PERSONAL AND CORPORATE INSOLVENCY UPDATE

Holly Doyle, Simon Passfield & James Hannant, Guildhall Chambers

Personal Insolvency Case Notes

Howell v Lerwick Commercial Mortgage Corp Ltd [2015] EWHC 1177 (Ch) (Nugee J)

A statutory demand should not necessarily be set aside under r 6.5(4)(d) IA on the basis that the undisputed part was less than £750 or that the debtor had a cross-claim which fell short of the demand by less than £750

A debtor applied to set aside a statutory demand served on him pursuant to r 6.5(4)(a) IR (i.e. on the grounds that he appeared to have a counterclaim, set-off or cross demand which equalled or exceeded the amount of the debt or debts specified in the statutory demand). On appeal, the court concluded that the value of the debtor's arguable cross-claim was approximately £3,245-£3,385 and the value of the undisputed part of the statutory demand was £3,935. The court was therefore required to consider whether a statutory demand should be set aside where a debtor appears to have a cross claim which does not equal or exceed the amount of the demand, but if set against the demand would reduce the balance to below £750.

In *Re a Debtor (Nos 49 and 50 of 1992*) [1995] Ch 66, the Court of Appeal held that where the undisputed part of a statutory demand was less than £750 it was appropriate to set aside the demand pursuant to r 6.5(4)(d) IR (i.e. the court is satisfied, on other grounds, that the demand ought to be set aside). However, Nugee J noted that a petition can be based on more than one debt and there is no statutory requirement that each such debt is at least £750. Accordingly, given that a statutory demand for a debt of less than £750 is not liable to be set aside on that basis alone, he considered that a partially disputed demand should not necessarily be set aside under r 6.5(4)(d), as the creditor ought to be entitled to rely on the undisputed part of the debt as a petitionable debt forming at least part of the basis for a petition. He suggested that Re a Debtor (Nos 49 and 50 of 1992) could be distinguished on the basis that there was no suggestion in that case that the creditor had other debts, or might join forces with other creditors. The question of what order the court should make pursuant to r 6.5(6) in such a case (i.e. whether the court should specify as the date after which a petition can be presented such time as the creditor could aggregate the debt with a sufficient other debt or debts to equal or exceed £750 or authorise the presentation of a petition at the normal time but add words to the effect that nothing in the order justified the presentation of a petition where the aggregate of debts did not equal or exceed £750) was expressly left open.

The position is not precisely the same where the debt itself is not disputed but the debtor relies on a cross-claim which falls short of the debt by less than £750 (assuming the cross claim is not a set-off which would operate as a defence to the debt), because if the statutory demand is not set aside the creditor will be entitled to present a petition on the basis of the full debt claimed in the statutory demand and not simply the difference between the debt and the cross claim. This does not mean that a bankruptcy order will be made on the hearing of the petition; if at the hearing of the petition it remained the case that the only claims between the parties were the debt and the cross-claim, the Court would probably dismiss the petition. However, if (as in the present case) there were suggestions of other debts owed by the debtor to the creditor, then it could not be said that any petition would inevitably fail. In the circumstances, it was not appropriate to set aside the demand.

Clarke v Cognita Schools Limited [2015] EWHC 932 (Ch) (Newey J)

There is no requirement for an order setting aside a statutory demand pursuant to r 6.5(1) IR to contain a statement notifying the debtor that he can apply to have the order set aside, varied or stayed

The court dismissed applications to set aside a statutory demand pursuant to r 6.5(1) IR, on the basis that no sufficient cause was shown for it. The orders did not contain a statement notifying the debtors that they could apply to have the orders set aside, varied or stayed (which, by CPR 3.3(5) must be

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

included on all orders made by the court of its own initiative). The debtors argued that as a result the application had not been effectively determined and that there were therefore "outstanding applications to set aside a statutory demand" (within the meaning of s 267(2)(d) IA) which should have prevented the presentation of the petitions on which they were subsequently adjudged bankrupt.

Newey J held that CPR 3.3(5) does not apply to an order made under r 6.5(1) IR and that there is no requirement for such order to state that the debtor can apply to have it set aside, varied or stayed. This is understandable because the dismissal of an application to set aside a statutory demand merely means that the creditor is free to present a bankruptcy petition, not that a bankruptcy order will necessarily be made: the debtor will still be free to dispute his liability to the creditor in the context of any petition. Moreover, it may be possible for the debtor to apply to have an order under r 6.5(1) set aside under s 375 IA (for which there is no time limit).

In any event, an order which omits a CPR 3.3(5) statement is effective unless and until set aside. In the meantime, there would be no outstanding application to set aside a statutory demand (within the meaning of s 267(2)(d) IA).

***Woolsey v Payne* [2015] EWHC 968 (Ch) (John Male QC sitting as a Deputy High Court Judge))**

On an application for an annulment pursuant to s 282(1)(a) IA, the appropriate test is whether there was a genuine triable issue in relation to the petition debt

The High Court considered appeals by the petitioning creditor against order made by Chief Registrar Baister: (i) setting aside a statutory demand served on Mrs Payne pursuant to r 6.5(4)(b) IR; and (ii) annuling a bankruptcy order made against Mr Payne pursuant to s 282(1)(a) IA. Both the statutory demand and the bankruptcy order were based upon the same loan agreement and the same alleged debt claimed by the petitioning creditor.

At first instance, Mr and Mrs Payne raised various challenges as to the enforceability of the loan agreement pursuant to the Consumer Credit Act 1974 which the Chief Registrar concluded that these gave rise to genuine triable issues.

The petitioning creditor appealed on three grounds: (i) the Chief Registrar was applied the wrong test in the case of Mrs Payne's application for an annulment; (ii) the loan agreement was not a regulated agreement; and (iii) in any event, the agreement was exempt from the provisions relied upon by Mr and Mrs Payne by reason of s 74(1)(a) CCA 1974.

The Judge noted that there were two conflicting authorities on the test to be applied on annulment applications. In Guinan III v Caldwell Associates Ltd [2014] BPIR 531, Neuberger J (as he then was) held that the test was the same as the test applied on an application to set aside a statutory demand (i.e. whether there is a genuine triable issue). In *Flett v HMRC and Daly* [2010] BPIR 1075, Anthony Elleray QC held that the burden of proof was on the debtor to demonstrate that, on the balance of probabilities, he did not owe the petition debt. He held that the reasoning of Neuberger J was to be preferred.

The Judge went on to dismiss both appeals on the basis that the debtors have demonstrated that there were genuine triable issues in relation to the enforceability of the loan agreement.

***Mark Robin Sands v (1) Carlos Layne (2) Wycombe District Council* [2014] EWHC 3665 (Ch) (David Donaldson QC sitting as a Deputy High Court Judge); *Re John Christopher Cahillane* [2015] EWHC 62 (Ch) (Kevin Prosser QC sitting as a Deputy Judge of the High Court);**

Conflicting decisions as to whether the decisions of appellate courts are not reviewable under s. 375(1) IA

Sands v Layne

The First Respondent **("CL")** was declared bankrupt on the Second Respondent's **("WDC")** petition. CL appealed the decision to the High Court where it was disposed of by consent. The consent order

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

provided that WDC would be given security over CL's home and that he would also make monthly payments to discharge his indebtedness.

Almost a year after the consent order was drawn by the Court, CL's Trustee in Bankruptcy appealed the consent order on the basis that the court had failed to give sufficient regard to the interests of the Bankrupt's (CL's) other creditors.

The issue upon which the court had to rule was whether s. 375(1) of the Insolvency Act 1986 (**"IA"**) (which provides a court with jurisdiction to review or vary its own order) is applicable when the Court's decision is made pursuant to s. 375(2) (appeal from the decision of a County Court Judge or a Registrar in the High Court).

The Judge held that section 375(1) did not give a litigant an unlimited right to a second bite at the cherry. The Court would only review its own orders in the light of fresh evidence or a change of circumstances. In *Appleyard v Wewelwala* [2012] EWHC 3302 (Ch), the High Court had held that the decisions of appellate courts could not be reviewed under s. 375(1). Whilst the judge was of the view that this could create potential anomalies, he did not find that the decision in *Appleyard v Wewelwala* was wrong and therefore he concluded that he was bound by it.

The Judge then addressed the question of whether, in the event that he was wrong to find that the decision was not susceptible to review, the interests of creditors were a material consideration under s.271(3), which set out the grounds upon which the court could dismiss a bankruptcy petition. The Judge held that the creditors' interests were not material considerations, it being neither necessary nor appropriate for their interests to be considered in the context of a dispute between the petitioning creditor and the debtor.

Re Cahillane

A debtor ("**C**") applied to set aside a statutory demand served on him by a creditor ("**NALM**") pursuant to r 6.5(4)(c) IR (i.e. on the basis that NALM held some security in respect of the debt the value of which equaled or exceeded the full amount of the debt). The statutory demand related to a number of loans which were secured against various properties in Ireland ("**the Irish Properties**"). Each party was given permission to adduce expert evidence in the field of chartered surveying "to address the value" of the Irish Properties for the purposes of C's application.

C instructed an expert to provide a valuation of the potential future value of the Irish Properties and applied for an extension of time for filing the report. Registrar Jones dismissed that application on the basis that the report did not address the matter in issue (i.e. the present value of the Irish Properties) and dismissed C's application to set aside the demand.

HHJ Pelling QC dismissed C's appeal against that decision. C applied pursuant to s 375(1) IA to review that decision. Chief Registrar Baister adjourned the hearing of a bankruptcy petition presented by NALM pending the determination of that application. NALM appealed against that decision.

On appeal, Kevin Prosser QC held that the comments made by Briggs J in *Appleyard v Wewelwala* were obiter and, accordingly, that David Donaldson QC had been wrong in *Sands v Layne* to hold that he was bound to follow it. He considered, on balance, that Briggs J's interpretation of s 375(1) IA was wrong and concluded that the provision does give the court jurisdiction to review, vary or rescind appellate orders.

However, on the facts, he considered that the s 375(1) application was doomed to fail. Accordingly, he allowed the appeal and dismissed the application.

***Fred Perry (Holdings) Ltd v (1) Ivan Genis (2) Ayelet Haim Genis* Unrep. (2014) (Master Price)**

The significance of parties having registered 'home rights' when the Court exercises its discretion under s. 14 of the Trusts of Land and Appointment of Trustees Act 1996.

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

The Claimant **("FPH")** had obtained judgment against the First Defendant **("IG")** secured by charging orders over the First and Second Defendant's family home (**"the Property"**).

The Property was in the sole name of IG, however the Second Defendant (**"AG"**) claimed a beneficial interest. AG had registered her 'home rights' not to be evicted or excluded from the property under the Family Law Act 1996 (**"FLA"**) and had obtained a charge on IG's interest. The couple's children were also resident at the Property and attended a local specialist school.

The Judge observed that when exercising his discretion under s. 14 of the Trusts of Land and Appointment of Trustees Act 1996 (**"TOLATA"**) the Court would give regard to the factors enumerated at s. 15(1) of TOLATA. However, authority suggested that the court should give precedence to the commercial interests of the creditors (*Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 All E.R. (Comm) 920).

Section 34(2) FLA provided that "home rights" could be restricted or terminated if it was just and reasonable to do so. In deciding whether this was the case the Court would have regard to the factors listed at s. 33(6) FLA. These factors were different to the s. 15(1) TOLATA factors and included the housing needs, financial resources and the likely effect of any order on the wellbeing of the parties or any relevant child.

The Judge observed the tension between the competing criteria and also the absence of any authority on the issue. However, he also held that were he to give precedence to AG's home rights then an anomaly would arise as AG would be treated differently to a spouse who did not have home rights. The Judge then noted the importance of like cases being treated in the same way and held that he would make an order for sale.

***Chanan Singh Thandi v (1) Mark Sands (2) Andrew Appleyard (trustees in bankruptcy of Tarlochan Singh)* [2014] EWHC 2378 (Ch) (HHJ David Cooke)**

Demonstrating sufficiency of intention when proving the existence of a common intention constructive trust.

The Applicant's son, Mr Tarlochan Singh **("TS")**, had been the registered proprietor of a number of properties. The properties had been purchased between 1980 and 2003. Following TS's bankruptcy in 2011, the Applicant **("CST")** asserted that his son, TS, held the properties for him on a bare trust, relying on either his having provided the purchase money or on a deed of trust dated 2003. He claimed that the deed regularised and evidenced the existing trust. He therefore claimed that the properties had never formed part of the bankruptcy estate and sought their transfer to him from the respondent trustees in bankruptcy **("the Trustees")**.

CST therefore applied for an order that the properties held by his son be transferred to him, on the basis that he was their sole beneficial owner.

The question for the court was whether in the absence of supportive contemporaneous evidence, CST was able to demonstrate sufficient intention to establish a common intention constructive trust.

The court held, dismissing the application, that the starting point was that the beneficial interest followed the legal interest. The onus was on the person asserting that it was otherwise to prove it. The Court had to identify the parties' actual intention and on the evidence before the Court there was nothing to suggest that the parties intended that the properties be held under a common intention constructive trust. The Court therefore found that the beneficial interest in the properties remained with the son.

***Price & Anor v Davis & Anor* [2014] EWCA Civ 26 (Arden LJ, Davis LJ, Sullivan LJ).**

The 'statutory binding' provided for by s. 260 IA applied to an IVA agreed at a 'further creditors' meeting' convened under s. 262(4)(b) IA.

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

Mr and Mrs Davis had obtained the protection of interim orders pursuant to s. 252 IA prior to having IVAs approved by their creditors. The Appellants (Mr and Mrs Price) who were creditors of the Davis successfully challenged the valuations given to their claims under s. 262 IA.

The DJ discharged the interim order, suspended the creditors' approvals of the IVAs and ordered a further creditors' meeting under s.262(4)(b) IA. That suspension was to end upon approval of the varied IVAs. As the successful parties, Mr and Mrs Price acquired a further debt in respect of their costs. They did not vote in respect of this debt at the further meeting. Mr and Mrs Price then served statutory demands upon the Mr and Mrs Davis for non-payment of their costs liability.

The matter came before the Court of Appeal where Mr and Mrs Price argued that because the original approval of the IVA had been suspended, only those creditors bound by the original IVA were bound by the IVA as subsequently varied.

The Davis argued that they were not bound by the IVA in respect of those costs because the IVA only bound the original members of the IVA and that IVA had been suspended not revoked.

The Court of Appeal decided that the real question was whether s. 260 IA bound creditors of an IVA agreed at a further meeting under s. 262 IA. The Court accepted that on a literal interpretation of s. 260, only IVAs agreed at the original meeting would be binding. However, the Court also found that such an interpretation would create anomalies which could not have been Parliament's intention.

Accordingly, Arden LJ held that the reference to 'a "further meeting" in s.262(4)(b) in relation to a nominee is to be read as a "further meeting under s.257"'.

As a result, the District Judge had been right to find that Mr and Mrs Price were bound by the IVAs and was correct to have set aside the statutory demands.

Bank of Scotland plc v (1) Nicholas Forrester (2) Ivor Forrester **[2014] EWHC 2036 (Ch) (Mr Simon Monty QC sitting as a Deputy Judge of the High Court)**

A father was able to demonstrate the existence of an agreement pursuant to which he held 100% of the beneficial interest in a property even though the legal interest was owned by his son.

The Second Defendant **("IF")** had owned a property since 1964. In 1994 a bankruptcy order was made against him and a trustee in bankruptcy was appointed. In 1998 the trustee obtained an order for possession of the property, which he enforced the following year. The First Defendant **("NF")** (the Second Defendant's son) purchased the property from the trustee, having obtained a mortgage. IF remained in occupation and made payments to NF.

NF remortgaged the property to the Claimant **("the Bank")**, but defaulted. The Bank sought possession. IF asserted that after the trustee enforced the order for possession, he and NF agreed that the property would be transferred to NF to enable him to get the first mortgage, IF would then pay his son sufficient to cover the mortgage repayments, and the beneficial interest would remain with the father.

The son (NF) denied any such agreement, stating that he had acquired the beneficial interest, and that his father had paid him rent. Under a settlement agreement, the Bank's claim against NF was subject to an agreement with the father that, unless the son defeated his claim, a possession order would not be sought, but the father would become responsible to the Claimant for part of the mortgage debt.

The court had to determine 'two simple questions'. The first was whether the father held a beneficial interest in the property. The second was if so, what the size of that beneficial interest was.

The Court accepted IF's evidence and refused the application. On NF's case his father would have sacrificed substantial equity for no apparent gain. Instead, the Court found that there had been an

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

express agreement between IF and NF that whilst NF was to hold the legal interest in the Property, the beneficial interest was to remain with IF. In the absence of an express agreement, the Court found that there had been a shared common intention that IF was to retain one hundred per cent of the beneficial interest in the property.

***Girdhar and Parekh v Bradstock* [2014] EWHC 1321 (Ch) (Mr Jonathon Klein sitting as a Deputy Judge of the High Court)**

An unauthorised modification in an IVA proposal, if proven, would constitute nothing more than a material irregularity and would not invalidate the IVA

The Second Claimant (**"P"**) proposed an IVA which was subsequently approved at the meeting albeit with a modification. Payments were made under the IVA and it was twice varied at P's request. P failed to honour his obligations under the IVA and P's nominee petitioned for his bankruptcy.

P subsequently sought declarations that the IVA was a nullity as (i) he had not provided consent to the modification contained in the original IVA and (ii) the Chairman had used an unauthorised proxy vote to support the inclusion of the modification.

The Court dismissed P's claim holding against him on the facts. It did however also hold that had P made out his case then the acts complained of by P would have constituted nothing more than a material irregularity for the purposes of s. 262 IA. In those circumstances, the order would have remained valid until there was an order revoking or suspending the IVA.

***Re Salliss* [2014] EWHC 229 (Ch) (Sir Terrence Etherton C)**

A Deputy Registrar was wrong to dismiss a discharged bankrupt's application for annulment of his bankruptcy on the basis that his main creditor bank remained unpaid, as the bank had told the trustee in bankruptcy clearly and unequivocally that it did not intend to prove for its debt.

The Appellant (**"S"**) appealed against the decision of a Registrar not to annul his bankruptcy. He also appealed against the Registrar's decision to allow applications made by S's trustee in bankruptcy (**"the Trustee"**) ruling that the Trustee was to be remunerated on the basis of time properly spent.

S had five unsecured creditors. Four creditors proved in the bankruptcy and upon S's discharge remained unpaid. However, post discharge the four creditors were paid in full by S. The fifth creditor (**"B"**) was aware that S intended to apply for an annulment. However, it had told S clearly and unequivocally that it did not intend to prove for its debt. In those circumstances the debt owed to B was not a relevant consideration when deciding S's application for an annulment. Accordingly, the annulment was granted.

With regard to the remuneration application, the Registrar's approach was found to be flawed. The principles to be applied were as stated in *Brook v Reed* [2011] EWCA Civ 331, [2012] 1 W.L.R. 419 and as contained in Part Five of the Practice Direction (Ch D: Insolvency Proceedings) [2012] Bus. L.R. 643. Neither authority had been mentioned by the Registrar and the principles contained in those authorities had not been given proper weight.

In those circumstances the Registrar's decision on the annulment application and the remuneration application would be set aside and remitted to a different Registrar.

***Pathania v Adedeji* [2014] EWCA Civ 681(Maurice Kay LJ, Rafferty LJ, Floyd LJ)**

The making of a bankruptcy order did not have the effect of depriving the bankrupt of a cause of action against a third party as his estate had not vested in the Official Receiver at the time at which judgment had been entered against the third party.

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

Mr Pathania (**"P"**) obtained judgment against Mr Adedeji (**"A"**) in respect of a loan. Prior to judgment being entered, P was declared bankrupt. A argued in the Court of Appeal that P's bankruptcy had divested him of his cause of action and that the judgment should be set aside accordingly.

The Court of Appeal rejected A's argument and held that although the Official Receiver (**"O/R"**) became the receiver and manager of the bankrupt's estate upon the making of the bankruptcy order (s. 287 IA), the estate had not vested in the O/R at the time at which judgment was entered. Accordingly P had not been divested of his cause of action prior to judgment being entered in his favour. Further, even if the estate had so vested, it would have been necessary for A to show that P was aware that it had.

Accordingly, the Appeal was dismissed.

Ludsin Overseas Ltd v Maggs **[2014] EWHC 3566 (Mr John Baldwin QC sitting as a Deputy Judge of the High Court)**

The High Court held that a statutory demand presented by a creditor should not be set aside where an offer to purchase a property which constituted that creditor's security was substantially lower than the debt owed to it.

Rule 6.5 of the insolvency rules allows the court to set aside a statutory demand in circumstances whereby it is satisfied that the creditor has security which equals or exceeds the full amount of the debt. At first instance, the Registrar relied upon valuation evidence as suggesting that the security held by the creditor was sufficient to allow them to be paid in full.

That decision was appealed by the creditor who also made an application to introduce further evidence. That evidence detailed, *inter alia*, that there had been a single offer to purchase the property in respect of which the security was held and that offer was substantially lower than the valuation evidence relied upon by the Registrar at first instance.

The High Court allowed the appeal holding 'that the best indication of the value of an asset at any particular time is what someone will pay for it after reasonable attempts have been made to sell it'.

Corporate Insolvency Case Notes

Re Casa Estates; Carman v Bucci **[2014] EWCA Civ 383, (Sullivan, McFarlane and Lewison LJJ,)**

A company which could only pay its debts as they fell due by going deeper and deeper into long term debt was insolvent

In an action under s.238 of the Insolvency Act, Mrs. Bucci, company secretary and wife of the director, sought to rebut the presumption of insolvency in s.240(2) that at the time of the payments to her, Casa Estates Limited ("CEL") was unable to pay its debts as they fell due.

CEL introduced property investors to Dubai, through Casa Dubai Ltd ("CDL") in Dubai. It appeared that CEL paid CDL a monthly retainer of £10,000 and CDL agreed to pay CEL 6% commission on sales. CEL passed investors' moneys to CDL who was in turn to pass them to the developer. CDL set off the sums it was due to pay CEL against the investors' money it was to receive from CEL and would pay the withheld money to the developers in Dubai, with CEL transmitting any shortfall in payments due to developers. This meant that money only flowed from CEL to CDL and not vice versa, and no profits were remitted from CDL back to CEL.

CEL did not maintain a client account, but mixed depositor's monies with its own. Its accounting systems did not enable depositor's monies to be accurately identified. When CEL received customer deposits it had an obligation to account to the customer for those deposits, which was a liability to

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

those customers until such time as the deposits were correctly applied towards the purchase of property in Dubai by payment to the developers.

At the time payments were made to Mrs. Bucci, CEL was marginally insolvent on a balance sheet test. CEL had recorded as an asset a loan to another connected company, Gianluca (UK) Lt (GUL) , but there was no real prospect of CEL ever recovering this loan since GUL was loss making from the start.

At first instance, HHJ Purle QC held that CEL had been cash flow solvent because there was no suggestion that any creditor had served a statutory demand or obtained a judgment against CEL, there was no creditor pressure and CEL was in fact paying its debts as they fell due. It had no cash flow problems at the time that it made payments to Mrs Bucci, these only arose after the collapse of the Dubai property market in late 2008 and it was not until that point that CEL reached the "Point of no return" (the phrase which had been applied by the Court of Appeal in *Eurosail*).

The decision was appealed and by the time Warren J gave his decision on appeal the Supreme Court ha considered the appeal in *Eurosail* and held that "the point of no return" test was not the appropriate test (see [2013] UKSC 28). He considered that the continued payment of debts was only possible because new deposits from investors were used to pay old debts, and there was no material upon which it could be said that, if no significant value was attributed to the GUL loan, CEL would be able to meet its liabilities.

On appeal by Mrs Bucci to the Court of Appeal, Lewison LJ (with whom McFarlane LJ an Sullivan LJ agreed) considered the proper test to be applied Following *Eurosail* and *Cheyne Finance* (paras 27 and 28). The cash-flow test and balance sheet test stand side by side and the balance sheet test is not excluded simply because the company is in fact able to pay its debts as they fall due. The two tests are part of a single exercise to determine whether a company is unable to pay its debts.

When applying the cash-flow test it is not enough for the court merely to ask whether the company is for the time being able to pay its debts as they fall due. In an appropriate case it must inquire how it was managing to do so. If a company is only able to pay its debts by borrowing new money (taking deposits from new investors) to pay off old debts, then unless it is able to trade out of insolvency, it is insolvent whether on a cash-flow or balance sheet test. Further, as a trading company CEL was insolvent on a balance sheet basis, as the loan to GUL was of no value. While that in itself may not be a conclusive answer to the question whether CEL was insolvent, it is difficult to see how it could not lead to that conclusion in the case of a trading company unless there was credible evidence that the balance sheet would improve in the near future.

There was no underlying material to substantiate the claim that CDL's assets exceeded the amount owed by CEL to depositors. The inference was that CEL had used investors' deposits for its own ends and so was using new deposits to pay old deposits.

Lewison LJ also emphasised that, where the statutory presumption of insolvency applies, if the judge is not in a position upon the evidence to make a finding of solvency, or not in a position to make findings about one or more of the building blocks in the case that the company was solvent, the presumption prevails.

Hosking and Bonney (liquidators of Hellas Telecommunications) v Slaughter and May
[2014] EWHC 1390 (Ch) (HHJ David Cooke)

Ability of subsequent insolvency practitioners to review legal fees previously agreed under IR 7.34.

The liquidators of a company appealed against the refusal of the Registrar to order that the fees of the solicitors employed by the administrators previously in office (and agreed and paid by the administrators) should be assessed by the court.

The Company entered administration on 26 November 2009. The Administrators had employed Slaughter and May ("the Firm") to advise them in relation to a number of claims which might have

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

been open to the Company. The administrators agreed and paid Slaughter and May legal fees of about £2.5m. By the end of 2011 the administrators concluded that there were no claims that could be realistically pursued and therefore applied for the administration to be brought to an end. The administration was brought to a close in early December and the company wound up and liquidators appointed. The former administrators subsequently agreed a further bill presented by the Firm in respect of their work on the court hearing.

The liquidators later sought to challenge the fees paid to Slaughter and May under rule 7.34 of the Insolvency Rules 1986 (through assessment) or the Solicitors Act 1974 (although this latter claim was dropped)

The Registrar held that assessment under Insolvency Rule 7.34 could not be ordered because the administrators had agreed to the relevant fees, and further declined to order assessment under the inherent jurisdiction because it would be wrong to do so, relying on the reasoning of Ferris J in *Engel v Peri* [2002] BPIR 961 that Parliament had left the decision to employ solicitors and agree their fees to the responsible insolvency practitioner and the Court should not usurp that function.
The liquidators appealed. The issues to be determined on the appeal were

1. The correctness of the Registrar's interpretation of the rules;
2. Whether it was open to the Registrar to direct assessment of the December bill under r 7.34(4), and whether the Registrar had been right not to order assessment on the basis that the administrators had agreed the fee despite that agreement being made after the end of the administration; and
3. Whether the Registrar had wrongly decided that where r 7.34(1) applied, the Court had no remaining inherent jurisdiction to direct assessment after fees had been agreed.

HHJ David Cooke held that:

1. The Registrar's interpretation of the Rules was correct. The 1986 Act represented a "sea change" from the position prior, which had had mandatory taxation of costs in bankruptcy and compulsory liquidation. Now, the power to decide whether costs should be agreed or assessed was given to the responsible insolvency practitioner; a change which would have little effect if it was not binding .

   The decision to seek to asses the costs had been that of the liquidators, not the administrators, but the liquidators had not been the responsible in solvency practitioners in relation to the decision to agree the firm's costs payable as expenses of the administration. Rule 13.9 defined the responsible insolvency practitioner "in relation to any insolvency proceedings" so there could be no doubt that, in relation to the administration, the administrators in office for the time being were the responsible insolvency practitioners. Decisions of the administrators in the course of the administration could not be retaken or undone by liquidators subsequently appointed (see paras 22-24 of the Judgment)

   The Registrar had also correctly held that r 7.34(4) related only to the costs of litigation, not to the general costs incurred in the insolvency procedure. The rule recognise that the Court retained power in litigation before it to make an order for assessment of costs relating to that litigation, and that was distinct from the question of the costs payable from the estate in the general conduct of insolvency (para 28).

2. The Registrar was wrong to hold that r 7.34(4) applied to any bill that referred to legal proceedings. As the power in r 7.34(4) was to make an order "in...proceedings before the Court", it could only be construed as applying to costs orders made in those proceedings by the court seised of the proceedings. There could therefore be no ground for limiting the power of that court to cases where the costs were not agreed.

   The rule was not intended to exclude the possibility that the court in proceedings before it might conclude that assessment of costs was required and so order without leaving the matter to the insolvency practitioner's discretion. The judge in the proceedings (bringing the administration to an end) had made an order as to costs, which directed that the costs be

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

treated as expenses of the administration. He had not required them to be assessed. Accordingly, they were costs payable out of the estate and fell within r 7.34(1), so the responsible insolvency practitioner could either agree them or require their assessment (paras 31-34).

The "responsible insolvency practitioner" in r 7.34(1) was "the person acting...as administrator" which could not be construed as extending to former administrators. Accordingly the registrar had been wrong to consider that the December bill was governed by r. 7.34(4) and/or had been validly agreed by the administrators. The company had gone into liquidation and thus the quantification of the amount charge on the assets in the hands of the liquidator was a matter that requires to be dealt with in the liquidation, in relation to which the liquidator is the responsible practitioner, so that he may agree them under r 7.34(1) and if he does not do so, the default requirement for assessment takes effect (para 40).

3. The Registrar had not held either that the Court had no remaining inherent jurisdiction to direct an assessment, nor that any such residual jurisdiction had been excluded by the fees being agreed. Rather , he had accepted that in principle the jurisdiction existed, but considered that it should not be exercised in the circumstances. His exercise of that discretion could not be said to be wrong (paras 49-50 and 58-59). The court also held that in certain circumstances, the inherent jurisdiction to review would be invoked: circumstances such as approval being procured by fraud.

Slaughter and May have been granted permission to bring a second appeal in relation to the December bill. The Liquidators were granted permission to appeal by Briggs LJ on 14 January 2015 to challenge the Registrar's exercise of his discretion (see [2015] EWCA Civ 28).

***Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)* [2015] 2 WLR 1168**
(Lord Neuberger PSC; Lord Mance JSC; Lord Clarke JSC; Lord Sumption JSC; Lord Carnwath JSC; Lord Toulson JSC; Lord Hodge JSC)

(1) An illegality defence could not bar a claim brought by the liquidators of a company which had been the vehicle for a VAT fraud, against its former directors and overseas suppliers who were alleged to have been involved in the fraud, as the conduct of the directors could not be attributed to the company where there was a claim against the directors for a breach of their duties.
(2) The Insolvency Act 1986 s.213 had extra-territorial effect.

Bilta (UK) Ltd (""**B**") was alleged to have been the vehicle for a VAT carousel fraud after having entered into a series of transactions relating to carbon credits with various parties, including a swiss company, Jetivia SA ("**J**") . B went into liquidation and its liquidators brought claims against B's former directors (**C** and **N**) and against J and J's chief executive ("**E**") who was resident in France, alleging that they had been parties to an unlawful means conspiracy which had involved the directors breaching their fiduciary duties and J and E dishonestly assisting them. The liquidators sought contributions from J, E and the former directors under the Insolvency Act 1986 s.213 and further claimed (through B) (ii) damages in tort from each of the 4 defendants and (ii) compensation based on breach of constructive trust from J and E.

J and E applied to strike out the claim, arguing that it was precluded by an illegality defence and that s.213 could not be invoked because it did not have extra-territorial effect. The Court of Appeal rejected those arguments (*[2013] EWCA Civ 968, [2014] Ch.52)*).

J and its chief executive appealed the decision dismissing their application to strike out the claims. The issues on appeal were:
(i) whether B could maintain the proceedings in view of the principle ex turpi causa non oritur actio (the illegality defence); and
(ii) whether section 213 had territorial effect.

On issue (1), the Supreme Court held that in most circumstances the acts and state of mind of its directors and agents could be attributed to a company by applying the rules of the law of agency but

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

that ultimately the key to any question of attribution was always to be found in considerations of the context and the purpose for which attribution was relevant. Where the purpose of the attribution was to apportion responsibility between a company and its agents so as to determine their rights and liabilities to each other, the result would not necessarily be the same as in a case where the purpose was to apportion liability between the company and a third party. Where a company was the victim of wrongdoing by its directors, or of which they had notice, the wrongdoing or knowledge of the directors could not be attributed to the company (as a defence to a claim brought in the name of the company by its liquidators for the loss suffered by the company as a result of the wrongdoing) even though the wrongdoing or knowledge of the directors might be attributed to the company in other types of proceedings. Thus the defence of illegality was not available to the Defendants against the company's claim because the Defendant's wrongful activities could not be attributed to the company in the proceedings brought by the liquidators.

Lords Toulson and Hodge considered the doctrine of illegality had been developed on the ground of public policy and depended on the nature of the particular claim, whereas Lord Sumption considered the illegality defence was based on a rule of law on which the court was required to act, if necessary of its own motion, in every case to which it applied. It was not a discretionary power and it was not dependent on a judicial value judgment in each case (paragraph 62). The remaining majority of the Supreme Court declined to go into the proper approach to the defence of illegality on this appeal since the matter had not been fully argued, but accepted that it did need to be addressed by this Court (see paragraphs 15-17 and 34)

Further, the majority of the Supreme Court considered that two principles could be extracted from the decision in *Stone & Rolls v Moore Stephens* [2009] UKHL 39 (Lords Sumption, Toulson and Hodge taking a different view): The first was that an illegality defence was not available against a company when there were innocent shareholders and directors. The second was that the defence was sometimes available when there were no innocent shareholders or directors. Subject to those points, it was not in the interests of the future clarity of the law for that decision to be treated as authoritative or of assistance (see paragraphs 21-30 and 48-50).

On issue (2), the Supreme Court held that section 213 did have extra-territorial effect. Its context was the winding-up of a company registered in Great Britain, but the effect of such a winding-up order was worldwide. In the case of a company trading internationally, and in an increasingly globalised economy, it was difficult to see how the provisions of s.213 could achieve their object if their effect was confined to the UK. The section contained no express limits on its territorial application. Further, s.238, which dealt in similar terms with preferences and transactions at an undervalue, had been held to apply without territorial limitations (*Paramount Airways Ltd (No.2), Re [1993] Ch. 223* applied).

(1) Mark John Wilson (in his capacity as liquidator of 375 Live Limited (2) 375 Live Limited (in liquidation) v (1) SMC Properties limited (2) Unitguide Limited (3) Vincent Clegg [2015] EWHC 870 (Ch) (Mr Registrar Briggs)

The Court summarised the approach taken to applications to validate transactions under the Insolvency Act 1986 section 127.

375 Live limited ("**the Company**") decided in November 2013 to sell a mortgaged property and placed it on the market with an asking price of £1.5M. Two offers were received, for £1.1M and £1.3M. In February 2014 a petition for the company's liquidation was presented by HMRC. The mortgagee pressed for payment and indicated that it would take possession and sell the property to recover its debt. The Company sold the property to SMC Properties limited ("**SMC**") on 6 March 2014 for £850,000. A winding-up order was made in April 2014.

The liquidator argued that the transaction had been at an undervalue and should be declared void. SMC argued that the transaction had been made in good faith and at arm's length and not at an undervalue, and should be validated. .

Mr Registrar Briggs first considered the policy of s.127, tracing the origins of the provision back to 1571 , While the liquidator argued that section 127 was intended to buttress the first principle of insolvency law (that all the property of the insolvency estate is available to creditors), SMC argued

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

that, although the section automatically avoided a post petition transaction, the principle concern of the section was to underpin the second principle of insolvency law that all the estate of the insolvent shall be distributed rateably amongst creditors of the same class. Thus the harshness of the section should be ameliorated by validation in circumstances where a post-petition disposition is made without notice of the petition and where a disponee is not being preferred.

Mr Registrar Briggs commented that the section itself did not express its purpose, but by making every post-petition transaction void was indiscriminate. He cited a passage in Goode's Principles of Corporate Insolvency Law (4th ed. page 610) which drew a distinction between the policy of the section and its (much wider) effect by operation, which applied as much to bona fide business transactions as to preferences and effectively paralysed a company's business.

He considered that the modern authorities were consistent with a policy designed at preventing and remedying a breach of the second fundamental principle of insolvency law (ie to procure as far as practicable rateable payments to the unsecured creditor's claims). The section also had another function (acting by its mere operation) which was to prevent dissipation. It prevented a disposition of the company's assets to its creditors' prejudice and prevented improper alienation by making every post-petition transaction void, but permitted the court to validate dispositions even where full value was not obtained (see paragraph 31).

Register Briggs considered that the Court is unlikely to validate where there is breach of the policy behind the section unless the facts of the case demonstrated salvage or the assets were swollen as a result (applying *J Leslie Engineers Co Ltd (In Liquidation), Re [1976] 1 W.L.R. 292*). Thus section 127 would bite equally if:
(a) full value was provided for a company asset after a petition was presented in circumstances where the directors paid one of many creditors in full, breaching the pari passu principle; and
(b) if a substantial undervalue was provided to a company in the same situation but the directors decided to ensure that every creditor in the same class was paid pari passu (see paragraphs 20 and 31-32).

He then went on to consider the principles governing the discretion to make a validation order. He cited the summary of principles in Lindsay Kennedy *Denney v John Hudson & Company Limited* [1992] BCLC 901 at 904C- 905B, but added that in a different sort of case different factors may be relevant (although the policy consideration remained constant) such that each case had to be determined on its own facts .He therefore added that the court would be slow to validate a transaction if there were a significant reduction in the company's assets, and that Good faith in the context of s.127 related to knowledge of the petition (on the narrow view) , but could extend beyond that (the wider view). If that was correct, a transaction which significantly depleted the company's assets to the detriment of the general body of creditors was unlikely to be made in good faith "In other words the further away from value a transaction is or was, the less likely it is that the Court will find that it is or was made in good faith (see paragraphs 36-38).

The court accepted evidence from the purchaser about the circumstances of the purchase and that it had not known about the presentation of the petition before the agreement to purchase. The transaction had been made in good faith and at arm's length within the context of a pressing secured creditor who would have taken possession and sold the property as mortgagee in possession if not paid (at a price potentially less than the £850,000 paid by SMC).

Further, on the basis of expert valuation evidence, the investment basis of valuation was appropriate, rather than an owner-occupation valuation. The appropriate rental yield was 5.75 per cent. Capitalising the rent and deducting the costs of purchase, refurbishment and other costs, the appropriate value at the transaction date was £900,000. A special assumption that there would be a constrained marketing period also applied because of the mortgagee's intention to take possession, in which case there would have been a distressed sale.

While the court would be slow to validate a transaction if there was a significant reduction in the value of the company's assets available to the general body of creditors, the asset lost was worth around £900,000, not applying the special assumption, and the company had received £850,000. If one applied a 5% per cent margin of error for the accuracy of valuations, the general body of creditors

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

would not have suffered significantly or at all. The same result would be reached applying the special assumption.

The Court therefore concluded that the policy behind s.127 was not undermined as the transaction had not favoured a pre-liquidation creditor, and in any event. the findings as to value meant there had been no or no significant loss to creditors. Even without applying a discount for valuation error/ the special assumption of a forced sale, the balance between SMC (" the innocent third party") and the general body of creditors lay in favour of SMC given that the sum paid would have been 5-6% less than open market value (paragraph 78).

***(1) Gate Gourmet Luxembourg IV Sarl (2) Specialist Airport Services Limted v Gary Kenneth Morby [*2015] EWHC 1203 (Mr Registrar Briggs)**

The bankruptcy court has no jurisdiction to grant an order for retrospective substituted service, but could waive irregularities in service under rule 7.55 in the appropriate circumstances.

Mr Registrar Briggs considered that, in the unusual circumstances of the case, personal service had been effected on the debtor even where he was not touched by the petition since he had requested it be handed (in his presence) to his agent at a meeting specifically convened for service to be effected. If that was not correct, he considered that the Court did not have jurisdiction to grant retrospective substituted service of the petition (because paragraph 6.3 of the 2014 amended insolvency practice direction now provides that Part 6 of the CPR does not apply to the service of a bankruptcy petition). However, rule 7.55 provided the Court with discretion to deal with defects and irregularities on a case by case basis, and there is nothing in principle which prevents its application to service.. A 3 stage test applied from the plain language of the rule (1) are there insolvency proceedings on foot? (2) can the court be satisfied that curing a defect or irregularity would result in no injustice which could be described as substantial in nature and (3) if so, is the injustice such that it cannot be remedied by order of the court. In this case there would be no substantial injustice by waiving any irregularity in service.

***Philip Davidson Sebry v (1) Companies House (2) Registrar of Companies* [2015] EWHC 115 (QB) (Edis J)**

The Registrar of Companies had a common law duty of care, when entering a winding-up order on the companies register, to take reasonable care to ensure that the order was not registered against the wrong company.

The court was required to determine preliminary issues in a claim for negligence and breach of statutory duty against the defendant Registrar of Companies. The claimant was the former managing director of a company called Taylor and Sons Limited. The company was a steel fabricator. It was a well-respected and substantial business. In 2009 a winding-up order was made against an unrelated company, Taylor and Son Limited, and sent to the registrar. The order did not contain a company number. The registrar inadvertently amended the registration details of the claimant's company, as its name was very similar, showing it to be in liquidation. The company's accountant noticed the mistake and contacted the registrar, who rectified public online records later the same day but was unable to correct subscription services for several weeks. The company's suppliers and creditors, including the company's bank, became aware of the false entry on the register and suspended the company's credit. The company subsequently went into administration.

The court was required to determine whether

1. the registrar owed the company a duty of care under the Companies Act 2006 to exercise reasonable care and skill so as to ensure that incorrect information was not entered on to the register;
2. the registrar owed the company a duty of care under common law;
3. the registrar's breach of duty had caused the company to enter administration.

The preliminary issues were determined in favour of claimant.

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

1. The court was not satisfied that there was a cause of action for damages for breach of statutory duty against the registrar in relation to his functions under the 2006 Act. The Act regulated the keeping of the register and imposed duties on the registrar for that purpose. The register published information which was available to the whole world, because it was available on the internet. The common law of negligence had control mechanisms designed to restrict the class of person who could claim damages for economic loss. However, the imposition of a statutory duty giving rise to a claim for damages at the suit of anyone who suffered economic loss by reason of any act or omission in breach of the statutory duty would create a very wide duty indeed. There was nothing in the Act to justify a finding that that was the intention of Parliament (para 106).

2. If a person did an act which was capable of causing harm to a particular person if done carelessly, he would have assumed responsibility to that person in respect of that task (following *White v Jones [1995] 2 A.C. 207*). In determining whether an assumption of responsibility and duty of care existed, the court took the following factors into account:

   (a) unless a remedy was provided by the common law of negligence, a company damaged by carelessness in these circumstances would have no remedy;
   (b) it was not difficult for the registrar's staff to avoid errors of the instant type; (c) there were no public policy reasons for denying a duty of care;
   (d) the statutory duty or contractual relationship between the company and the registrar did not limit the nature and extent of the responsibility;
   (e) balancing the harm done to the company against the potential adverse impact on the registrar, it was clear that the balance favoured the loss falling on the registrar rather than the company;
   (f) it was likely that the imposition of a duty would improve the accuracy of the register, which was plainly in the public interest. It was fair, just and reasonable to impose a duty of care upon the registrar.

   A special relationship between the registrar and the company arose because it was foreseeable that if a company was wrongly said to be in liquidation, it would suffer serious harm. The nature of the exercise also supported the existence of such a relationship. The company was not consulted before an entry was made and had no opportunity to protest that the entry, if made, would be a mistake. Foreseeability and proximity had therefore been established, (following *Caparo Industries Plc v Dickman [1990] 2 A.C. 605)*. Accordingly, the registrar owed a duty of care when entering a winding-up order on the register to take reasonable care to ensure that the order was not registered against the wrong company. The duty was owed to any company which was not in liquidation but which was wrongly recorded on the register as having been wound up by order of the court. The duty extended to take reasonable care to enter the order on the record of the company named in the order, and not any other company. It did not extend to checking information supplied by third parties, but only to entering that information accurately on the register (paras 108-118).

3. The registrar's error had been a disaster for the company. The rumour of insolvency spread and the suppliers' immediate reaction was to refuse further credit to the company. Prior to the error, the suppliers had been trading on ordinary 30-day credit terms, and actually affording longer periods of credit than that. The company's main customer terminated the company's contract because of its concerns about the company's future, which were fuelled by rumours resulting from the error. The bank refused to lend further money to the company. The claimant had proved that the reason the company went into administration was the error made by the registrar (paras 37, 39, 47-48).

***Re Harvest Finance Ltd (In Liquidation), Also known as: Jackson v Cannons Law Practice LLP* [2014] EWHC 4237 (Ch), (Registrar Jones)**

The court indicated that the Insolvency Rules 1986 r.9.6(4), which provided for payment of costs at the court's discretion, was probably not limited to costs resulting from examinations under the

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

Insolvency Act 1986 s.236(2), but also extended to costs resulting from compliance with an order for delivery up of documents under s.236(3).

The respondents were successors to a limited liability partnership which had acted on behalf of the company in numerous conveyancing transactions and in respect of 100 off-shore special purpose vehicles. The liquidators suspected that the transactions had been fraudulent, and obtained an order against the solicitors under s.236(3) for delivery-up of documents and electronic files. The respondents had incurred £40,381 in identifying and retrieving electronic files in respect of the company's affairs.

The court was required to determine

1. whether it had jurisdiction to order the payment of the solicitors' expenses;
2. if so, whether an order should be made in favour of the solicitors.

The liquidators relied on *Cloverbay Ltd (No.1), Re (1989) 5 B.C.C. 732* and submitted that the court had no jurisdiction to order the payment of costs under s.236 orders.

The solicitors relied upon *Aveling Barford Ltd, Re [1989] 1 W.L.R. 360* and argued that innocent parties should be paid their costs of compliance.

The Court found as follows:

1. The requirement to provide information to an office holder, albeit under compulsion, was a public duty in aid of the administration of justice. It existed in order that office holders could perform their statutory duties. The duty was potentially incompatible with an order to pay the costs of compliance. However, the Insolvency Rules 1986 r.9.6(4) provided for payment of travelling expenses and "other costs falling upon him ... at the court's discretion". The question was whether the application of r.9.6(4) was limited to costs resulting from the exercise of the power of examination under s.236(2), or whether it extended to costs resulting from compliance with an order under s.236(3).

   In *Cloverbay* the court had decided that r.9.6(4) made no provision for the payment of costs of compliance; the court could achieve that result by a conditional order but should only do so in exceptional circumstances because of the public duty to assist the office holder. However, a number of matters had not been raised before the judge in Cloverbay including: (a) the statutory history of s.236: written interrogatories were treated as an alternative to oral examination, and the power to require documents to be produced under s.236(3) was an additional power within the same examination process. It was therefore difficult to construe s.236 as creating independent, distinct powers; (b) rule 9.6(4) did not limit costs by expressly referring to the "costs of the examination"; (c) the phrase "other costs falling upon him are at the court's discretion" was wide enough to include legal costs but did not include legal costs of representing a respondent at an examination. Therefore, it could not be solely concerned with the costs of the examination; (d) "other costs" referred to both subsections (2) and (3) of s.236. There was no reason to create any distinction between them when construing r.9.6(4),

   Whilst there was conflict between *Cloverbay* and *Aveling* , the practical result of those decisions was the same. Whether approached from the basis that jurisdiction was only achieved by making a conditional order, or from the basis that jurisdiction existed under the rule, the court would not presume costs of compliance would be paid. On the contrary, it would take account of the fact that compliance was pursuant to a public duty (see paras 19-24, 31, 34-36 of judgment).

2. The solicitors had control of the files relevant to the transactions at issue, albeit as an innocent party. Their public duty required them to provide the files and relevant information to the liquidators, subject to the issue of legal privilege. The court should not, in the exercise of its discretion, permit them to charge for the time incurred in complying with the s.236 order, whether as solicitors or not, because

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

(a) the existence of the public duty was of particular importance in the context of a suspicion of fraud;
(b) payment would transfer the solicitors' public duty into a professional service; albeit that the costs were non-profit costs;
(c) the liquidation should not have to bear the financial burden resulting from the fact that the records were not easy to access;
(d) if the solicitors had met particular difficulties concerning the identification or transfer of files, they should have raised it with the liquidators or the court before incurring costs (paras 46-47).

***D&D Wines; Bailey v Angove's Pty* [2014] EWCA Civ 215 (Patten, Lewison and Sharp LJJ)**

Where an agent was entitled to collect monies, moneys paid to it after its insolvency were available for agent's creditors generally and were not held on trust for the payor for transmission to the principal.

A company, D&D Wines, was the agent and distributor for the respondent, Angove. The agency agreement between Angove and D&D provided that Angove would, in respect of each sale, send an invoice to D&D for the price which named the end-purchaser as consignee. Angove would also issue a credit note which represented D&D's commission. D&D would collect the moneys from the end-purchaser and pay to Angove the sum due under Angove's invoice less the amount of the credit note. The termination clause in the agreement provided that termination of the agreement would not affect the accrued rights or remedies of either party. Shortly after D&D entered administration, Angove terminated the agency. Shortly thereafter D&D received substantial moneys from two end-customers.

The first instance judge held that because the agency agreement had been terminated at the time D&D received those moneys it had no right to them. The moneys were held on trust for the end-customers and were payable to Angove on their behalf.

The Court of Appeal rejected this analysis. On the true construction of the agency agreement D&D's right to collect moneys from the end-customers for past sales survived the termination of the agency. The Court of Appeal also rejected Angove's submission that there arose a constructive trust of the moneys because it was unconscionable for D&D's liquidators to get the benefit of receiving the moneys but not be obliged to meet D&D's obligations to Angove. Patten LJ said that it was hard to see how it could be unconscionable to receive payment under a subsisting contract notwithstanding the supervening insolvency. This case was distinguishable from *Neste Oy v Lloyds Bank* [1983] 2 Lloyd's Rep 658 since in that case the payment held subject to a constructive trust had been essentially gratuitous.

***Re Brown Bear Foods; Shaw v Webb* [2014] EWHC 1132 (Ch) (HHJ Simon Barker QC)**

In an unusual case which emphasises the genuine nature of the Court's discretion, instead of making an administration order as sought and which was unopposed, the Court brought on an extant winding up petition for hearing and appointed a provisional liquidator.

After presentation of a winding up petition, S, the sole director, applied for an administration order, with the consent of the petitioning creditor and holder of the sole floating charge. S claimed to have purchased the sole issued share from H, the former director, for £1m, but the share purchase agreement contained contradictory statements as to whether H owned the share beneficially or on behalf of others, the share to which it referred was a share in HHH Ltd, not the company and the buyer was stated to be Brown Foods Ltd not S, and the terms in which the consideration was to be paid was uncertain. There was a preferential payment of £104,000 to an unidentified connected company in respect of which a recovery of £50,000 was expected. Bank statements showed that since presentation of the winding up petition £6,732 had been paid out to Q Ltd and £108,500 of a VAT refund to Nwn. S's evidence did not deal with these payments but he informed the court through Counsel that he did not authorise them. Nwn was connected to Q Ltd and/or H.

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

The judge held that, despite the conditions for making an administration order being satisfied, it was not appropriate to do so. In particular under s.127 of the Insolvency Act dispositions since presentation of the winding up petition were void but the effect of the making an administration order would be to neutralise this. The post winding up payments should remain void unless and until justified, and there might also be other such dispositions because not all the relevant bank statements had been produced. Similarly, it was not appropriate to treat the admin application as a winding up petition. The share purchase cried out for explanation. The judge appointed one of the proposed administrators provisional liquidator to get in assets and investigate. He continued the moratorium and fixed a return date with directions for advertisement of the petition but allowing a window for the company's assets to be realised in the meantime.

***Top Brands Limited v Sharma* [2014] EWHC 2753 (Ch) (HHJ Simon Barker QC sitting as a judge of the High Court)**

The Court gave guidance on the standard of care to be expected from a liquidator, in negligence and as a fiduciary

Top Brands, creditor of Mama Mia Ltd ('MML'), in liquidation, applied under s.212 of the Insolvency Act 1986 for orders that Mrs Sharma (MML's former liquidator) account to MML for some £548,000 paid away from the company in the course of the liquidation to a third party company, SERT, as a result of her negligence and in breach of her fiduciary duties. SERT, a customer of MML's, had claimed that the £548,000 was a prepayment for goods, impressed with a Quistclose trust in its favour entitling it to repayment of the sum whereas in fact , SERT's claim was fraudulent.

HHJ Simon Barker QC held that the effective cause of the loss was not the fraud, as Mrs Sharma contended, but her failure to conduct the liquidation of MML with the care and diligence to be expected of an ordinary, skilled insolvency practitioner. The Judge found that had Mrs Sharma reviewed the documents as she ought to have done, she would readily have discovered a number of serious irregularities including the fact that the pattern of trading between MML and SERT involved goods always being paid for by SERT after, not before, delivery. Had she discharged her duties to a reasonable standard, the sum in question would not have been paid away before the true position as to MML's trading, assets and liabilities had been enquired into by the liquidator. By contrast, within two months of taking office, the new liquidator discovered a VAT fraud on the part of MML thought to be in the region of some £1.5 million in addition to the SERT fraud. The Judge further concluded (obiter, since he decided the claims on the basis of negligence) that Mrs Sharma's conduct could also be characterised as a conscious disclaimer or disregard of responsibility for the assets in her charge on a material scale and were therefore a breach of fiduciary duty on her part.

The decision is under appeal.

***Re Brilliant Independent Media Specialists Ltd; Maxwell v Brookes* Unreported, (Registrar Jones)**

The registrar provided a useful summary of the court's present approach to applications to fix officeholders' remuneration

The applicants had been appointed as joint administrators of a company under proposals for an administration to last six months (the respondent creditors' committee being keen for the applicants to complete the administration as swiftly as possible in order to allow the appointment of liquidators). The creditors committee did not anticipate that the joint administrators would carry out nearly as much work as the joint administrators contended that they had carried out. The creditors' committee approved the payment of pre-administration costs in the sum of £32,807 and fees following the joint administrators' appointment of £180,173, but refused to agree to pay any further fees. Following the company's liquidation, the former joint administrators applied to court to fix further remuneration in the sum of £395,265 pursuant to r.2.106 of the Insolvency Rules 1986.

Registrar Jones held that:

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

1. Whilst the views of a creditors' committee should be taken into account during an administration and will frequently be taken as reflecting the views of the creditors as a whole, it was not for the creditors' committee to determine how the administration should be conducted; that is a decision for the officeholder. The joint administrators were entitled to receive remuneration for work carried out even though the creditors' committee always made it clear that the company was to be liquidated as soon as possible, and that any investigatory work should be carried out by liquidators.

2. Where an administrator's work falls outside agreed administration proposals, and, in particular, a time period for administration contemplated by the proposals, the court should not normally override, or authorise an administrator to do anything which is contrary to, the proposals – or fix remuneration in respect of such work. In this regard, however, "*it is also relevant to consider and, if appropriate, take account of the jurisdiction that exists to vary the proposals. Plainly it will be relevant if work otherwise falling outside the proposals could have been authorised*" and the court should "*normally not question the commercial judgments of an administrator* ".

3. Neither the joint administrators' litigation against the company's main creditor nor their investigations into the company's affairs pre-administration fell outside the proposals.

4. The court did not have jurisdiction to fix remuneration in respect of work done by the joint administrators after termination of their appointment notwithstanding that the liquidators requested their services. Remuneration for such services was a matter between the liquidators and the joint administrators.

The court fixed the joint administrators' further remuneration at £233,147 as a fair, reasonable and proportionate sum.

***Re Eiffel Steel Works Ltd*, Unreported (Judge Andrew Hochhauser Q.C., 15 January 2015)**

Although a failure to give notice to the members of a company of the proposed appointment of administrators was arguably a defect in the procedure, the administrators' appointment was not a nullity and was declared to be valid as there had been no ascertainable prejudice.

The applicant joint administrators of an insolvent company applied for a declaration that their appointment was valid. The company's directors had unanimously resolved to appoint the administrators and the company's parent company had been aware of and agreed to the proposed appointment. The issue was whether the appointment was invalid because notice of intention to appoint should have been given to the "company" under the Insolvency Act 1986 Sch.B1 Pt 4 para.26(2) and para.26(3), and the Insolvency Rules 1986 Pt 2 (4) r.2.20 to 2.22. The administrators argued that, even if notice was required, the failure to give it had not rendered their appointment a nullity.

The judge granted the application. While a notice should have been served, the failure to do so did not result in the administrators' appointment being a nullity (applying *Ceart Risk Services Ltd, Re [2012] EWHC 1178 (Ch), [2013] Bus. L.R. 116*, *Assured Logistics Solutions Ltd, Re [2011] EWHC 3029 (Ch), [2012] B.C.C. 541* and *BXL Services, Re [2012] EWHC 1877 (Ch), [2012] B.C.C. 657*). The company owners had been aware of and fully approved of the decision to appoint, and there had been no ascertainable prejudice of any kind . There was no substantial, irremediable injustice, which under r.7.55 of the Rules would cause the insolvency proceedings to be invalidated by any formal defect or irregularity.

Holly Doyle
Simon Passfield
James Hannant
Guildhall Chambers

The material contained in this article is provided for general information purposes only. It does not constitute legal or other professional advice. No responsibility is assumed by any member of chambers for its accuracy or currency, and reliance should not be placed upon it. Specific, personal legal advice should be obtained in relation to any case or matter. Any views expressed are those of the editor or named author

.