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Welcome to the Summer 2016 edition of the Bulletin. No issue these days would be the same without at least one case on a scheme of arrangement; this time Metinvest required the court to consider the principles for determining the composition of a class of creditors. This issue is rather light on cross-border and appellate cases, although the lifting of the automatic stay under the Cross-Border Insolvency Regulations was considered in *Gardner v Lemma Europe Insurance Company*.

The lifting of a stay was also an issue in the *Avonwick* case. Here, it was lifted to enable conspiracy proceedings to be brought against the individual concerned. The case is interesting as it suggests that the scope of an application for unlawful means conspiracy can extend beyond breaches of criminal statutes to sections 238 and 239 of the Insolvency Act 1986. Those provisions are also considered in *Re Cosy Seal* which provides an instructive worked example of the application of the legislation on transactions at an undervalue and preferences.

Once again, the Bulletin has been written entirely by students studying on the LL.M programme here at Nottingham Law School. I would like to thank them very much for all their work and to congratulate them on their contributions, particularly at a time when they are all very busy writing their dissertations. The profiles of this issue's contributors can be found at the end of the Bulletin.

Otherwise, it only remains for me to wish you all the very best for a lovely summer holiday.

Paula Moffatt

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## **CROSS-BORDER**

### ***Gardner v Lemma Europe Insurance Company Limited (in liquidation) [2016] EWCA Civ 484***

#### **Executive summary**

A stay on proceedings in the UK against a Gibraltar company in liquidation (imposed under the Cross-Border Insolvency Regulations 2006) would not be lifted in the absence of a challenge to the competence of the courts of Gibraltar to determine the dispute in the liquidation; the need to preserve the estate for creditors outweighed the contractual right of the appellant in the proceedings.

#### **Facts**

The appellant, who was a solicitor, had taken out professional liability insurance with Lemma Europe Insurance Company Limited ("Lemma") for the 2009 insurance year. Lemma was registered in Gibraltar and the appellant practised in the UK. Lemma went into liquidation in Gibraltar and, in February 2013, the liquidation was recognised in the UK, leading to the imposition of an automatic stay of proceedings against Lemma under Article 20 of Schedule 1 to the Cross-Border Insolvency Regulations 2006 ("CBIR").

The appellant subsequently sought an indemnity under the policy for costs incurred in defending disciplinary proceedings brought by the Solicitors Regulation Authority in 2012 in respect of five transactions he had been involved in.

The appellant applied to the court for the automatic stay to be lifted in order to bring a claim, but this was refused by the judge at first instance.

The appellant appealed to the Court of Appeal.

#### **Decision**

The Court of Appeal unanimously dismissed the appeal. On the facts, the appellant's claim against Lemma for an indemnity under the 2009 insurance year was not covered by the terms of the policy. Even if the appellant's construction of the policy had been seriously arguable, the judge had acted within his discretion in declining to lift the stay.

#### **Comment**

The judgment was brief and the decision unanimous, but it nonetheless provides a useful reminder of a couple of important points. First, the effect of the CBIR automatic stay is to give the foreign company in liquidation the same protection against proceedings that an English company would have under section 130(2) Insolvency Act 1986 (the “1986 Act”). In other words, no action can be taken without the leave of the court. As Patten LJ pointed out, this is all about the preservation of a company’s assets in the liquidation through the avoidance of unnecessary litigation. The creditor’s right to make a claim is replaced with the right to lodge a proof of debt.

This leads to the second point: when will the court allow the stay to be lifted? The principles were considered in the first instance judgment [2014] EWHC 3674 (Ch) at paragraphs [7]-[11] and these are worth looking at as they were upheld as an accurate statement of the law by the Court of Appeal. The starting point is that the same approach should be taken to a foreign liquidation as would be taken to a liquidation under the 1986 Act; the court must “do what is right and fair in the circumstances of the individual case” and this will turn on the question as to whether there is a “genuinely arguable case”. If such a case can be established, its merits must be considered: is it fair or just to deal with it through court or arbitration proceedings or is it better to deal with it in the liquidation? This then leads to the final principle, that liquidation is a collective insolvency proceeding and that the interests of all the creditors must be considered to ensure that claims are resolved with the least cost to creditors.

In the present case, the Court of Appeal was clear that there was nothing to suggest that the Gibraltar court was not competent to manage the dispute in the liquidation. Consequently, the necessity of preserving the insolvent estate to benefit creditors outweighed the interests of the individual appellant to have his claim determined in England.

*Paula Moffatt & Miriam Carra*

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## **SCHEMES OF ARRANGEMENT**

### ***Metinvest BV (“Metinvest”) [2016] EWHC 79 (Ch)***

#### **Executive summary**

The composition of a class of creditors under a Companies Act 2006 scheme of arrangement is determined by the rights of those creditors through a comparison of (a)

the rights of creditors in absence of the scheme and (b) any new rights acquired by the scheme; on the facts, the parties formed a single class, since liquidation was the appropriate comparator.

## **Facts**

Metinvest was a company incorporated and domiciled in the Netherlands and the holding company and principal finance raising company for a large mining and steel group (the "Group"). Most of its assets were located in Ukraine and its business was adversely affected by the turmoil in Eastern Ukraine. The Group had liabilities under various Notes it had issued. The Notes were due to mature in January 2016, 2017 and 2018. The Notes were governed by English law and both Metinvest (as issuer) and the Note guarantors had irrevocably submitted to the English court's jurisdiction.

Payment defaults were expected on the January 2016 Notes which would trigger a cross-default under the remaining Notes. Metinvest was also in default under its other finance facilities.

Accordingly, the company applied for an order convening a single meeting of its scheme creditors to consider and, preferably, approve a scheme of arrangement under Part 26 of the Companies Act 2006 ("CA 2006"). The proposed scheme imposed a moratorium against enforcement action by noteholders providing for some breathing space, during which the negotiation of a restructuring of debts could take place. In return, partial payment was promised. Additionally, a Practice Statement letter was circulated referring to the issue of the Explanatory Statement and Scheme at a later date.

Certain noteholders objected to the scheme (the "Objectors") on the following grounds: (i) the January 2016 Notes were in a different class from the other Notes because of their right to be paid first, therefore a single meeting would be inappropriate; and (ii) the English court lacked jurisdiction to authorise scheme meetings, as there was no "sufficient connection" with England for a single class meeting.

## Decision

The court rejected both the arguments of the Objectors.

Following *Re Hawk Insurance Co. Ltd.* [2001] 2 BCLC 480 the court held that, in determining class composition, it needed to take into consideration: (a) the rights of creditors in absence of the scheme; and (b) any new rights acquired by the scheme. If there were a material difference between the rights under (a) and (b), the creditors would be considered to be within different classes, but only if such a difference were to make it impossible to have a common interest as a group. As a result of the cross-default on the January 2016 Notes, the position of the 2017 and 2018 noteholders would become materially the same as those of the January 2016 noteholders as the Notes would become due and payable. Under (b), the rights of scheme creditors would be materially the same as well, since the scheme would have a substantially similar effect on the position of all noteholders. Further, the noteholders would have the same entitlement to payment of interest. The court held that insolvency was the appropriate comparator and that the rights of the scheme creditors would be materially the same.

Following *Re Magyar Telecom BV* [2015] 1 BCLC 418, a “sufficient connection” to England was established as the Notes were governed by English law.

## Comment

The first part of the decision emphasises on which basis class composition should be tested. The Objectors disagreed with the company’s contention that the different Notes fell into the same class as, in their view, the company was (still) solvent. Consequently, the company had acted prematurely by going to court with a scheme before seeking the noteholders’ consent. The court did not agree with this view, noting that the Practice Statement covered, in detail, the dire position of the company. Since non-payment of the January 2016 Notes triggered cross-default of the other Notes, this clearly gave the process an “all for one and one for all” feel to it and, accordingly, made it hard for the Objectors to convince the court that the position of the noteholders differed sufficiently to justify a separate class of creditors.

The second part of the decision dealt with the issue of jurisdiction. Again, the objectors could not convince the court. Since English law governed the Notes, the existence of a "sufficient connection" had been previously established. Moreover, the incorporation of the company and some creditors in other EU Member States did not seem to hinder the English court from claiming jurisdiction. Considering the abundance of case-law in this regard, this should not have come as a surprise to the Objectors.

Consequently, the court had jurisdiction to authorise a Scheme meeting. Although the Objectors did not approve of this course of events, it will hopefully prove to be the right decision and lead to a higher recovery rate for all creditors.

*Tjalling Bosker*

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## **ADMINISTRATION**

### ***Re Property Edge Lettings Ltd [2015] EWHC 4069 (Ch)***

#### **Executive summary**

Administrators had been properly appointed by a building society lender which held a valid qualifying floating charge over the company's assets; the company's grant of fixed and floating charges over property in favour of the building society as security for the loan made to buy that property did not result in the automatic crystallisation of an earlier floating charge granted by the company.

#### **Facts**

In 2007, Capital Homes Loans Limited ("CHL"), a mortgage lender, granted Property Edge Lettings Ltd ("PEL") a loan secured by a fixed and floating charge over residential property owned by PEL. The charges were duly registered at the Companies House. The CHL charging deed provided for the automatic crystallisation of the floating charge if PEL encumbered the property subject to the floating charge without the written consent of CHL (the "crystallisation clause").

In 2008, PEL entered into a loan agreement with Derbyshire Building Society ("DBS") to raise finance for the redevelopment of a hotel and to purchase the adjoining land. On 9<sup>th</sup> May, the loan facility became available to PEL and it used part of the sum to complete its acquisition of the land. The same day, PEL granted a fixed charge by way of legal mortgage over both sites in favour of DBS. A few hours later, PEL executed a debenture, purporting to grant a floating charge over its assets in favour of DBS. PEL did not seek the written consent of CHL before granting security in favour of DBS, contrary to the terms of the CHL charging deed.

The redevelopment venture was unsuccessful and PEL got into financial difficulties. In 2012, the Nationwide Building Society ("Nationwide") as successor in title to DBS, claimed the benefit of the floating charge granted to DBS and placed PEL into administration by making an out-of-court appointment under paragraph 14 of Schedule B1 to the Insolvency Act 1986 (the "1986 Act").

In 2015, the applicants, who were the substantial creditors of PEL, issued an application notice against Nationwide and the administrators of PEL. They pleaded, *inter alia*, that Nationwide did not hold an enforceable and/or a qualifying floating charge over the property of PEL and, therefore, that the purported administration of PEL had been a nullity. The claim was made on the grounds that, as the mortgage deed creating the fixed charge was executed by PEL in favour of DBS, the CHL crystallisation clause came into operation and all the assets of PEL became subject to a fixed charge in favour of CHL, as a result of automatic crystallisation of CHL's floating charge. Therefore, later that day, PEL's grant of floating charge to Derbyshire was not valid as there were no unencumbered assets left over which a floating charge could exist.

The respondents issued a cross-application and sought a declaration that the applicant's case was totally without merit and should be struck out.

## **Decision**

The judge rejected the application, holding that no reasonable grounds for bringing it had been disclosed. It was held that the grant of a fixed charge to DBS did not result in the



automatic crystallisation of CHL's floating charge and that the DBS debenture constituted a floating charge according to section 251 of the 1986 Act and was therefore enforceable against PEL.

### **Comment**

The judge came to his decision by relying on the House of Lords' decision in *Abbey National Building Society v Cann* [1991] 1 AC 56. Curiously, the case was not relied upon by any of the counsel. *Cann* held that, where a purchaser is acquiring property through the assistance of a bank or a building society loan, the transactions of purchasing the property and granting the bank a charge over it are one, indivisible transaction, provided that there was a prior agreement to grant a charge once the purchaser acquired the legal estate in the property. There is never a time where the legal estate solely vests in the purchaser unencumbered by the charge. The purchaser only has the equity of redemption. The principle in *Cann* was said to be equally applicable to the present case. PEL's acquisition of the land was assisted by the loan facility advanced by DBS and hence was always subjected to the terms and conditions of DBS's mortgage contract and debenture. The property was never absolutely vested in PEL for it be caught by the CHL crystallisation clause.

The applicants had also argued that the DBS debenture was vitiated by a common mistake, namely the failure to obtain CHL's consent prior to its execution and was void. The judge rejected this on the grounds that the representational warranties given to DBS by PEL in the loan facility letter and the debenture established "beyond doubt" that PEL could grant the floating charge to DBS without the prior consent of any person, including CHL. After PEL's warranties and representations to DBS, it was not open to PEL to challenge the validity of the DBS floating charge over its assets and the judge considered that it was not open to any of PEL's creditors or shareholders to challenge its validity either.

*Muhammad Furqan Haider*

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***Re Cosy Seal Insulation Ltd (in administration); Ross and others v Gaffney and another company* [2016] EWHC 1255 (Ch)**

## **Executive summary**

The administrators' claims that certain transactions constituted transactions at an undervalue or unfair preferences under sections 238 and 239 of the Insolvency Act 1986 (the "1986 Act") as were substantiated.

## **Facts**

Cosy Seal Insulation Ltd (CSIL) entered into administration in July 2014. Mr Gaffney was its sole director and shareholder. The administrators sought to challenge certain transactions and payments made prior to CSIL entering administration as preferences and/or transactions at an undervalue under sections 238 and 238 of the 1986 Act. The administrators also alleged that certain of Mr Gaffney's activities amounted to misfeasance and/or breach of his duties as a director of CSIL under the Companies Act 2006 (the "Companies Act"). A number of the transactions had involved a separate company, CSIL (UK) of which his wife, Mrs Gaffney, was the sole director and shareholder at all times.

The claims made by the administrators with regard to these transactions were in three categories.

Firstly, three payments made by CSIL to Mr Gaffney between March and May 2014, which amounted to approximately £531,000 and which the administrators argued were preferences. The third payment in May 2014 was made on the same day as CSIL passed a resolution stipulating its insolvency and a creditor, Wetherby, presented a winding up petition against CSIL. Mr Gaffney had also required an additional £31,000 to be paid by CSIL to a racing company, a payment which the administrators contended was an act of misfeasance and/or preference.

Secondly, payments made to CSIL (UK) in May 2014 as well as additional payments under various agreements between CSIL and CSIL (UK) as preferences and/or acts of misfeasance by Mr Gaffney.

Thirdly, the sale of 40,000 carbon tonnes of credit amounting to £100,000 from CSIL to CSIL (UK) in March 2014 which CSIL (UK) never paid for and which the administrators viewed as a transaction at an undervalue.

## **Decision**

The judge held that CSIL was insolvent at the "relevant time" for the purposes of section 240 of the 1986 Act when the relevant transactions and payments were made. This was

determined by both the cash flow test and the balance sheet test pursuant to section 123 of the 1986 Act.

Mr Gaffney was found to have been influenced by a desire to prefer the first three of his debts over the debts of others as well as the position of CSIL (UK) in the event of CSIL's insolvent liquidation for the purposes of section 239 of the 1986 Act. He and CSIL (UK) were required to repay the money with interest.

The sale of the carbon credits was found to have been at an undervalue. A subsequent profit of £584,442 from its later sale by CSIL (UK) was ordered to be repaid by CSIL (UK) with interest.

None of the payments, including the payments to the racing company were objectively in the best interests of the creditors as a whole. Mr Gaffney and CSIL (UK) were found to be jointly liable to make repayments by way of equitable compensation and also to repay the £31,000 paid to the racing company despite the payment of those sums not amounting to a preference.

### **Comment**

This case provides a text book application of sections 238 and 239 of the 1986 Act. HHJ Behrens identified four legal issues to be determined.

Issue 1: Whether CSIL was insolvent at the "relevant time" of each of the transactions concerned as stipulated in section 240(1) of the Insolvency Act 1986 (IA 1986).

Issue 2: In relation to the preference allegations, discerning whether CSIL was influenced by a desire to put Mr Gaffney and/or CSIL (UK) in a better position than he/company would have been in an insolvent liquidation.

Issue 3: Whether the sale of carbon credits in March 2014 to CSIL (UK) for £100,000 which were subsequently sold on to a third party for a profit of £584,442 were at an undervalue.

Issue 4: In relation to the misfeasance dispute, whether Mr Gaffney failed to act in the creditors' interest by entering into the transactions and therefore breached the duties owed to CSIL under sections 171, 172 and 174 of the Companies Act. If so, the issue arose as to whether he ought to be excused under section 1157.

As stipulated in section 240(1) and (2) of the IA 1986, whether a company entered into a transaction at an undervalue or given preference at a “relevant time” must be discerned (para 89). This was dependent on Mr Gaffney and CSIL (UK) being connected persons with CSIL and whether the contravened transaction or preference given, occurred in the period of 2 years of the onset of insolvency. Both matters were conceded on behalf of Mr Gaffney and CSIL (UK) (para 90). Therefore, the issue to be determined in relation to the “relevant time” was whether CSIL was unable to pay its debts or became unable to pay its debts as a result of the transactions or preferences.

In determining the cash flow insolvency of a company the court should not be blinded by the potentially opaque facts presented which may lead to overlooking the possibility of temporary liquidity (para 126). This case demonstrates that a company’s communications (such as, in the instant case, an email sent to HMRC stipulating the company’s desperate need for a VAT refund) can prove pivotal in influencing the court’s decision as to whether a company is solvent or not. Sections 123(1)(e) and 123(2) of the 1986 Act provide the relevant definitions. A company is insolvent where the court is satisfied as to the proof of the company’s inability to pay its debts as they fall due. After taking into account the contingent and prospective liabilities, if it is proved to the satisfaction of the court that the value of the company’s asset is less than the amount of its liabilities, a company is deemed unable to pay its debts.

Cases such as *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2011] EWCA Civ 227, [2011] All ER (D) 74 (Mar), *Carman (liquidator of Casa Estates (UK) Ltd) v Bucci* [2014] EWCA Civ 383, [2014] All ER (D) 33 (Apr) and *Re Cheyne Finance* [2007] EWHC 2402 (Ch), [2007] All ER (D) 37 (Dec) shed light on the fact-sensitive approach. Lewison LJ in *Casa Estates* paras 27 and 28 stipulates how both the “present” and the “reasonably-near future” must be taken into account in relation to the cash-flow test. ‘[O]nce the court has to move beyond the reasonably near future’ the application of the cash-flow test becomes speculative. Whilst not exact, the application of the cash-flow test and the balance-sheet test operates in parallel.

The £1.2 million debt owed to the company and the £650,000 dividend paid to Mr Gaffney in 2013 played a huge part in the cash flow insolvency of CSIL. HHJ Behrens was satisfied that CSIL was unable to pay its debts as they fell due (para 127). With the benefit of hindsight (*Green v Tai* [2015] BIR 24 and *Watchorn v Jupiter* [2014] EWHC 3003 (Ch)) HHJ Behrens rejected (*obiter*) Mr Gaffney’s assertion that CSIL was balance sheet solvent due to the £1.2 million debt owed to the company (para 133). Taking into account the

difficulty of recovering a debt, the judge imposed a discount of at least 30% to reflect the risk of non-recovery (para 133). Despite such discount CSIL was also found to be balance sheet insolvent (para 134).

The preference claim related to the three challenged payments made to Mr Gaffney totalling the sum of £531,000 in repayment of loans given by Mr Gaffney to CSIL (para 142) and payments to CSIL (UK) totalling the sum of £263,000 (paras 149 and 150). Mr Gaffney failed to convince the court of his desire to treat creditors fairly and that the payments to CSIL (UK) were in relation to consultancy services provided by Mrs Gaffney to CSIL.

HHJ Behrens rejected the respective assertions pursuant to section 239(5) of the 1986 Act. CSIL was presumed to have been influenced by a desire to put Mr Gaffney and/or CSIL (UK) in a better position than he/company would have been in an insolvent liquidation (para 138). Applying the test put forth by Millet J in *Re MC Bacon* [1990] BCC 78 at para 87, which determined the word "desire" to be a subjective matter, the desire of the company to positively improve the creditors' position could not be evinced (para 143). Mr Gaffney's assertion was rebutted on the evidence that the payment was unnecessarily timed considering the company's financial difficulties (para 146). The £200,000 paid on 27 May 2014 was made on the same day as the filing of the "Notice to Appoint Administrators" (para 144).

Despite accepting Mr Gaffney's argument with regard to the regulatory uncertainties regarding the validity of the credits, the sale of credits from CSIL to CSIL (UK) totalling the sum of £100,000 was held to be an undervalue (para 159) whilst the subsequent re-sale price was fair (para 161). In any case there was no real reason as to why the sale to the third party had to be undertaken by CSIL (UK) (para 160).

In relation to the misfeasance claim HHJ Behrens followed *Re Regentcrest plc v Cohen* [2001] 2 BCLC 80 to discern that Mr Gaffney as the sole director of CSIL had the duty to act *bona fide* (subjectively speaking) in the interests of all the creditors. Furthermore as Mr John Randall QC in *Re HLC Environmental Projects* [2013] EWHC 2876 (Ch), [2013] All ER (D) 240 (Sep) stated, the director has a duty to refrain from actions which place the creditor's prospects of being paid at "real" risk (para 164). The distinction between "remote" and "real" risks is entirely dependent on the specific facts of the case. The subjective test is only applicable where actual consideration of the best interests of the company can be evinced and in the absence of such, the test becomes objective, namely



whether an intelligent and honest man in the position of Mr Gaffney is able to reasonably believe that the transaction is in the company's best interests (*Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74 E-F, obiter per Pennycuik J and *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598 at 138 per Mr Jonathan Crow). The objective test must be applied where a very material interest such as that of a large creditor, is unreasonably overlooked. HHJ Behrens applied the objective test presumably because Mr Gaffney failed to consider the interests of creditors.

CSIL (UK) and Mr Gaffney financially gained as a result of the breach of his duty as the sole director of CSIL. Therefore, Mr Gaffney could not rely on section 1157 of the Companies Act to excuse his actions as there was no basis for accepting that his conduct was reasonable (para 166).

The judgment was relatively clear in relation to the applicability of established principles for clawback claims and breach of duty. It is unfortunate that the judgment failed to clarify upon whether carbon credits constitute property under section 436 of the 1986 Act. Despite the *obiter* remarks in *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 156 which determined the EU emissions trading system carbon credits as property, a failure to appreciate the legal nature of intangible property remains an issue even at an EU level (Kelvin F K Low and Jolene Lin, 'Carbon Credits as EU Like It: Property, Immunity, TragiCO2medy?' (2015) 27(3) J Environmental Law 377). The relevance here is that Millet J in *Re MC Bacon* held that where a charge is created over a company's assets, there can be no transfer at an undervalue if there is no diminution of the company assets to begin with. Therefore if a carbon credit does not constitute property, it cannot be included within the company's assets and as such there can be, *ipso facto*, no diminution in the company's assets in the event of a transfer that involves carbon credits.

*Kazuhisa Deguchi*

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## **LIQUIDATION**

***Avonwick Holdings Ltd v Castle Investment Fund Ltd [2015] EWHC 3832 (Ch)***

### **Executive summary**

A bankruptcy stay would be lifted to enable proceedings to be brought against the individual concerned on the grounds that he had conspired with others to put assets beyond the reach of the claimant judgment creditor, contrary to sections 238, 239 and 423 of the Insolvency Act 1986 (the "1986 Act").

## **Facts**

In 2010, Webinvest borrowed \$100 million from Avonwick. The loan was guaranteed by Mr S. Webinvest borrowed another \$100 million from Castle. Mr. S was the sole shareholder of both Webinvest and Castle. The money borrowed was then lent to Globoid and was due to be repaid by Globoid in May 2012.

Globoid failed to repay the loan and arbitration proceedings began between Globoid and Webinvest in 2013. The arrangements were settled during the summer of 2014 without Globoid repaying any part of the loan it owed to Webinvest. Under the terms of the settlement, Castle received the benefit of the \$200 million debt owed by Globoid to Webinvest. Globoid was subsequently dissolved.

In November 2014, Avonwick obtained judgment against Webinvest for approximately \$200 million in respect of its original loan. Webinvest failed to pay the judgment debt and went into liquidation in March 2015. Meanwhile, Mr. S, as loan guarantor, had been declared bankrupt and benefited from an automatic stay of proceedings.

Avonwick and the liquidators of Webinvest alleged that Mr. S conspired with others during the arbitration proceedings by unlawful means, to deprive Webinvest of its right to the Globoid debt so defeating Avonwick's claim to be paid the sum due under the judgment debt. The "unlawful means" constituted (i) causing Webinvest to enter into the transaction at an undervalue, the preference and the transaction defrauding creditors under sections 238, 239 and 423 of the 1986 Act, as well as (ii) procuring breaches of fiduciary duties owed to Webinvest by its directors.

Avonwick applied for permission to lift the automatic stay arising on bankruptcy in order to bring unlawful means conspiracy proceedings against Mr. S and to re-amend its claim accordingly.

## **Decision**

The Court lifted the stay of proceedings against Mr. S and allowed Avonwick to re-amend its claim to include unlawful means conspiracy.

## **Comment**

The defendants argued that an application for unlawful means conspiracy could not be based on the 1986 Act. The judge disagreed, relying on *Lonrho Limited v. Shell Petroleum Company Limited (No.2)* [1982] AC 173. This was on the grounds that the provisions in question were intended to provide a means of protection for creditors as a particular class of individuals. Indeed, the acts described in sections 238, 239, and 423 of the 1986 Act are unlawful acts, and the court found no reason to deny an action related to a conspiracy. Therefore unlawful means conspiracy claims should not be confined to breaches of criminal statutes only, and claims based on acts caught by sections 238, 239, and 423 of the 1986 Act must be allowed because they give rise to a cause of action. Because the claimants had a real prospect of success, they were granted the right to join the defendant to the proceedings.

Judge Dight provided a new means to protect creditors from the poor behaviour of debtors, therefore practitioners and creditors may be very satisfied of this unlawful means conspiracy claim's extension to insolvency provisions. Nevertheless, the defendant made an application for permission to appeal, and only time will show if this judgment will be followed or not.

*Victor Laplace-Builhé*

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***Re Saad Investments Company Ltd and another (in liquidation); Akers and others v Hayles [2016] Lexis Citation 69 (25 May 2016)***

## **Executive summary**

Rule 9.6(4) Insolvency Rules 1986 gives the court an “unfettered discretion” to make an order for costs (other than travel expenses) in favour of a person summoned to attend a section 236 Insolvency Act (“1986 Act”) examination.

## **Facts**

SAAD Investments Company Limited and Singularis Holdings Limited were Cayman Island companies that went into liquidation in the Cayman Islands. Both liquidations were recognised in the English courts under the Cross-Border Insolvency Regulations 2006.

The respondent had been required to attend court for examination under section 236 of the 1986 Act in view of his previously held position with a Saudi Arabian entity (“TME”). TME was closely connected with the companies in liquidation and the respondent was believed to be a valuable source of information with regard to the alleged fraudulent behaviour of the companies in liquidation and the possible involvement of TME. There was no suggestion that the respondent any connection with the alleged fraud.

The question arose as to the allocation of the respondent’s costs in respect of the section 236 application. Although the joint liquidators did not dispute the court’s discretion to award costs against them, they contended that costs should not be awarded, as the provision of information to a liquidator was a public duty in aid of the administration of justice.

## **Decision**

It was held that the court had a discretion to award legal costs to an examinee. An order was made for the provision of the reasonable costs of the respondent’s representation at the examination.

## **Comment**

Whilst recognising that the court had a discretion to award costs to an examinee, counsel for the joint liquidators contended that the court should not allow them on the basis of a number of pre-1986 Act cases. He relied first, on *Ex parte Wadell, In re Lutscher* (1877) 6 Ch D 328 ("*Lutscher*"). Here, Cotton LJ had held that a witness is entitled to reasonable expenses. Second, he relied on *In re Appleton French & Scrafton Limited* [1905] 1 Ch 749 ("*Appleton*"). Warrington J gave a costs order in this particular case, but did not wish to set a precedent, holding that "ordinarily persons examined [...] in bankruptcy, merely as witnesses would not be entitled to be paid out of the assets or otherwise their costs of employing solicitors or counsel" (p. 755-756).

The judge referred to the more recent decision of *Re Harvest Finance Ltd* [2015] 2 BCLC 240. Leaving aside the facts of the case, he noted three aspects mentioned in this judgment as relevant for the underlying case: (i) that assisting an office-holder is a public duty necessary to the administration of justice (para 19); (ii) the wording regarding "other costs" was not mentioned in the Companies Act 1985 (para 11.6.4); and (iii) although not general practice, the words of rule 9.6(4) IR 1986 provide the court with jurisdiction to order costs (paras. 50.3 and 56).

The judge held that rule 9.6(4) gives "the court an unfettered discretion to make an order for costs" and noted that that the court must be cautious about authority decided before 1986; authority preceding the coming into force of the modern rule should be merely regarded as an indication of the practice before 1986.

Four undisputed aspects were relevant to the exercise of the court's discretion in this case, namely: (a) the extraordinary nature of the case; (b) the alleged fraud; (c) delay on the part of the joint liquidators, which may have led to faded memories of the respondent; and (d) the fact that the examination was ultimately fruitless. The judge considered that two other factors were also relevant: first, the fact that the applicants had ample funds at their disposal; and second, the fact that the representation of the respondent by counsel during the examination was likely to have been beneficial to both parties. Accordingly, the court ordered payment of the reasonable costs of the respondent's representation at the examination.



The respondent's application for the payment of pre-application costs was rejected. These costs were incurred as part of the respondent's cooperation with the applicants. Ultimately, these costs were made to avoid the eventual examination which took place; rule 9.6(4) IR 1986 refers to "[a] person *summoned* to attend for examination" [emphasis added] and therefore has a narrow scope. Costs should be "limited to dealing with costs arising out of an examination, not costs attributable to some alternative method of gathering information".

The ruling of the Companies Court makes sense. Rule 9.6(4) IR 1986 explicitly provides for compensation if a person gets *summoned* to attend for examination. It therefore seems right that a person gets compensated for the costs *arising from* that examination. Accordingly, a narrow definition is justified: pre-application costs should not be included.

Although the author agrees with the outcome in this case, he deems the additional justification for the costs order (the respondent's representation at the examination) to be lacking and rather ambiguous. In its motivation, the court refers to the fact that the applicants have "ample funds at their disposal". Does this lead to the conclusion that *any* costs should be compensated, simply because the money is there and it would not cause hardship on the general body of creditors? In the author's view, the justification for compensation lies in the fact that a person complies to a *public duty*: the availability of ample funds is simply irrelevant. Consequently, the motivation lacks at this point. Luckily, as the judge stated in his last paragraph, this judgment is not intended to set any precedent.

*Tjalling Bosker*

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# Contributors' profiles



## **Victor Laplace-Builhé**

I obtained an LLB in France, an LLM in the Netherlands and I am currently studying for a Dual LLM in Insolvency Law at Radboud University and NTU. I am specialised in European and corporate law and I developed an interest for pre-packaged administration. I would like to work in a corporate and restructuring department of an international law firm.



## **Miriam Carra**

I studied law at the University of Montpellier, France where I obtained a bachelors and an honourable bachelor (Masters) in law. I then spent an Erasmus year at Radboud University in Nijmegen after which I chose to study on the Dual LLM in insolvency law programme with NTU where I am currently based. I wish to continue learning about European Insolvency Law and am considering studying for a PhD with a view to undertaking legal practice in this field.



## **Tjalling Bosker**

I have completed an LLB and LLM in Dutch Law at the University of Groningen. Currently, I am studying for a Dual LLM in Insolvency Law at Radboud University Nijmegen and NTU. My interest in insolvency law was sparked during my studies at Groningen, and naturally, I wrote my dissertation on this topic as well. I have a particular interest in the role of financiers with regard to the rescue of troubled companies. In the future, I would love to work in the field of restructuring and insolvency / banking and finance at either a law firm or a bank.



## **Kazuhisa Degucha**

I studied for my LLB at Keele University with one of my modules in the final year being Company Law. I am now studying for an LLM in Human Rights Law at NTU and I hope to work for the UN in the future. I have maintained my interest in company law by undertaking a free-standing elective in Corporate Rescue.



## **Muhammad Furqan Haider**

I studied law NTU and am now studying for an LLM in Corporate and Insolvency Law NTU. My interest in corporate insolvency law was sparked by studying it briefly at undergraduate level. In future, I would like to practise in the field of corporate law.