce the intended shares (i.e. at the second stage), it may have no alternative but to ask what their intentions as reasonable and just people would have been had they thought about it at the time.

20. The Justices went on to state that whilst the conceptual difference between inference and imputation is clear, the difference in practice may not be so great because the scope for inference is wide [34] and that in the present case there was no need to impute an intention that the parties' beneficial interests would change, because the judge made a finding that the intentions did in fact change [48].

Lord Collins JSC

21. Lord Collins expressly agreed with Lord Walker and Baroness Hale, stating that it should not be necessary to reconsider the correctness of *Stack v Dowden* because "the differences in reasoning are largely terminological or conceptual and are likely to make no difference in practice" [58].

22. He accepted that it is not possible to impute a common intention to displace the presumption of equality but that "the difference between inference and imputation will hardly ever matter and that what is one person's inference will be another person's imputation" [65].

Lord Kerr JSC

23. Lord Kerr rejected the suggestion that the divergence in reasoning between inference and imputation is unlikely to make a difference in practice [67]. He cautioned against straining the concept of inference simply to avoid "the less immediately attractive concept of imputation" [72].

24. Accordingly, where it was clear that a common intention was not deductible from the evidence or did not exist, imputation was the only course to follow and the court's attention should be "squarely on what is fair" [75].

Lord Wilson JSC

25. Lord Wilson considered that the speeches of Baroness Hale and Lord Walker in both *Stack v Dowden* and *Jones v Kernott* made it clear that a common intention can be imputed to the parties [78]. Curiously, he rejected Baroness Hale's suggestion in *Stack v Dowden* that the court cannot abandon the search for the parties' intentions in favour of the result the court considers fair as wrong [88] and did not accept that it demonstrated that she had not intended to recognise a power to impute a common intention at all [87], as Rix LJ had held in the Court of Appeal.

26. Advocating a more rigorous approach to inference, he concluded that in the present case inference was impossible but that an intention should be imputed to the parties to share the beneficial interest in the property in the proportions awarded [89].

(ii) Equitable Accounting

27. Having found (by inference) that the parties intended that their beneficial interest in the property should change after Mr Kernott moved out, in considering the second stage Lord Walker and Baroness Hale held that the intention which could be inferred was that Mr Kernott was entitled to half of the value of the property as at the date at which he moved out (1993) but that thereafter Ms Jones was entitled to the remaining equity in the property resulting from the increase in value; Ms Jones would have the sole benefit of any capital gain [48]. This also represented the fair outcome.

28. The Justices noted that on this approach there is no scope for further accounting between the parties, which it was suggested would be a disproportionate exercise [50]. It was not made explicitly clear that these principles do not apply.

29. It is suggested that insofar as *Jones v Kernott* purportedly clarifies *Stack v Dowden*, the decision of Blackburne J in *French v Barcham* [2008] EWHC 1505 (Ch) remains good law such that equitable accounting principles remain applicable on an application by a trustee in bankruptcy for under s 14 TOLATA.

Summary

30. The ambiguity of the speech of Baroness Hale in *Stack v Dowden* is neatly illustrated by the divergence of opinion between Lord Collins and Lord Wilson as to whether or not imputation of a common intention to alter the beneficial ownership of property was permissible as a result thereof. Both Lord Kerr and Lord Walker are vehement that imputation is a proper tool in the court's armoury where inference is not possible. In contrast, Lord Collins makes it abundantly clear that this is not permissible, albeit he suggests that he would be willing to effectively impute an interest under the guise of 'inference'. For their part, Lord Walker and Baroness Hale do not explicitly spell out whether imputation is available at the first stage.

31. However, what is clear is that the Supreme Court were unanimous in finding on the facts, whether by inference or imputation, that Mr Kernott intended that Ms Jones' beneficial interest in the property should be enhanced (and accordingly his diminished) once he had left the house, notwithstanding that there were no discussions between them in relation thereto.

32. Curiously, it appears that the court's approach to quantification was to treat Mr Kernott as having fixed the financial value of his interest as at the date at which he left the property and that thereafter he had no interest in any financial gain to the property. This presents at least two issues. Firstly, this would appear to sit more comfortably with a resulting trust analysis than that of constructive trust, since the proportions of each parties' interests in the property at any given time can be calculated only by reference to the value of the net equity in the property. Secondly, this is liable to create significant difficulties in the event that the property decreased in value subsequent to the constructive trust arising. In that instance, would Ms Jones have been required to bear the consequential capital loss?

33. Conversely, this method of valuation has the advantage that the value of Mr Kernott's interest in the property is both fixed and readily identifiable and not affected by subsequent events. In contrast, if his beneficial interest under the constructive trust diminished over time in line with Ms Jones' discharge of the mortgage obligations, it would follow that her beneficial interest could be enhanced simply by delaying before asserting an increased interest.

34. Assuming that Mr Kernott had been adjudged bankrupt and it was his trustee asserting an interest in the property, the trustee may potentially be placed in the unenviable position of awaiting the expiry of the first year of his appointment in order to benefit from the presumption in s 335A(3) IA and potentially losing equity in the property resulting from the consequent delays.

35. Regrettably, it appears that the issues presently raised may simply be the tip of the iceberg, throwing up a morass of further litigation. In short, a good result for the lawyers!

3 Personal Insolvency Case Updates

Abernethy v Hotbed Limited **[2011] EWHC 1476 (Ch); [2011] BPIR 1547**
H, acting on behalf of a group of investors, loaned funds to a company, guaranteed by its director A. H served a statutory demand on A, and his application to set it aside was dismissed. On applying for permission to appeal, A applied to adduce new evidence, asserting a defence by way of a collateral agreement. Newey J dismissed the appeal on that point, but granted permission to appeal on the basis that H might not have had standing to serve the statutory demand on behalf of the creditors.

Adeosun v Her Majesty's Revenue & Customs **[2011] EWHC 1577 (Ch); [2011] BPIR 1555**
HMRC presented a bankruptcy petition in the sum of £107,000 odd. The debtor made a number of payments, but also made promises to pay the balance, which were not kept. A bankruptcy order was made when the debt stood at £89,000 odd, at a time when the debtor was offering to pay £60,000 with instalments of £10,000 a month. The debtor received an offer of a loan of £80,000, but his application to annul the bankruptcy order based on that offer was dismissed, on the basis that the bankruptcy order should be appealed. Vos J dismissed the debtor's application for permission to appeal the bankruptcy order out of time. The Registrar had been entitled to make the bankruptcy order against the background of the then existing offer, with previous offers not having been met.

British Arab Commercial Bank plc v Ahmad Hamad Algosaibi & Brothers Co **[2011] EWHC 2444 (Comm); [2011] BPIR 1568**
A number of banks had issued proceedings against the defendants. After a trial where liability was admitted, one of the banks obtained interim charging orders over properties. After those orders were served on the other banks, they followed suit. Flaux J held that where a statutory insolvency scheme that required that assets be dealt with pari passu had not intervened, the first past the post principle as regards enforcement applied. While there was a residual discretion not to make a final charging order where conduct or exceptional circumstances required it, there was nothing to justify the exercise of such discretion on the facts.

Commissioner for Her Majesty's Revenue & Customs v Earley **[2011] EWHC 1783 (Ch); [2011] BPIR 1590**
HMRC alleged E owed over £4 million in tax. E proposed an IVA, whereby he proposed to reduce the tax debt to £100,000. HMRC informed the nominees of its intention to reject the proposal and pursue the full debt. E was made bankrupt and obtained, without notice, an injunction restraining HMRC from voting against the IVA. HMRC did not vote and the IVA was approved. After the injunction expired HMRC applied to revoke the approval of the IVA. The Chancellor held that he was bound by the decision in *Clarke v Coutts & Co* [2002] EWCA Civ 943; [2002] BPIR 916 such that the Court had jurisdiction to hear an application to revoke the approval of an IVA despite the bankruptcy of the debtor. HMRC had been unfairly prejudiced by the reduction of its debt to £100,000 and there been a material irregularity in that HMRC had been prevented from voting, when its vote against would have carried the day.

Hunt (as trustee in bankruptcy of Janan George Harb) v (1) Harb (2) HRH Prince Abdul Aziz Bin Fahd Abdful Aziz **[2011] EWCA Civ 1239; [2012] BPIR forthcoming**
H asserted that she had a valuable claim against the son of the late King of Saudi Arabia, arising from her claim to have secretly married the late King. A bankruptcy order was made against H on her own petition. Her trustee in bankruptcy issued a claim against the Prince, shortly before the expiry of the limitation period. However, upon being unable to obtain after the event insurance and third party funding, the trustee discontinued the proceedings. On H's application, the Deputy Judge set aside the discontinuance, to enable offers to be made for an assignment of the claim, directing that the trustee could reject any offer on terms that all or any part of the net proceeds of a successful claim would be paid to him or applied for the benefit of the creditors on the grounds that the purchaser would in pursuing the claim after sale be acting as the mere nominee or delegate of the trustee who would accordingly continue to be at risk of liability for costs. H appealed against the direction. The Court of Appeal dismissed the appeal, but deleted the direction. Just as it was not right at an early stage of litigation for the court to consider imposing a restriction on the prospective trial

judge's discretion as to costs, so it would be wrong to decide whether to make an order in the terms of (or similar terms to) the Deputy Judge's order, before one even knew the existence, number, provenance and terms of any offers which the trustee might receive for the claim. The Court of Appeal left open the question whether the court would have power in an appropriate case to give a similar direction where it had all the offers which the trustee had received, and thought it just to make such an order.

Kapoor v (1) National Westminster Bank plc (2) Tan **[2011] EWCA Civ 1083, [2011] BPIR 1680**

A company which was a connected creditor of K assigned part of its debt to an individual, C, as a mechanism designed to ensure that an Individual Voluntary Arrangement was accepted by K's creditors. Another creditor of K, a bank, applied to revoke the approval of the IVA on the grounds that there was a material irregularity at or in relation to such meeting and or that the decision of the chairman to treat the claim of the individual as a claim not associated with K be set aside. His Honour Judge Hodge QC, sitting as a High Court judge, granted the application ([2011] EWHC 255 (Ch), [2011] BPIR 842). The assignment was not an absolute assignment, so the debt was still owed to a connected creditor. The court would not sanction a scheme demonstrably lacking good faith and clearly undermining the policy of the voting entitlements. The Court of Appeal dismissed the appeal. The judge's conclusions on the assignment were wrong, such that the chairman had been correct to allow C's vote. However, against the background of the obligations of good faith and the legislative policy as regards the required majorities for IVA approval, there had been a material irregularity in allowing C to vote because to do so would be to give effect to a scheme designed solely to subvert that policy.

Re Kaupthing Singer and Friedlander Ltd **[2011] UKSC 48, [2011] BPIR 1706**

The Supreme Court unanimously decided that the rule in *Cherry v Boultbee* (a person cannot share in a fund in relation to which he is also a debtor without first contributing to the whole by paying his debt) was excluded on the facts by the rule against double proof (a person cannot have more than one proof in respect of the same debt). It would be technical, artificial and wrong to treat the rule against double proof as trumping set-off but as not trumping the rule in *Cherry v Boultbee*. Lord Walker cast considerable doubt on the decision of the Court of Appeal in *Re SSSL Realisations* (2002) Ltd [2006] EWCA Civ 7, [2006] BPIR 457.

McGuiness v Norwich and Peterborough Building Society **[2011] EWCA Civ 1286**

M provided a guarantee for his brother's mortgage liabilities to the Society. Under the terms of the guarantee, M agreed to pay any sums due under the guarantee immediately on demand and to see that any sums due from the borrower were paid. The guarantee made it clear that M was to be seen as a principal debtor (and not simply a surety) and that there was no need for enforcement steps to be taken against the borrower before the guarantee was enforced against M. The brother fell into arrears, and the Society sought to enforce the guarantee by serving a statuary demand on M. The Deputy Registrar made a bankruptcy order against M, holding that the liability of M under the guarantee was for a liquidated sum and was not merely a damages liability. M's appeal was dismissed by Briggs J ([2010] EWHC 2989 (Ch); [2011] BPIR 213), holding that M's liability was for a liquidated sum upon which a bankruptcy order could be made. The Court of Appeal dismissed M's further appeal, agreeing that on its construction the personal liability of M under the guarantee created a liability in debt and not in damages. Where a guarantor's liability was for damages (e.g. where their obligation was to provide an indemnity or an undertaking that the principal debtor would perform his obligation, it did not matter that the measure of the damages was easily ascertainable (being the amount of the principal's debt), that is not a debt for a liquidated sum and it could not found a bankruptcy petition.

Namulas Pension Trustees Limited (2) Boyd v (1) Mouzakis (2) Mouzakis (3) Hogg (4) Grant **[2011] BPIR Issue 6 (Chesterfield County Court, District Judge Stark, 9 August 2011)**

Two Claimants had issued proceedings against the debtors, husband and wife, in relation to commercial rent arrears. Notice of the creditor's meetings was sent to one of the Claimants, care of the solicitors acting for him in the proceedings, who were also acting for the other Claimant (with no notice specifically addressed to that other Claimant.) After approval of the

IVAs, the Claimants issued applications to revoke the approval of each of the IVAs under s 262(1)(b) of the Insolvency Act 1986 on the grounds of material irregularity, in that they were not given notice of the creditors' meetings and that, had they been given notice, they would have voted against the proposals, thereby defeating them. The District Judge revoked each of the IVAs on the grounds of material irregularity. Neither of the Claimants received actual notice of the creditors' meetings and it was inconceivable that they would not have (i) attended the creditors' meetings and (ii) voted against the proposals. The notice of the meeting and of the IVA proposals were not validly served on the solicitors. The general provisions of CPR Part 6 as to service could not be used to overcome the specific requirements of rr 12A.1 and 12A.5 of the Insolvency Rules 1986. The improper service amounted to an irregularity under s 262(1) of the Act. The Claimants were each separate legal entities and separate creditors, and it was not sufficient to treat service on one as service on the other. That too amounted to an irregularity. The IVAs were be revoked and there was no purpose in convening another meeting as the Claimants would defeat the proposals, if put again.

National Westminster Bank plc v Yadgaroff (2) Paylor (3) Sofer-Yadgaroff (4) Yadgaroff (5) Zeff **(Chancery Division, Norris J, 15 December 2011)**
Shortly before the creditors' meeting to consider Y's IVA proposal, his wife submitted a large debt claim allegedly based on a consent order in matrimonial proceedings, which had culminated in her interest in a property being used to discharge debts due from the debtor to his first wife. The chairman allowed the vote, but marked it as objected to, which meant that the IVA was approved. The bank's appeal was dismissed by the deputy registrar. Norris J allowed the appeal, on the basis that's the wife's evidence was such that the value of her debt was substantially lower. The IVA was set aside and no further meeting was ordered, with the effect that the bank was entitled to proceed with a bankruptcy petition against the debtor.

Official Receiver v Negus **(Chancery Division, Newey J, 16 December 2011)**
The Official Receiver sought an income payments order against the bankrupt for £40 pcm, being half of the difference between his income and expenses. An order was refused, because the entirety of the sums generated would go to discharge bankruptcy expenses, and the creditors would receive nothing. Newey J allowed the Official Receiver's appeal. The fact that the sums would discharge expenses only was not a ground to refuse to make the order, as (1) the foundation of the order under s.310 of the Insolvency Act 1986 made no reference to a benefit to creditors, (2) it was as important to discharge the expenses as well as debts, since the expenses had priority and (3) public policy was that a bankrupt should not be discharged from his debts without some obligations.

Orrick, Herrington & Sutcliffe (Europe) LLP v Frohlich **(Ch D 18/10/11)**
O, F's solicitors, served statutory demand on F in respect of an unpaid invoice for their professional services. F disputed the invoice but made no application to set aside the statutory demand. F and O subsequently entered into a compromise agreement. No payment was made and O presented a bankruptcy petition allegedly on the basis of an agreed and liquidated debt. F asserted that O's costs should be assessed - the statutory demand had been based not on the compromise agreement but the invoice. Deputy Registrar Schaffer dismissed the petition. The statutory demand was for an unliquidated amount and was therefore inherently defective. It did not matter that the invoice had been converted into a liquidated sum later as a result of the compromise agreement. The Practice Direction on Insolvency proceedings made it clear that only the debt claimed in the demand might be included in the petition. Despite the fact that F had for all practical purposes admitted the liability, that would not justify the Court exercising its discretion to make a bankruptcy order. The Court could not say that although the statutory demand might be defective and the bankruptcy petition might not be sustainable, a bankruptcy order would be made because the money was owed.

Re Ruiz (a bankrupt); Mekarska v (1) Ruiz (2) Boyden **(Court of Appeal, Thorpe LJ, Kitchin LJ and Mann J, 2 December 2011)**
Peter Jackson J had dismissed a wife's application to annul a bankruptcy order made against her husband on his own petition as well as an appeal against an ancillary relief order providing her with a lump sum equal to the surplus after the bankruptcy debt and costs had

been paid (see [2011] EWHC 913 (Fam), [2011] BPIR 1139). The wife sought permission to appeal, asserting that that her matrimonial home rights of occupation and her ancillary relief requirements took priority over the bankruptcy. The Court of Appeal dismissed her appeal. Her rights of occupation had no such priority, and merely ensured that she could not be removed without a court order. Further, it was wrong in both law and practice to consider adjourning a bankruptcy petition pending determination of existing ancillary relief proceedings.

Salter v Wetton (as trustee in bankruptcy of Calder (deceased)) **[2011] EWHC 3192 (Ch)**
S and the bankrupt were joint owners of a property. The bankrupt's interest was transferred to S at an undervalue 2 ½ years before the bankruptcy order. On the trustee's application, the transaction was avoided as a transaction at an undervalue, it being common ground that the transfer of the property was at an undervalue, the judge relying upon the presumption of insolvency under s.341(2) of the Insolvency Act 1986 because of their joint trusteeship. The trustee had relied on one debt to a firm of solicitors which resolved itself into a judgment in December 2010. The Judge found this was not a liability of the bankrupt in April 2006 so he was not cash flow insolvent. However, as S had not adduced evidence sufficient to create a positive balance sheet, the presumption as to balance sheet insolvency had not been rebutted. Briggs J allowed S's appeal. If the bankrupt had been cash-flow solvent, as at the time of the transfer he had no other debts, he could not have been balance sheet insolvent provided he had some assets, however illiquid. Therefore, there was no insolvency of the bankrupt at the time of the transfer. It was unfair for the Judge to have decided the case by reference to C's undisclosed debts when S had succeeded in relation to the only debt relied upon by W as part of his case.

Sanders v (1) Donovan (2) Donovan **(Ch D 26/07/11)**
On 6 February 1995, a bankruptcy petition was presented against D, and a bankruptcy order was made on it on 3 May 1995. S was appointed as trustee in bankruptcy with effect from 1 February 1996. After having vacated office, S was re-appointed as trustee upon discovery that D owned land in Morocco. S issued proceedings in Morocco to realise that property. DCD argued that a power of attorney granted to him by D dated 16 February 1995 gave DCD the power to deal with the property and defeated S's claim. The Supreme Court of Morocco asked S to obtain a judgment of the English court as to the effect of the power of attorney on S's title to the property. S issued an appropriate application. Chief Registrar Baister held that the power of attorney was entered into the period caught by s 284 of the Act and, as it was neither validated nor ratified by the court, was void to the extent that it purported to, created or gave rise to any disposition of property. In any event, the bankruptcy of the donor of a power of attorney automatically revoked the power (applying *Dawson v Sexton* and *Markwick v Hardingham*). Therefore the power of attorney was of no effect. The property in Morocco was included in the bankruptcy estate and vested in S pursuant to ss 283(1), 306 and 436(1) of the Act and he was entitled to realise it for the benefit of the creditors. DCD had no power in respect of the assets in the bankruptcy estate.

Secretary of State or Work and Pensions v (1) Payne (2) Cooper **[2011] UKSC 60; [2012] BPIR Issue 1**
Cranston J had held that attempts by the Secretary of State to recover overpaid benefits from future payments were caught by the moratorium imposed on enforcement when a debtor obtained a debt relief order. The Secretary of State's appeal was dismissed by the Court of Appeal. The Supreme Court unanimously dismissed the Secretary of State's further appeal. There was no such thing as the "net entitlement principle". The Claimant had a statutory entitlement to the amount of benefit which was awarded. The liability to repay arose independently of any entitlement to any benefit from which the Secretary may later decide to recoup it. The power to recover the debt by deduction from benefit was a "remedy in respect of a debt" which could not be exercised during the moratorium, according to section 251G(2) of the Insolvency Act 1986. There was no reason to distinguish between the DRO scheme and bankruptcy in this respect.

Sofaer v Anglo Irish Finance plc **[2011] EWHC 1480 (Ch); [2011] BPIR 1736**
A creditor demanded £8 million from the debtor due under various guarantees, with the principal debt being secured over properties owned by the borrower. The debtor proposed an IVA in an attempt to avoid bankruptcy. The creditor voted against it, resulting in the IVA not

being approved and the debtor's bankruptcy. After the meeting, the debtor acquired the equity of redemption in each of the charged properties, and on his appeal against the valuation of the creditor's vote, asserted that the creditor was secured. Lewison J dismissed an appeal against a registrar's decision to strike out the debtor's appeal. It was held that the creditor's claim was liquidated and ascertained, as it was conclusively quantified, and that the debt was not secured because s 383(2) of the Insolvency Act 1986 required the debt to be secured on the debtor's property, which it was not. Also, the relevant date for determination was the date of the meeting, so the post-meeting acquisitions were not relevant.

***Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd and* others [2011] UKPC 17; [2011] BPIR 1743**
TMSF obtained judgment against D in the sum of US $30 million. D was later made bankrupt. TMSF subsequently learnt that D had established two discretionary trusts in the Cayman Islands with assets of some US $24 million, in respect of whish D had a power of revocation of the trusts, with the consequence that he could re-invest in himself an amount which would satisfy a very large proportion of the judgment debt. The Privy Council, in allowing an appeal from the Cayman Islands, applied *Masri v Consolidated Contractors International Co SAL (No. 2)* [2008] EWCA Civ 303; [2009] QB 450, [2008] BPIR 531 so as to enable TMSF to appoint a receiver by way of equitable execution under s 37(1) of the Senior Courts Act 1981 over the power of revocation.

***Williams (Trustee of the Insolvent Estate of John Owen Napier Lawrence Deceased) v (1) Lawrence (2) Lawrence* [2011] EWHC 2001 (Ch); [2011] BPIR 1724**
M and his mother, as executors of the deceased's estate, transferred the deceased's interest in a property to M for the sum of £38,250, calculated by reference to a beneficial interest and right of occupation allegedly acquired by M pursuant to pre-death discussions . An insolvency administration order was subsequently made against the estate of the deceased as a result of the deceased's liabilities at Lloyd's. HHJ David Cooke (sitting as a Judge of the High Court in the Chancery Division, Birmingham District Registry) upheld the trustee in bankruptcy's claim that the transfer of the interest in the property was a void disposition under s 284 of the Insolvency Act 1986. M did not have the rights in the property as maintained. Whilst if he had had such rights, the value of the whole property would have been only £35,000, it was in fact the case that the deceased's interest in the property was worth significantly more that £38,250. The transfer would not be ratified.

***Williams (Trustee of the property of Nassim Mohammed) v Mohammed* (Chancery Division, HHJ Hodge QC (sitting as a judge of the High Court), 16 March 2011**
Post-bankruptcy, the bankrupt had obtained advice from a solicitor as to the bankruptcy estate, the approach to be adopted with the trustee in bankruptcy and the application of insolvency law to the bankrupt's business affairs. On the trustee's application, the district judge ordered the bankrupt to disclose a copy of the file note of the advice provided by the solicitor. HHJ Hodge QC grated permission to appeal, but dismissed the appeal. The correspondence accompanying the file note gave the impression that the advice was given with the purpose of assisting the bankrupt in circumventing his statutory obligations to the trustee. Having read the file note, the Judge determined that whilst no such iniquitous advice was actually provided, the bankrupt's purpose was an improper one, to conceal assets. Any privilege in the file note was abrogated by the iniquitous purpose, even if that purpose was not fulfilled.

***Zinda v Bank of Scotland plc* [2011] EWCA Civ 706; [2011] BPIR 1802**
A possession order was made against Z, suspended on terms that he should pay the current instalments plus £96 per month towards the arrears. The arrears and outstanding sum were later consolidated by agreement into a single monthly payment, but further arrears arose. Upon further arrears, the bank sought enforcement. Z applied to suspend enforcement, arguing that the consolidation arrangement had discharged the previous arrears, with the effect that the possession order had been extinguished. The district judge dismissed the application and Z's appeal was dismissed. The Court of Appeal dismissed Z's second appeal. The effect of the consolidation was not to discharge the mortgage, but only to clear the arrears. Under the terms of the possession order, Z had to pay the current instalments and the arrears, which he had not done.

4 Corporate Insolvency Case Updates

Adjei and others v Law For All **[2011] EWHC 2672 (Ch) (Norris J)**
The directors of a company applied for an administration order with retrospective effect having failed to serve notice of intention to appoint on a qualifying charge holder. Norris J adopted the same approach which he took in *Care Matters*, accepted that the purpose of administration was reasonably likely to be achieved and made a retrospective order. The court declined to award the directors' costs of the application as an expense of the administration, the application having been necessitated by their mistake in the first place.

Argentum Lex Wealth Management Ltd v Giannotti **[2011] EWCA Civ 1341**
An investment company (W) negligently mismanaged a client (G)'s request to transfer his occupational pension scheme to a self-invested personal pension. G complained to the FOS, which advised that he would be better to resort to court proceedings, which he subsequently issued. Before trial, W transferred its assets to a new investment company (A), applied to the FSA to have its authorisation cancelled and was placed into voluntary liquidation. As a condition of W being allowed to cease and A being allowed to start up business, A was required to enter into a deed poll with the FSA accepting responsibility for the acts and omissions of W in carrying out regulated activities. The liquidators settled G's claim and a consent judgment was entered against W. A failed to honour the judgment and G served a statutory demand. A applied for an injunction restraining G from presenting a winding up petition on the grounds that: (1) The deed pool referred solely to complaints capable of being made and actually made to the FOS. G was not an eligible complainant because he had withdrawn his claim to the FOS; (2) A's acceptance of the liabilities of W did not absolve G from the necessity of obtaining a judgment against A; (3) the deed pool cannot extend to liabilities for judgments against W to which A was not a party and had no opportunity of defending. The Court of Appeal unanimously upheld the appeal against HHJ Baker QC's decision to refuse an injunction, holding that all of the points were susceptible of argument and should be matters for proper argument in front of a Chancery Judge at the appropriate time and should not be dealt with by way of the kind of "side wind" which the Companies Court operates by way of its jurisdiction in granting injunctions to restrain petitions. It would appear that Longmore LJ effectively applied a lower test than the standard real prospect of success, equating the test to permission for judicial review/permission to appeal applications.

Belmont Park Investments PTY Limited (Respondent) v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc (Appellants) **[2011] UKSC 38**
The Supreme Court unanimously upheld the decisions of the High Court and Court of Appeal below that contractual provisions in swap agreements did not offend the anti-deprivation principle. The principle does not apply to bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy or other formal insolvency process.

Brazzo v Routledge **[2011] EWHC 2027 (Ch)**
Directors of a company had compromised CDDA proceedings by given undertakings. A claim was subsequently brought against the directors alleging breach of trust and fiduciary duty. The directors sought to exclude documents referring to the result of the CDDA proceedings from the trial bundle. The Judge accepted that the statements in the undertakings were not admissions but nor were they irrelevant to the claim and could properly be put in cross-examination.

Re Care Matters Partnership Ltd **[2011] EWHC 2543 (Ch) (Norris J)**
The court refused to make an administration order with retrospective effect on the basis that it could not be satisfied on the evidence that the purpose of administration was reasonably likely to be achieved. If it was appropriate to make an administration order, it could only be made with retrospective effect if the conditions for making an administration order were also satisfied at that date. Norris J gave permission to appeal to the Court of Appeal, noting that the issues surrounding validity of appointment arising from *Re Minmar (929) Ltd* [2011] EWHC 1159 (Ch)) and *Re G-Tech Construction Ltd* [2007] BPIR 1275 needed definitive determination at a fully contested hearing. Although the Judge followed *G Tech* he questioned

the correctness of that decision and suggested that the approach he took in *Re Blights Builders Ltd* [2008] 1 BCLC 245 (administration order with prospective effect and granting an indemnity under para 104 Sch B1 IA) may supply the answer.

Re Business Dream Ltd **[2011] EWHC 2860 (Ch)**
The directors of a Company filed a notice of intention to appoint an administrator after a winding up petition had been presented but not served. The directors subsequently passed a resolution for CVL and purported to appoint a liquidator before the expiry of the interim moratorium. The directors argued that by reason of the extant petition the filing of the notice of intention to appoint was an abuse of process and/or a nullity such that the interim moratorium never came into effect (an argument allegedly deployed successfully on numerous unreported occasions). HHJ Behrens QC rejected that argument. At the time of the resolution to file the notice, the directors had no knowledge of the winding-up petition and there was no reason to believe that they did not genuinely intend to appoint B as administrator. Even if that was wrong and there was an abuse of process and as a matter of discretion the court decided to strike out the notice the striking out would not have retrospective effect. The Judge accepted that the notice of intention to appoint could be withdrawn by the directors and a fresh resolution passed.

Re Derfshaw Limited **[2011] EWHC 1565 (Ch)**
In seven consolidated cases administrators were purportedly appointed by directors under para 22(2) Sch B1 but no notice of intention to appointment was given to the company. On the basis of the decision in Minmar, the administrators accepted that the purported appointment was invalid and applied to the court for an administration order with retrospective effect. In making the Order, Morgan J followed the decision of Hart J in *Re G-Tech Construction Ltd* [2007] BPIR 1275.

Doffman and Isaacs v Wood **(13 September 2011)**
An application pursuant to s 298 for the removal of trustees in bankruptcy on the grounds of conflict of interest was refused. The applicants had been directors of four companies which had entered liquidation and had had disqualification orders made against them. The liquidators (L) gave notice that they might issue claims alleging misfeasance, breach of fiduciary duty and fraud relating to matters raised in the disqualification proceedings. The applicants were subsequently adjudged bankrupt and solicitors working in the same office as L were appointed as trustees in bankruptcy (T). The applicants claimed that there was a serious conflict of interest particularly as privileged documentation relating to the disqualification proceedings might be passed by T to the L. The court rejected that argument. The creditors were happy with T and there was no evidence that T would act in breach of their duties. In any event, an undertaking from T not to deliver up privileged documents was sufficient.

Re Gatnom Capital **(Ch D 29/11/2011)**
The court imposed a non-party costs order against the controlling shareholder and director of an insolvent company that entered into a CVA in reliance on the votes of spurious creditors under sham transactions in order to prevent a winding up order.

Glatt v Sinclair **[2011] EWCA Civ 1317**
The Court of Appeal granted permission to continue an action for breach of duty against a court-appointed receiver. The receiver sold a property for £330,000. On the day of completion, the purchaser remarketed for £445,000, and a sale was agreed at £455,000 six months later. Whilst the receiver was entitled to rely on valuations, given the substantial increase in sale price and the fact that neither the asking price nor any sales particulars or advertising had been disclosed there remained a triable issue over whether the property had been adequately advertised and marketed.

Re Kaupthing Singer and Friedlander Ltd **[2011] UKSC 48**
The Supreme Court unanimously decided that the rule in *Cherry v Boultbee* (a person cannot share in a fund in relation to which he is also a debtor without first contributing to the whole by paying his debt) was excluded on the facts by the rule against double proof (a person cannot have more than one proof in respect of the same debt). It would be technical, artificial and

wrong to treat the rule against double proof as trumping set-off but as not trumping the rule in *Cherry v Boultbee*. Lord Walker cast considerable doubt on the decision of the Court of Appeal in *Re SSSL Realisations (2002) Ltd [2006] Ch 610*.

Re Kudos Business Solutions Limited **[2011] EWHC 1436 (Ch)**
S, the sole shareholder and director of an office management company allowed R to use the company to market a DX mailing service to customers, a number of whom entered into contracts, at a time when the company was never in a position to provide those services. All of the monies paid to the company in advance was paid to S and R for their personal benefit.
S was held to have acted in breach of his fiduciary duties and was guilty of wrongful trading from the date at which he should have known that there was no reasonable prospect of the company avoiding an insolvent liquidation.

Re Medicentres (UK) Ltd **(25 July 2011)**
The directors of a company the subject of a failed CVA applied for an administration order in order to give effect to a pre-pack sale of the company's business. The former CVA supervisor sought his own appointment as administrator and proposed an extended period of marketing of the company, funded by way of a loan, in order to see what better offers were forthcoming. The directors argued (i) a supervisor of a failed CVA cannot propose himself as administrator; or (ii) there is a conflict of interest in a supervisor accepting such appointment. The court preferred the appointment of the IPs proposed by the directors. A small factor in favour of that appointment was the conduct of the CVA may have to be investigated by the administrators. More importantly, on the evidence before the court, there was no real prospect of a better offer coming along.

Re Nortel GMBH **[2011] EWCA Civ 1124**
The liability created by a contribution notice under the Pensions Act 2004 on a relevant target company which is in administration is not a provable debt in the administration but is payable as an expense of the administration. Prior to administration, there was no pre-existing legal obligation on the company and hence no contingent liability so as to be provable under r 13.12(1)(b) IR. Where Parliament imposed a liability that was not a provable debt on a company in an insolvency process then, unless it constituted an expense under another provision of the expenses regimes for administration and liquidation, it would constitute a necessary disbursement.

Payless Cash and Carry Ltd (In Liquidation) v Patel **[2011] EWHC 2112 (Ch)**
A director who had wrongfully and fraudulently caused his company to incur a liability to HMRC by wrongfully claiming input tax on contrived purchases was guilty of fraud and liable to the company for the amounts wrongly claimed.

Rehman v Chamberlain **[2011] EWHC 2318 (Ch) (HHJ Keyser QC)**
R sought to argue that a floating charge over a company's assets contained in a debenture registered within the twelve months preceding the company's insolvency was not invalidated by s 245 IA because the debenture merely recorded an earlier agreement that R would take immediate security upon the advance of the moneys giving rise to an equitable security in the form of a floating charge. The court rejected that argument on the facts. The agreement between R and the company fell squarely within the second class of case identified in *Jackson & Bassford Ltd, Re* (1906) 2 Ch 467 Ch D, namely an agreement that security would be created, but it was not an agreement so expressed as to create a present equitable right to a security, Even if R had an informal security agreement prior to the execution of the debenture, it created a registrable security interest that he did not register with the result that any such an interest would be invalid in the Company's liquidation.

Re Stanleybet UK Investments Ltd **[2011] EWHC 2820(Ch)**
X, a holding company owned by A and B in equal shares was placed into administration on the application of A. The joint administrators proposed to sell shares held by X in a subsidiary, Y. A offered to purchase the shares. The joint administrators believed that the sale would provide the best return for X's creditors. B, which was also the majority creditor, was not satisfied that the shares had been marketed properly and voted down the proposal. The joint administrators applied to the court under para 55(2) Sch B1 IA for an order that they cease to

act as administrators and directing them to send a notice to place X into voluntary liquidation. A opposed the application. In granting the order sought, Sales J held that the considered approach of responsible administrators in difficult and complex situations should be given considerable weight by the court in deciding what to do and that, in deciding how to proceed, the joint administrators had properly had regard to the wishes of the majority of creditors. Whilst creditor preferences are not absolutely binding on either the joint administrators or the court, they should be given considerable weight in deciding how to proceed in the difficult and unusual circumstances.

Sunwing Vacation Inc v E-Clear (UK) Plc **[2011] EWHC 1544 (Ch)**
An application was made to the court pursuant to s 112 and 155 IA by SV, a company engaged in an arbitration in Germany against third party respondents (X), for the disclosure by the liquidators of E Plc of specified classes of documents. If SV's claim against X was successful, credit would be given for the amount of that recovery against SV's claim against E Plc. In the circumstances, a disclosure order would satisfy the necessary test that it be made for the purposes of the winding up and be just and beneficial.

Holly Doyle
Simon Passfield
Guildhall Chambers
January 2012