Nottingham Law School

Centre for Business and Insolvency Law

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This term's edition of the Insolvency Bulletin is illustrative of the wide range of cases, both large and small, that can fall under the insolvency umbrella. We kick off with the Privy Council's decision in *Stichting Shell Pensioenfonds* to grant an anti-suit injunction in order to prevent an advantage being given to one claimant over other comparable claimants in the Madoff case.

If the remaining cases have a theme, it would seem to be about the overlap between different jurisdictions. In the case of the *Commissioners for HMRC v Changtel Solutions*, the court had to consider the extent to which its insolvency jurisdiction was abrogated by the jurisdiction of the tax tribunal, whilst in *Salford Estates*, the court had to consider the impact of the mandatory stay on insolvency proceedings imposed by the 1996 Arbitration Act. And *Agrenco* shows that an English liquidation of an overseas company can validly continue, even where that company has been dissolved in its own country of incorporation and so ceases to exist.

Otherwise, *Eiffel Steelworks* provides a reminder of where we got to with the administration cases on defective appointments (we follow *Virtualpurple)* and *Day v Tiuta International* gives us an update on the doctrine of subrogation.

We look forward to welcoming you to Nottingham on 25 and 26 June 2015 for the INSOL Europe Academic Forum conference we are co-hosting with Radboud University, Nijmegen, Netherlands. Full details of the conference can be accessed [here].

There will be no Summer edition of the Insolvency Bulletin as I am away from the office, but I hope that you all have a great summer.

Paula
Paula Moffatt

In this Bulletin…

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CROSS-BORDER

Stichting Shell Pensioenfonds v Krys and another (British Virgin Islands) [2014] UKPC 41

Executive summary

As there was nothing to suggest that allowing the appellants to obtain an advantage over other comparable claimants in the liquidation of a BVI company was consistent with the ends of justice, an anti-suit injunction would be granted against them.

Facts

Fairfield Sentry Ltd ("Fairfield") was incorporated in the British Virgin Islands ("BVI") as a mutual fund. Investors acquired shares in Fairfield and Fairfield placed the funds for investment with Bernard L Madoff Investment Securities LLC ("BLMIS"). Investors could redeem their shares based on a published net asset value ("NAV"). The arrangements were part of a Ponzi scheme created by Bernard Madoff that ran for seventeen years until he was arrested in 2008 for fraud. By October 2008, $US7.2 billion, being 95% of Fairfield's assets, had been forwarded by Fairfield to BLMIS. Fairfield was ordered to be wound up by the BVI court in July 2009.
Between 2003 and 2006, Stichting Shell Pensioenfonds ("Shell"), a Dutch pension fund, had subscribed for shares in Fairfield in the sum of US$45 million. The various subscription agreements were governed by New York law.

Following Mr Madoff's arrest, Shell applied to Fairfield to redeem its shares in accordance with its agreement, but no payment was made. A few days later, Fairfield ended its practice of redeeming shares.

In order to protect its position while it prepared a substantive claim for misrepresentation and breach of warranty, Shell applied to the Dutch court for an attachment order over all the assets of Fairfield held by its intermediary, Citco Bank Nederland BV ("Citco"). An attachment order was made in December 2008 in respect of the Dublin branch of Citco. This was challenged by Fairfield but the challenge was rejected by the Dutch court in 2011.

The effect of the attachment order was that if Shell were successful in its Dutch claim, it would be possible for Shell to satisfy its judgment debt in full from Fairfield's assets held in Citco in Dublin. Other creditors whose claims may have ranked equally to, or ahead of, Shell's claim in the liquidation would be disadvantaged by only being able to recover a dividend.

Fairfield's liquidators subsequently applied to the BVI court for an anti-suit injunction to restrain Shell from prosecuting its claim and requiring it to take all necessary steps to procure the release of the attachment order. The application was rejected at first instance, but the liquidators successfully appealed to the Court of Appeal. Under the order made by the Court of Appeal, Shell was restrained from taking any further action in the Dutch litigation against Fairfield and was prohibited from commencing any new proceedings. The order of the Court of Appeal did not refer to the attachments.

The Court of Appeal gave the following reasons for allowing the appeal: (i) Shell was subject to the personal jurisdiction of the BVI court because it had lodged a proof in the liquidation; (ii) the assertion by the Dutch courts that it had 2

jurisdiction to attach assets on the sole ground that it consisted in a debt owed to Fairfield by a Dutch entity was exorbitant; and (iii) Shell should not be allowed to avail itself of that jurisdiction in order to obtain a priority that it would not be entitled to under the BVI statutory rules of distribution.
Shell appealed against the decision to the Board of the Privy Council.

Decision

The Board of the Privy Council dismissed Shell's appeal and upheld the order of the Court of Appeal. This order had the effect of ensuring that there would be no Dutch judgment to which the attachments could relate. This

achieved the desired result of preventing the attachments from leading to execution against the Citco Dublin account. Shell was not disadvantaged by the decision since it could prove in the liquidation for damages for misrepresentation and breach of warranty.

Comment

As their Lordships pointed out, for as long as the attachments remained in place, the BVI liquidators could not access the Citco Dublin account. There had been some discussion as to whether the order should be amended to lift the attachments, but the Board considered that this was unnecessary. It observed that, as the appellants and respondents were "responsible parties" it expected that the question of access to the Citco Dublin account would be resolved by agreement. Failing this, an application to the High Court by the liquidators for the attachments to be released would be necessary.

It was accepted in the case that any other party with a claim against Fairfield could also have applied to the Dutch courts for an attachment and any funds attached would have then been shared amongst the judgment creditors. It was also the case that, because Fairfield was located in a non-EU jurisdiction, it was a foreign insolvency for the purposes of Dutch law. Dutch law does not allow a foreign insolvency to apply to assets located in the Netherlands.

This case raises the old chestnut of the territorial versus universal approach to insolvency proceedings. Under BVI law, the making of a winding up order of a BVI company that takes place in the BVI will subject all the assets of that company, wherever they are situated, to a statutory trust for distribution in accordance with statutory rules (s175(1) of the BVI Insolvency Act 2003). Once collected, the assets will then be distributed *pari passu* amongst unsecured creditors. The *lex situs* rule is only relevant when determining which assets form part of the insolvent estate. The approach is, thus, the same as English law and is universal, in that it "does not seek to ring-fence local assets or local creditors" (para 15).

In this case, the attachment order had been made before Fairfield was wound up by the BVI court. At that point, it would not have been possible for the attachments to be inconsistent with BVI law. Had the attachments created a proprietary interest in the assets in the Dublin Citco account, then those assets could not have formed part of the assets of Fairfield on its insolvency. As a matter of Dutch law, however, it was clear that the attachments did not create a proprietary interest in the assets held in the Citco account in Dublin; they simply worked to preserve funds in that account so that they could be applied in satisfaction of any later substantive judgment Shell obtained against Fairfield. 3

It was clearly the case that the Shell attachments were inconsistent with the mandatory statutory scheme for winding up in the BVI. The Board cited the principle from *Bushby v Munday* (1821) 5 Madd 297, 307, that the court does not purport to interfere with any foreign court (here the Dutch court) but can act against a defendant to restrain him from starting or continuing proceedings in a foreign court "where the ends of justice require". The Board went on to discuss the term "ends of justice" and noted that it was an imprecise expression that had been considered in *Carron Iron Company Proprietors v Maclaren* (1855) 5 HLC 415. *Carron* considered the categories of case to which it applied. These were, broadly, situations where litigation could be considered to be vexatious (either because one party was harassing the other or because the forum was inappropriate as matters could be better and more conveniently resolved in England) or situations where the foreign proceedings were "contrary to equity and good conscience". In *Carron*, the House of Lords held that the court had an equitable jurisdiction to restrain parties from acting in such a way as to violate the statutory scheme of distribution. The leading modern case is *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 in which Lord Goff explained that the principle in insolvency cases was not based on protecting litigants from vexatious claims, but on protecting the jurisdiction of the English court to ensure that the claimants were treated equitably.

The Board concluded, therefore, that the BVI court had a jurisdiction to act in the interests of the general body of creditors and members of Fairfield. It also observed that, following *Singularis Holdings Ltd v PriceWaterhouseCoopers* [2014] UKPC 36 (reported in the Autumn Bulletin), the BVI court had a responsibility to conduct insolvency proceedings in the public interest. This meant that it should be conducted in an orderly way on a world-wide basis, regardless of the territorial limits of its jurisdiction. Ultimately, even though Shell had not acted oppressively or vexatiously, it was still possible for an anti-suit injunction to be issued against it.
As the BVI court's action against Shell was an action *in personam*, Shell had to fall within its jurisdiction. It was held that Shell did so for two reasons, first through its participation in the injunction proceedings and second, through lodging a proof of debt in respect of its claim under the redemption notice. The Board was clear that a submission consists of "any procedural step consistent only with acceptance of the rules under which the court

operates" (para 31). It rejected the contention that Shell had not submitted to the jurisdiction of the BVI courts for all purposes: by proving in the liquidation, Shell had submitted to a statutory regime which precluded it from acting in such a way as to prevent the application of the statutory order of priorities.

The Board rejected the contention that an anti-suit injunction would not issue to prevent a foreign litigant from resorting to the courts of its own country. An injunction would be available regardless of the nationality or residence of the creditor.

Finally, the Board considered that the BVI court could exercise its discretion in the liquidators' favour. There was nothing to suggest that allowing Shell an advantage over other creditors would be consistent with the ends of justice. The Board did not consider that this would surprise Shell; after all, it had invested in a BVI company and ought not to be surprised that, in the event of its insolvency, it would be wound up in the BVI.

In the matter of Agrenco Madeira Comercio Internacional LDA and in the matter of the Insolvency Act 1986

Executive summary

The continuing English liquidation of a Portuguese incorporated company that had been dissolved in Portugal would survive the Portuguese dissolution under section 225(1) Insolvency Act 1986.

Facts

Agrenco Madeira Comercio Internacional LDA (the "Company") was incorporated under laws of Portugal in 2004 although its centre of main interests ("COMI") was in Brazil. It imported and exported agricultural products and hired cargo storage space on ships. It was also responsible for international distribution on behalf of its group companies and entered into Forward Freight Agreements ("FFAs") with various counterparties.

In 2008, the Company experienced financial difficulties and ceased trading. In August 2009, it presented a petition for a compulsory winding up in England. As its COMI was in Brazil, the EC Regulation on Insolvency Proceedings 1346/2000 did not apply and, in October 2009, the English court wound up the Company as an unregistered company.

Following a request to the Company's former Madeiran financial advisers to prepare the Company's annual accounts and assist with tax issues, the English liquidators (the "Liquidators") discovered that the Madeiran registration authorities had commenced proceedings for the involuntary dissolution and liquidation of the Company in Portugal. This would take effect on or after May 2014.

The English winding up had realised substantial assets, but the Liquidators anticipated that they would need a further two years to complete their work which included commencing proceedings against certain FFA debtors and resolving the position with regard to various intercompany debts.

The Liquidators applied to the court for a declaration that the English winding up would survive the dissolution of the Company in Portugal and would continue to have effect as well as a declaration that the Liquidators would continue to be authorised to perform their duties, notwithstanding the Portuguese dissolution.

Decision

The judge granted the relief sought on the basis of section 225(1) Insolvency Act 1986.

Comment

This was an interesting judgment which traced the origins of section 225 back to the Russian Revolution of 1917. Between 1917 and 1920, a number of Russian banks which had conducted business in England were dissolved in Russia without their affairs in England having been satisfactorily dealt with. This led to the enactment of section 338(2) Companies Act 1929, which enabled a foreign company that had been dissolved in its country of incorporation to be wound up in England as an unregistered company.
Although the legislation meant that the validity of the winding up was not in doubt, it did raise issues where the banks had carried on their business for a

period of time after they had been declared dissolved in Russia. This was considered by the House of Lords in *Russian and English Bank and Florance Monte-Fiore Guedalla v Baring Brothers and Company Limited* [1936] AC 405. Although it had been determined prior to this case that the banks had been dissolved in Russia at an undefined point in 1918, the House of Lords noted that the banks had nonetheless acquired assets after this period and that there were pre-dissolution and post-dissolution creditors. Lord Atkin found that the court was entitled to imply that the dissolved company was to be wound up as if it had not been dissolved and ultimately, the House of Lords concluded (3:2) that the foreign dissolution could be ignored for the purposes of the winding up.

In this case, section 225(1) was sufficiently wide to cover the situation that had arisen. This section provides that a company incorporated outside Great Britain that has engaged in business in Great Britain could be wound up as an unregistered company where it has ceased to do business here "notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated". Although it is generally the case that the law of the state of a company's incorporation regulates questions about the company's status, this principle is superseded by section 225(1).

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LIQUIDATION

The Commissioners for Her Majesty's Revenue and Customs v Changtel Solutions UK Limited (formerly ENTA Technologies Limited) [2015] EWCA Civ 29

Executive summary

The discretion of the Companies Court is not completely abrogated by the jurisdiction of the tax tribunal; the Companies Court need not defer to the tax tribunal in every case, though it may often choose to do so.

Facts

Between February 2010 and March 2013, Her Majesty's Revenue and Customs ("HMRC") made 36 VAT assessments against Enta Technologies Limited ("ETL"), of which only two were paid. On 25 March 2013, HMRC wrote to ETL warning it that, if the sums due (approximately £15.5 million) remained unpaid, then legal proceedings would be commenced against ETL which could result in a petition to wind up the company. Three days later, ETL lodged a notice of appeal against the VAT assessments and sought a time extension in which to lodge the appeal.

In April 2013, HMRC presented a petition to wind up ETL in respect of its unpaid VAT assessments. The judge noted that, under section 73(9) of the Value Added Tax Act 1994 ("VATA"), a tax assessment is a debt due unless cancelled or reduced following an appeal to the tax tribunal. In June 2013, however, the petition was struck out as an abuse of process since HMRC had advertised it in breach of an agreement between the parties not to do so.

HMRC presented a second petition to wind up ETL. ETL issued an application to restrain advertisement of the petition and/or to strike it out. ETL's application was adjourned until the first tier tax tribunal (the "FTT") had considered whether or not to grant ETL an extension of time. The FTT allowed the time extension and, in March 2014, the Companies Court granted ETL an injunction restraining 6

the advertisement of HMRC's petition and dismissed the petition as an abuse of process.
HMRC was given leave to appeal on the issue as to whether the FTT, rather than the Companies Court, was the appropriate forum to determine whether the debt had a real as opposed to a frivolous prospect of success and whether the judge at first instance had been correct to rely on Rule 8(3)(c) of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009/273 ("Rule 8(3)(c)) when he decided that the Companies Court should defer to the FTT. HMRC also appealed against the judge's decision that ETL's debts in respect of the tax assessments were disputed in good faith on substantial grounds.

Decision

The Court of Appeal unanimously allowed the appeal, holding that the judge was wrong to say that the Companies Court must defer to the FTT in a case of this kind. The discretion of the Companies Court is not

completely abrogated by the jurisdiction of the tax tribunal. The facts in the case were exceptional and the judge should have concluded that the debts represented by the tax assessments were not disputed by ETL in good faith and on substantive grounds. Accordingly, the order restraining the advertisement of the petition was discharged; ETL's application to dismiss the petition was dismissed; the requirement to advertise the petition was dispensed with and an order made that ETL be compulsorily wound up.

Comment

This case provides some helpful guidance as to the interface between the jurisdiction of the tax tribunal and the Companies Court. Lord Justice Vos was clear that the judgment did not mean that the tax tribunal would not normally be the appropriate forum to determine whether an appeal against a VAT assessment has a real prospect of success. A decision of the tax tribunal would, generally, be a compelling factor for the Companies Court in exercising its discretion, but the Companies Court need not defer to the tax tribunal in every case.
The reasoning of the judge at first instance was based on the principle that the winding up jurisdiction should not be used to resolve genuine disputes as to the existence of a debt: something on which all parties agreed. He noted that matters were more complicated in tax cases, however, because a statutory debt was created by the mere existence of a tax assessment. The judge also considered that, following the introduction of a power for the tax tribunal to strike out appeals "possessing no arguable merit" under Rule 8(3)(c), the question as to whether an appeal had a real prospect of success must be one for the tax tribunal, rather than the winding up court. Where adjudication on the correctness of a tax assessment was required, this had been entrusted to a specialist tribunal (i.e. the tax tribunal) by Parliament (*Autologic Holdings plc v IRC* [2006]1 AC 118). On this analysis, it would be wrong for a petitioner even to present a winding up petition without having first applied to strike out an appeal against a tax assessment.

The Court of Appeal took the view that the correct approach was to distinguish between the discretion that the tax tribunal judge exercised and the guidance that he gave. If the guidance had been wrong then the legal basis on which his discretion was exercised would have been affected. In this case, the guidance had been wrong. 7

Although it was true that the power to adjudicate on tax assessments had been entrusted to a specialist tax tribunal, this did not mean that the question to be addressed in the Companies Court was the same as the question to be addressed in the tax tribunal. The appeal against the tax assessment would not be indirectly decided simply by the commencement of winding up proceedings: if a winding up order were made against a company in this situation, it would be up to the liquidator to decide whether or not to pursue the appeal against the tax assessment as part of a collective process. In other words, the appeal would not necessarily die with the liquidation. The decision in *Autologic* did not apply. Rule 8(3)(c) did not alter the substantive jurisdiction of the tax tribunal to determine the validity of tax assessments, nor did it alter the substantive jurisdiction of the Companies Court to decide whether a company should be wound up in the particular circumstances of each case. HMRC had also argued that the FTT was wrong to say that the debt was disputed in good faith and on substantial grounds. At the initial tax hearing, the judge had indicated that he had not formed the view that the appeals had no real prospect of success. The Court of Appeal acknowledged that the judge may not have had the same amount of factual information available to him as was available to the Court of Appeal, but considered that he had been wrong to reach this conclusion. HMRC had identified considerable discrepancies in ETL's export arrangements and the fact that false evidence had been put before the court implicated ETL in fraudulent activities. The debts in respect of the tax assessments were not, therefore, disputed in good faith and on substantial grounds.

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Salford Estates (No.2) Limited v Altomart Limited [2014] EWCA 1575 Civ

Executive summary

In exercising its discretionary power to wind up a company, it was right for the court either to dismiss or stay a winding up petition in order to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than to require the court to investigate whether the debt was the subject of a genuine dispute on substantial grounds.
Facts

Salford Estates (No. 2) Limited ("Salford") had leased commercial premises for a period of 125 years to Altomart Limited ("Altomart") beginning in 1971. Under the terms of the Lease, Altomart was required to pay Salford a

service charge to cover a proportion of Salford's properly incurred expenses in providing certain services, plus an amount equal to the cost of the insurance premium on the premises (the "insurance rent"). Any disputes were to be dealt with by arbitration, "subject to the provisions of the Arbitration Act 1950 or any statutory modification or re-enactment thereof".

In July 2012, Salford and Altomart referred several disputes relating to the payment of the service charge and the insurance rent. In November 2013, Altomart was found liable to pay Salford approximately £64,000 (the "Award"). These were not immediately paid and Salford threatened to issue winding up proceedings if the sums due were not received by 5pm on 31 January 2014.

On that date, Altomart sent a cheque for the sum due, but it arrived after Salford had presented a winding up petition against Altomart. The petition stated that 8

Altomart was indebted to Salford in a sum over £90,000. This sum comprised both the Award and an additional amount in respect of service charges and insurance rent due for the year ending 31 March 2014.

Altomart objected to the petition on the grounds that the additional amount was disputed and that the dispute had to be referred to arbitration in accordance with the terms of the Lease. Altomart applied for an immediate stay and Salford agreed that it would not advertise the petition before 27 February 2014.

On 7 February 2014, Altomart applied to strike out or stay the petition on the grounds that (i) it was an abuse of the court's process (ii) Altomart was not unable to pay its debts (iii) the debt underlying the petition was the subject of a genuine dispute; and (iv) that the petition was liable to be stayed in any event under section 9 of the Arbitration Act 1996 (the "1996 Act").

At first instance, the judge stayed the petition. He noted that Altomart had been given an appropriate and sensible opportunity to pay the debts alleged to be due and so Salford's conduct in presenting the petition was not objectionable. He observed that the evidence tended to suggest that Altomart was solvent, but that it was long established that if a company failed to pay an undisputed debt, it would be deemed unable to pay its debts as they fell due. The judge concluded, however, that because Altomart had raised a defence to the dispute the arbitration provision under the Lease was called into play. As a result of this, he was bound to stay the insolvency proceedings under the mandatory stay provisions in section 9(1) and (4) of the 1996 Act.
Salford appealed on the grounds that, as the judge had concluded that Altomart had failed to raise a dispute in good faith and on substantial grounds, the petition ought not to have been stayed as section 9 of the 1996 Act had no application.

Following the issue of the notice of appeal, Altomart wrote to Salford offering to pay the amount demanded for insurance and for the service charge and provided an insurance quote illustrating that Altomart could obtain insurance at a lower cost than Salford was charging.

Decision

The Court of Appeal unanimously dismissed the appeal. Although the mandatory stay provisions in section 9 of the 1996 Act did not apply to the present case, in exercising its discretionary power to wind up a company under section 122(1) of the Insolvency Act 1986, the court should exercise its discretion consistently with the legislative policy embodied in the 1996 Act. It was right for the court either to dismiss or stay the petition in order to compel the parties to resolve their dispute through the dispute resolution method that they had chosen, rather than to require the court to investigate whether the debt was the subject of a genuine dispute on substantial grounds.

Comment

The judge at first instance was clear that, had it not been for the 1996 Act authorities he cited (*Rusant Limited v Traxys Far East Limited* [2013] EWHC 4083 (Ch) and *Halki Shipping v Sopex Oils* [19970 EWCA Civ 3062]) he would have dismissed the stay application on the basis that there was not a bona fide and substantial dispute as to the debt. As a consequence, the Court of Appeal was asked to consider how the 1996 Act affected the court's discretion to wind up a company. 9

The Court of Appeal noted that Salford relied on the non-payment of the specific debt mentioned in the petition as *evidence* that Altomart was unable to pay its debts when they fell due under section 123(1)(e) of the

Insolvency Act 1986. In other words, the winding up petition was not a claim for payment of the debt. This could be contrasted with the wording of section 9(1) of the 1996 Act which referred to legal proceedings being brought by way of a claim or counterclaim. The making of a winding up order would not necessarily result in Salford obtaining the right to be paid an amount equal to the debt specified in the petition. That would depend upon the value of Altomart's assets that were available for distribution to the general body of creditors and their respective rankings for priority purposes.

Although the Court of Appeal did not consider that Parliament intended section 9 of the 1996 Act to give debtors what would, effectively, be a right to a mandatory order that would affect the power of the court to wind up a company where a company could not pay its debts, the court could not ignore the policy behind the legislation. To do so could result in parties avoiding any arbitration arrangements and the 1996 Act through the presentation of a winding up petition. The party alleged to owe money would be forced to seek a stay at short notice or otherwise satisfy the Companies Court that the debt was the subject of a genuine dispute on substantial grounds.

Here, the fact that the debt was not admitted was enough to constitute a dispute for the purpose of the 1996 Act and enable the automatic stay under section 9 to take effect (*Halki Shipping),* regardless of the substantive merits of the defence.

The judge at first instance had stayed the petition because, unlike the Court of Appeal, he thought that the section 9 provisions were engaged. Although Salford had not argued the point, the Court of Appeal considered that it would have been better to have dismissed the petition on the basis that there was no evidence that Altomart had any other creditors who could have brought the petition.

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ADMINISTRATION

In the matter of Eiffel Steelworks Limited [2015] EWHC 511 (Ch)

Executive summary

As the directors' failure to give notice to the company of their intention to appoint administrators was not a nullity but a remediable defect, an order would be made that the administrators' appointment was valid.

Facts

Eiffel Steelworks Ltd (the "Company") was a subsidiary of Eiffel UK Ltd ("EUK"). Both companies were registered in England and Wales. Their ultimate parent was a French company ("ECM"). The Company and EUK both had the same directors. The Company and EUK were in financial difficulties and, in November 2014, were contacted by ECM and told that no further financial support would be provided to either company.
The directors of both the Company and EUK convened board meetings to consider whether EUK should be placed in creditors' voluntary liquidation and the Company into administration. The directors of the Company unanimously resolved to 10

appoint administrators under paragraph 22 of Schedule B1 of the Insolvency Act 1986 (the "1986 Act").
Draft appointment documents were sent by email to the directors of the Company prior to the board meeting along with draft documents in respect of the proposed liquidation of EUK. All relevant parties were, therefore, aware of the proposed appointment of the administrators in respect of the Company. Relevant parties included the Company's shareholders and directors.

Following the appointment, the administrators sold the business and assets of the Company.
No formal notice of intention to appoint administrators had, however, been served on the Company prior to the notice being filed. This was required under paragraph 26(2) of Schedule B1 and Rule 2.20(2) of the Insolvency Rules 1986.

The administrators sought one of the following forms of relief: (i) a declaration that the appointment of the administrators was valid notwithstanding that the Company had not been notified of the intention to appoint administrators; (ii) an order that the appointment of the administrators under the notice of appointment filed

with the court and all acts carried out in respect of it were valid; or (iii) an order that the administrators be appointed with retrospective effect.

Decision

The failure to give notice of intention to appoint administrators was not a nullity but a remediable defect and therefore an order would be made that the administrators' appointment was valid.

Comment

There was a rash of cases on defective appointments in 2012 (see the Spring and Summer Bulletins of that year) and this case reflects the approach taken in *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch) and subsequent cases, such as *Re Ceart Risk Services Ltd* [2012] ECHC 1178 (Ch). Notice to the Company is required to be given, but in the event that it is not, it is a remediable defect. This is a sensible response, particularly in the light of the circumstances of this case, where all parties clearly knew what was going on.
The fact that EUK knew and approved of the appointment of administrators meant that the judge was satisfied that there was no ascertainable prejudice of any kind. In reaching this conclusion, the judge took particular note of the wording of Rule 7.55 of the 1986 Rules which refers to "substantial irremediable injustice".
The judge considered the possibility of appointing the administrators with retrospective effect, but noted the concerns raised by the judges as to the nature and use of the jurisdiction in cases where this approach had been taken. He chose not to follow this approach on the basis that it was not necessary to do so in the light of the other authorities he had cited.

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In the matter of the Insolvency Act 1986 and in the matter of BW Estates Ltd [2015] EWHC 517 (Ch)

Executive summary

Administrators who had been appointed whilst LPA Receivers were in place were entitled to remuneration for their work in ascertaining the assets and liabilities of the Company and deciding what to do with the assets in their hands.

Facts

BW Estates (the "Company") was a property investment company. It owned five properties all of which were occupied by tenants and charged to Nationwide Building Society ("Nationwide"). In the course of litigation against the Company brought by the applicants, a freezing injunction was made against the Company. As a consequence, the Company's bank refused to make payments out of the Company's account including mortgage payments due to Nationwide.

Nationwide subsequently appointed Law of Property Act 1925 ("LPA") Receivers over each of the properties. Although Nationwide had a floating charge and could have appointed administrators, it chose not to do so. Administrators were subsequently appointed by the sole director of the Company in September 2013. Nationwide was notified but made no objection and did not appoint its own administrators.

The applicants had become creditors of BW Estates (the "Company") by buying a debt of approximately £18,000 owed by the Company to its former solicitors. It was accepted that the applicants held 10% by value of the Company's unsecured debts. The applicants were also judgment creditors of the Company in respect of frauds perpetrated by the beneficial owner of 75% of the shares in the Company and had obtained charging orders over those shares. Thus the applicants had an indirect interest in the majority of the shares in the Company, but were not shareholders.

The applicants contended that there was no good reason for the Company to go into administration at all. There had been no need for the Company to fail to make any payments to Nationwide: had the Company's bank been reluctant to make the mortgage payments, it could have asked the director to obtain the applicants' consent for them to be made and they would have given it. In due course, the receivers could have sold sufficient properties to repay the Company's debts after which the Company would have a surplus of funds. No creditors had been seeking payment and the Company had sufficient cash at the bank to discharge all its other outstanding debts. In their view, there was no benefit to the creditors in making the appointment and when the administration came

to an end in August 2014, the Company was in exactly the same position as it was before the appointment had commenced, except that the Company's assets were now reduced.

The administrators had been appointed on the basis that, under paragraph 3 of Schedule B1 to the Insolvency Act 1986 they could achieve a better return for creditors as a whole than would be likely if the company were wound up (without first being in administration), although the basis on which this statement had been made was not clear. The administrators had expended time and effort in trying to establish whether a liability from 1988 still existed against the Company in respect of Belvedere Investments, although their enquiries had proved

fruitless. If the liability still existed, the Company would have a deficit of £111,000, whereas if it did not, the Company would have a surplus.
The applicants applied to the court for an order that (i) the administrators' remuneration was excessive and should be disallowed or reduced; and (ii) that the administrators pay the costs of the application.

Decision

The judge rejected the argument that the administrators were not entitled to any remuneration for their services, but did not necessarily approve all the time spent and costs incurred. If the level of remuneration could not be agreed by the parties, a further hearing would be necessary.

Comment

This case is interesting because it shows an overlap between the appointment of the LPA receiver and the administrators. As the judge observed, Nationwide could have appointed administrators itself but chose not to, presumably because the Company had no other business than managing and receiving rents from the properties which were sufficient to cover the outgoings and payments due to Nationwide. The properties themselves were also more than sufficient security for the debt owed to Nationwide.

So what was the administrators' role? The judge was satisfied that it was entirely appropriate for them to identify the assets of the Company, obtain control of them and to find out whether the Belvedere liability was a real liability. Having achieved these things, the administrators could then decide how they should proceed. Equally, the judge was clear that exploring the Belvedere claim was not something that should have been pursued at any cost. It quickly transpired that Belvedere Investments had been dissolved and the Company director and the beneficial shareholder were less than forthcoming with information about it. Once the administrators had established that this was the case, they should not have incurred significant costs in investigating it further. The correct approach would have been to wait until assets were available for distribution to other unsecured creditors and then advertise for claims. If none emerged from Belvedere, all the other creditors could be paid off. The Company could then have been put back into the hands of the director or, failing that, wound up in order to make a distribution to shareholders.

The judge made plain that the administrators had not acted from any improper purpose and had not participated or assisted in any improper purpose that the Company director may have had. Equally, he had some sympathy with the argument put forward by the applicants that the administrators should not have incurred the costs that they did.

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RECEIVERSHIP

Day v Tiuta International Ltd [2014] EWCA Civ 1246

Executive summary

Receivers could be validly appointed under a company's rights of subrogation even if the company did not rely on those rights when making the appointment.

Facts

Mr Day was a businessman and developer. In 2008, he purchased land (the "Property") with a £3 million loan from Standard Chartered (Jersey) Limited ("SC") which was mortgaged against the Property.
In order to develop the Property, Mr Day needed further funds. In June 2011, he agreed to borrow £12.6 million from Tiuta International Ltd ("TIL") of which £6.6 million would refinance his existing borrowings including the SC mortgage and the remaining £6 million would finance the development. The loan was secured against the Property. Approximately £7.9 million was advanced of which £3 million was used to repay the SC loan and discharge the SC mortgage.

In July 2012, TIL went into administration and as no further funds were released to Mr Day, the development work ceased and the Property was left incomplete. Mr Day was unable to repay the TIL loan when due in November 2012 and, in January 2013, TIL appointed Receivers under the Law of Property Act 1925.
Mr Day ousted the Receivers from possession of the Property and issued proceedings against TIL, its Administrators and its Receivers, asserting an unliquidated claim for damages. Mr Day claimed damages on the grounds that TIL had breached its obligations under the TIL loan as TIL had been consistently late in advancing sums due and that this had caused him to lose contractors and had delayed the progress of the development. Mr Day argued that these sums should be set-off against the TIL loan. This would have the effect of releasing the Property from the TIL charge and so invalidating the appointment of the Receivers (the "set-off argument").
At the hearing, Mr Day also introduced a further and previously unpleaded claim that TIL had fraudulently misrepresented its financial status when entering into the TIL loan. He contended that this meant that he was entitled to rescind the TIL charge which would have the effect of invalidating the appointment of the Receivers (the "rescission argument").

At first instance, the judge granted a summary judgment in favour of TIL declaring that the Receivers were validly appointed and were entitled to market the Property. He rejected the set-off argument on the grounds that a mortgagor cannot unilaterally appropriate the amount of an unliquidated and unadmitted cross-claim in discharge of a mortgage debt, relying on a line of decisions that began with *Samuel Keller (Holdings) Ltd v Martins Bank Limited* [1971] 1 WLR 43.

He also held that, although there was a good arguable case as to TIL's fraudulent misrepresentation, even if Mr Day were entitled to rescind the TIL charge, TIL was nonetheless subrogated to the rights of SC under the SC charge since it had been discharged with TIL's money. Under its rights of subrogation, TIL would still have been entitled to appoint Receivers.

Mr Day appealed to the Court of Appeal contending that: (i) relief on the basis of subrogation could not be granted unless the party seeking to rely on subrogation had accepted that the security that it had entered into was invalid and not the security bargained for, which was not the case for TIL; (ii) TIL had not taken the necessary steps to appoint the Receivers under the SC charge and so they had no authority to sell the Property until TIL had properly appointed them; and (iii) TIL could not rely on rights of subrogation having misrepresented its position to Mr 14

Day and therefore having failed to comply with equitable principles such as "he who comes to equity must come with clean hands".

TIL responded that Mr Day should not have been allowed to run the rescission argument as it had not been pleaded in the Particulars of Claim. In any event, Mr Day had no evidence to support the rescission argument and, even if rescission were granted, counter-restitution to TIL would be necessary in the sum of £7.9 million, which Mr Day did not have.

Decision

The Court of Appeal unanimously rejected the appeal. It held that: (i) the judge at first instance was entitled to grant summary judgment on the grounds that either Mr Day's claim to rescission would fail, in which case TIL was entitled to appoint the Receivers under the TIL charge, or it would succeed, in which case TIL was subrogated to the SC charge and entitled to appoint the Receivers under its terms; (ii) the equitable doctrine of subrogation was sufficiently flexible to deem an appointment purportedly made under a voidable security as one having been made under subrogation rights in a case where the secured creditor did not know that its security was challenged. The determinative question was whether a lawful justification existed at the time of the act, whether the person knew of it or not; and (iii) following the principle in *Samuel Keller (Holdings) Ltd* a mortgagor cannot unilaterally appropriate the amount of an unliquidated and unadmitted cross-claim in discharge of a mortgage debt. The defence of unclean hands did not have an immediate and necessary relation to the equity

sued for as there was no direct connection between the alleged misrepresentation of TIL's financial position and the claim to subrogation.

Comment

This case provides a useful review of the doctrine of subrogation. In its consideration of the cases, the judgment drew on a number of points considered in the Court of Appeal case of *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291 [30] – [44]. These included the following. First, that the object of the remedy is to balance the rights and interests of the respective parties and so its application will depend upon the circumstances of the particular case in question; second, that it aims to prevent unjust enrichment; and third that it is a flexible remedy, although its application must be on a principled basis.

As Gloster LJ observed, the correct analysis of right of subrogation is that the party acquiring a creditor's security interest does not get precisely that, but instead obtains a "new and independent equitable security interest which … replaces the creditor's old interest" (para 43). TIL did not rely on the SC charge because it did not know that it might have needed to, since Mr Day had not raised the rescission argument at the time that TIL appointed the Receivers. It was not necessary for TIL to demand payment of the liabilities secured by the SC charge and, as she pointed out, to have done so would have been absurd since the liabilities under the SC loan agreement had been discharged.

It was common ground that equitable defences can be raised against a claim for subrogation. Having concluded that TIL could appoint the Receivers, Gloster LJ went on to consider whether TIL should be restrained from applying the proceeds of the sale of the Property to discharge the subrogated debt, whilst the court evaluated the merits of Mr Day's claim that TIL should not be able to exercise its subrogated rights as chargee. She concluded that it should not. Her reasoning was based on the principle which had been approved by the Court of Appeal 15

approved in *Samuel Keller (Holdings) Ltd:* essentially that, "notwithstanding the existence of an unliquidated cross-claim, unless and until a mortgage was discharged in the appropriate way on actual payment and acceptance of the sum due, the mortgage remained a mortgage, and the mortgagee was not only entitled to exercise his remedies of possession and appointment of receivers, but was also entitled to apply any surplus proceeds of sale up to the amount properly due under the mortgage in its discharge" (para 60). This principle would be undermined if a mortgagor could act to restrain the mortgagee from applying the proceeds of sale to pay off the secured debt.

Gloster LJ saw no need to comment on TIL's argument on counter-restitution although Vos LJ observed that he did not think that Mr Day could rescind the TIL loan without repaying the TIL loan.
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