Nottingham Law School

Centre for Business and Insolvency Law

Insolvency Bulletin

Spring 2014

Volume 7

This edition of the Insolvency Bulletin covers a number of cross-border cases concerning matters of jurisdiction as well as *Pillar Denton* which considers how advance rental payments should be treated when a company goes into administration.

The judgment in the *Erste* case emphasises the importance of avoiding detailed discussions of the merits of a case when dealing with questions of jurisdiction, whilst *Schmid v Hertel* clarifies the scope of Article 3(1) of the Insolvency Regulation (EC 1346/2000) and *Enasarco* considers the relationship between the 2007 Lugano Convention, the Insolvency Regulation and the Judgments Regulation (EC 44/2001).

***Pillar Denton* has determined that, where an office holder is in possession of property for the benefit of an administration or liquidation, he or she will be liable for rent as an expense of the administration or liquidation. This decision provides greater certainty for administrators and liquidators and will doubtless also please landlords. *Storm Funding* had a less positive outcome for the administrators of various Lehmans companies who will now have to make reserves for potential pensions liabilities under the Lehmans pension scheme in excess of those first identified in 2008.**

For anyone interested in writing in this area, please note that the Nottingham Insolvency and Business Law e-Journal would be pleased to receive manuscripts for the first issue of Volume 2, due out in June 2014. Submissions on insolvency, business and related areas of law, and which will be refereed, should be sent in the first instance to the Editor, Paul Omar, at paul.omar@ntu.ac.uk.

With all good wishes for a relaxing spring break.

Paula

Paula Moffatt

In this Bulletin…

CROSS-BORDER

Erste Group Bank AG London Branch v JCS "VMZ Red October" (1) Red October Steel Works (2) and Others [2013] EWHC 2926 (Comm)

Executive summary
The application by two of the Defendants to oppose service of proceedings outside the jurisdiction of Russia was dismissed on the grounds that the Claimant had demonstrated that there were serious issues to be tried and that it could bring an action within three of the jurisdictional gateways available under para 3.1 of Practice Direction 6B of the Civil Procedure Rules.

Facts
An application was brought by the third defendant ("RT") and the fifth defendant ("RT Capital") to set aside the service of proceedings on them outside the jurisdiction of Russia. RT was a Russian state run corporation responsible for managing Russia's military and manufacturing assets and developing its military industry. Its managing body comprised individuals who were either representatives of the President of Russia or the Russian Government. One of these individuals was a personal friend of President Putin (they had shared a house together whilst KGB agents in East Germany).

The claimant in the proceedings was the London branch of an Austrian bank ("Erste"). Erste was a participant in a US$80 million syndicated loan to the first defendant (the "Borrower") which was guaranteed by the second defendant (the "Guarantor"). In July 2009, a repayment of US$ 1.6 million due under the loan agreement was not honoured either by the Borrower or the Guarantor. Both the loan agreement and the guarantee were governed by English law and included a London arbitration clause and an exclusive jurisdiction clause that nominated the English courts.

Erste brought proceedings in the English court. It claimed against the Borrower and the Guarantor for the debt. It also claimed damages from RT for unlawful conspiracy or for unlawful interference with economic interests and/or contractual relations. The second claim was made on the grounds that the default was part of a deliberate and unlawful conspiracy by RT and the remaining defendants (which it claimed were in the control of RT) to strip both the Borrower and Guarantor of their assets and render them insolvent. Erste also sought an order under section 423 Insolvency Act 1986. RT and RT Capital denied the claims against them on the grounds that the inability of the Borrower and Guarantor to repay their debts was due to the economic down turn. This was in turn refuted by Erste since the steel manufacturing business, although now run by different companies, had been profitable over the last two years.

In December 2012, summary judgment was given against the Borrower and the Guarantor for US$16.8 million. The judgment was not appealed, but no payment had since been received by Erste.
The judge considered the principles for setting aside service out of the jurisdiction. First, the claimant had to show that there was a serious issue to be tried; second, the claimant must satisfy the court that there was a good arguable case that the claim fell within the categories of case for which leave to serve out of the jurisdiction may be given under paragraph 3.1 of Practice Direction 6B of the Civil Procedure Rules; and third, the claimant must satisfy the court that England is the appropriate forum. In order to establish a "good arguable case" for limb two, the claimant must show that it had a better argument than the foreign defendant. For the third limb, the court had to be satisfied that there was a real risk that justice would not be obtained in the foreign jurisdiction.

Counsel for the Defendants submitted that the recognition provisions of the Cross-Border Insolvency Regulations 2006 (relating to the recognition of foreign insolvency proceedings where a foreign liquidator had sought recognition) applied even though recognition had not, in fact, been sought by the Russian liquidator. Counsel for the Defendants also relied on the judgment of Lord Collins in *Rubin v Eurofinance SA* and *New Cap Reinsurance Corporation (in liquidation) v Grant* [2012] UKSC 46 on the grounds that, in *New Cap*, the syndicate was found to have submitted to the Australian jurisdiction by submitting a proof in the liquidation in Australia and so it was submitted that Erste's claim against the Borrower in Russia prevented it from pursuing its claims against the Borrower in England.

Decision
The judge held that there was a serious issue to be tried, that Erste had the better of the argument and could bring itself within three jurisdictional gateways under para 3.1 of Practice Direction 6B of the Civil Procedure Rules and that England was the appropriate and proper forum for the determination of the dispute between the parties.

In the absence of an application for recognition by the Russian liquidator, there was nothing in the Cross-Border Insolvency Regulations 2006 that justified or supported the English court in staying the claims against the Borrower and the Guarantor or in declining jurisdiction in respect of the claims or under section 423 Insolvency Act 1986. *New Cap* could be distinguished from the present case and did not necessitate the conclusion that, by putting forward its claim against the Borrower for proof in the liquidation, Erste had submitted to the jurisdiction of the Russian courts for the determination of the merits of that claim or its conspiracy and other claims.

Comment
The judge commented on the importance of avoiding detailed discussions of the merits of a particular case when dealing with questions of jurisdiction and cited Lord Neuberger's comments in *Capital plc v Nutritek International* [2013] UKSC 5. Lord Neuberger considered that the salient points should be capable of being identified relatively simply and uncontroversially. He also considered that it was not appropriate to involve lots of documentation or incur disproportionate levels of costs. In the present, case, Mr Justice Flaux noted the 17 lever arch files of evidence provided by RT in a "scattergun" approach: this was an interlocutory hearing and the question as to whether the claimant could satisfy one of the jurisdictional gateways should not become the subject of a trial on the facts.

Significantly, in commenting on the judgment of Lord Collins in *New Cap,* the judge observed that Lord Collins was not seeking to lay down a rule of law that the fact of lodging a proof of claim in a foreign liquidation amounted to a submission to the jurisdiction of that foreign court. Whether this had occurred or not, would always be a question of fact (para 114).

Ralph Schmid (as liquidator of A Zimmerman) v L Hertel [2014] EUECJ C-328/12

Executive summary
Article 3(1) of the Insolvency Regulation (EC 1346/2000) (the "Regulation") is to be interpreted to mean that the courts of the Member State in which insolvency proceedings have been opened, have jurisdiction to hear and determine an action to set aside a transaction brought against a person whose place of residence is not within the territory of a Member State.

Facts
This was a request for a preliminary ruling on the interpretation of Article 3(1) of the Regulation.
The liquidator was appointed in the debtor's insolvency proceedings which were opened in Germany in 2007. The liquidator brought an action against the defendant, who was resident in Switzerland, to have a transaction set aside. The action was dismissed as inadmissible both at first instance and on appeal on the grounds that the German courts lacked international jurisdiction. The liquidator appealed to the German Federal Court of Justice on a point of law.

The Federal Court considered case C-339/07 *Seagon* [2009] ECR 1-767 which determined the scope of Article 3(1) of the Regulation. That case had held that the courts of a Member State in which insolvency proceedings have been opened has jurisdiction in an action to set aside a transaction that is brought against a person whose registered office is in another Member State. The Federal Court recognised, however, that no judgment had yet been reached as to whether or not Artice 3(1) would apply where the place of residence or registered office of the person against whom the action had been brought was not a Member State, but a third country.

The Federal Court therefore referred the following question to the Court of Justice of the European Communities: "Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence or registered office is not within the territory of a Member State?"

Decision
Article 3(1) of the Regulation is to be interpreted to mean that the courts of the Member State in which insolvency proceedings have been opened, have jurisdiction to hear and determine an action to set aside a transaction brought against a person whose place of residence is not within the territory of a Member State.

Comment
The court noted that Article 3(1) provided that the courts of the Member State where the debtor had its centre of main interests ("COMI") had jurisdiction to open insolvency proceedings against the debtor. In this case, the COMI was in Germany, but the debtor was resident in Switzerland, which is not a Member State. The issue was whether the application of the Regulation was limited to cases where the cross-border elements only involved Member States. The Court of Justice considered that this construction did not result from the wording of the provisions of the Regulation. According to recital 14 of the preamble to the Regulation, the application of the Regulation is only precluded where the debtor's COMI is located outside the EU. Although some provisions of the Regulation (such as those relating to property rights under Article 5(1)) require the existence of connecting factors between two Member States, other provisions do not have any such express restrictions. If such a narrow interpretation were to be made, then Article 44(3)(a) would be superfluous since it specifically provided that the Regulation was not to apply in any Member State to the extent that it was irreconcilable with any other bankruptcy convention that a Member State may have entered into before the Regulation came into force.

More specifically, the Court of Justice considered that Article 3(1) could not depend upon the existence of a cross-border link with another Member State because the debtor's COMI had to be determined at the time when the request to open insolvency proceedings had been lodged. At this early stage of the insolvency process, it would be unclear as to whether any cross-border elements existed. It would not be possible to postpone determination of the court with jurisdiction until these matters were established: to do so would frustrate the objectives of improving the efficiency and effectiveness of cross-border insolvency proceedings.

The Regulation also provided legal certainty: it was well known that the debtor's COMI was the criterion established for determining jurisdiction and so the jurisdiction was foreseeable for any defendant participating in transactions with the debtor that might be set aside on insolvency.

****

Fondazione Enasarco v Lehman Brothers Finance SA (1) Anthracite Rated Investments (Cayman) Limited [2014] EWHC 34 (Ch)

Executive summary
Swiss proceedings were not governed by the Lugano Convention (OJ 2007 L 339/3) (the "Convention") as they were derived directly from the liquidation of LBF and were closely connected to them, so falling within the insolvency exemption.

Facts
Lehman Brothers Finance SA ("LBF"), a subsidiary of Lehman Brothers Holding Inc ("LBHI"), applied for an order for the court to stay proceedings under Article 27 of the Convention or otherwise exercise its discretion to stay proceedings under Article 28 of the Convention or on case management grounds under the Senior Courts Act 1981.

Anthracite Rated Investments (Cayman) Limited ("ARIC") applied under Article 20 of Schedule 1 to the Cross-Border Insolvency Regulations 2006 ("CBIR") for permission to bring a claim against LBF or, if the proceedings were stayed, a claim seeking relief against LBF.

The claimant ("Enasarco") had invested €780 million in notes under a transaction structured by the Lehman group. The notes were issued in December 2007 by ARIC 5 under a $10 billion secured euro medium-term note programme. ARIC was a special purpose vehicle incorporated in the Cayman Islands for the purposes of the programme. The principal sum was protected under a Derivative Agreement between LBF and ARIC entered into on the same date as the note issue.

The Derivative Agreement incorporated the standard form 1992 ISDA Master Agreement and a schedule, which had previously been agreed by the parties in 2006. The effect of the jurisdiction clause under the Derivative Agreement was to give exclusive jurisdiction to the English courts, as between the courts of States bound by the Convention, although proceedings could be brought in other countries. When LBHI filed for Chapter 11 protection under the US Bankruptcy Code in September 2008, this triggered an event of default under the Derivative Agreement, with LBF as defaulting party. ARIC was accordingly required to ascertain the close-out payment on early termination.

In October 2008, LBF went into liquidation in Switzerland. In September 2009, ARIC filed a claim against LBF in the Swiss proceedings for a termination payment of $61.5 million. The Swiss proceedings relating to LBF were recognised under the CBIR as foreign main proceedings, which resulted in an automatic stay of all proceedings in England against LBF under article 20 of Schedule 1 to the CBIR.

ARIC's claim against LBF was subsequently assigned to Enasarco and LBF notified accordingly. In 2010, LBF rejected ARIC's calculation of the termination payment. Enasarco subsequently applied to the English court for the correct method of calculation to be established and LBH consented to the lifting of the automatic stay for this purpose. Although the method of calculation was established in the English proceedings, the amount of the claim was not.

In 2013, when the LBF liquidators published the schedule of accepted claims, ARIC's claim was rejected and ARIC held to owe LBF $30.8 million. In April 2013, Enasarco filed a claim with the Swiss court challenging the liquidator's rejection of its claim and seeking an order for its inclusion. Enasarco sought to bring proceedings in England claiming $61.5 million plus interest from LBF under the Derivative Agreement and a declaration that no sums were payable by ARIC or Enasarco to LBF.
In September 2013, LBF applied to the court for the English proceedings to be stayed in favour of the Swiss proceedings, on the grounds that the Convention applied.

Enasarco and ARIC submitted that the Convention did not apply to the Swiss proceedings on the grounds that they fell within the exemption for insolvency proceedings in article 1(2)(b) and, further, that the court should not exercise any discretion to stay the English proceedings.

Decision
The judge considered the test from *Gourdain v Nadler (C-133/78) [1979] CMLR 180* and recital (6) to the Insolvency Regulation (EC 1346/2000) in order to determine whether the insolvency exemption under the Convention applied. This required a consideration of whether the Swiss proceedings derived directly from the liquidation of LBF and were closely connected with its liquidation proceedings. He held

that they were and that they clearly fell within the insolvency exemption. The judge held that Article 27 of the Convention did not apply to the proceedings and, therefore, there could not be an automatic stay of the English proceedings. Even if Article 28 of the Convention applied, he was satisfied that there was a strong case for refusing a stay of the English proceedings.

LBF's application was refused and ARIC granted permission to commence a claim against LBF.

Comment

The judgment provides some helpful revision on the relationship between the Convention, the Judgments Regulation (EC 44/2001) and the Insolvency Regulation.

The Judgments Regulation replaced the 1968 Brussels Convention, which addressed the enforcement of judgments in civil and commercial matters. The original 1988 Lugano Convention extended the application of the rules of the Brussels Convention to states (including Switzerland) which were members of the European Free Trade Association. The Convention simply extended the application of the rules of the Judgments Regulation to the parties to the 1988 Lugano Convention.

Article 1(2)(b) states that the Convention does not apply to "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". As a matter of EU law, these will be governed by the Insolvency Regulation which is suggested to "dovetail" with the Judgments Regulation to the extent described by Briggs J in *Re Rodenstock GmbH [2011] EWHC 1104 (Ch)* so that "the bankruptcy exclusion should exclude from the Judgments Regulation nothing more, and nothing less, than what was included within the scope of the Insolvency Regulation".

So far so good. But how does the Convention fit in, bearing in mind that it applies to countries outside the EU, such as Switzerland? According to the judge, the exclusion of insolvency proceedings should be considered in the same way under the Convention as it would be under the Judgments Regulation and so must be read in the light of the Insolvency Regulation. As he noted, "the judgments of the Court of Justice (CJEU) on the Brussels Convention and the Judgments Regulation provide authoritative guidance on the interpretation of the Lugano Convention" (para 25).

The decision in this case was based on the test in *Gourdain* and recital (6) to the Insolvency Regulation (which reflected the approach taken in *Gourdain*). If matters were to be excluded from the scope of the Convention, they must "derive directly from the bankruptcy or winding-up and be closely connected" with the liquidation proceedings. The judge considered that the Swiss proceedings fell within the exemption because they could only arise under Swiss insolvency law and were an integral part of the liquidation proceedings. As the whole point of the proceedings was to establish the amount and the ranking of the claim for the purposes of the liquidation, it was a matter which arose exclusively under the relevant insolvency law.

The judge did not consider whether Article 28 of the Convention applied only where both sets of proceedings were within the scope of the Convention as the Court of Appeal had left this issue open. He did not consider it necessary, however, in view of the strength of the case for refusing the stay of the English proceedings. The two main reasons that he gave were first, the fact that the Derivative Agreement contained an exclusive jurisdiction clause and second, the fact that the Swiss court would be likely to be greatly assisted by any judgment of the English court as to the rights and liabilities of the parties under the Derivative Agreement.

****

ADMINISTRATION: EXPENSES

Pillar Denton Limited & others v Michael Jervis and others [2014] EWCA Civ 180
Executive summary

Where an administrator or liquidator is in the possession of property for the benefit of an administration or liquidation, rent will be payable by the office holder as an expense of the administration or liquidation and will accrue on a daily basis. *Goldacre* and *Luminar* overruled.

Facts
One of the companies within the Game group, "GSGL", was the tenant of several hundred leasehold retail properties from which the group traded. Rent was payable quarterly in advance. On 25 March 2012, approximately £10 million in rent had become payable and was not paid. The Game group went into administration the next day. Some stores were closed, whilst others continued to trade and were quickly sold to Game Retail Ltd (the third respondent). £3 million of the March rent remained outstanding.

The issue arose as to whether the payment of part of an instalment of rent that was payable in advance could be treated as an expense of the administration. Two first instance cases (*Goldacre (Offices) Ltd v Nortel Networks UK Ltd [2009] EWHC 3389 (Ch)* and *Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd [2012] EWHC 951 (Ch)*), had decided that it could not. In *Goldacre,* the judge had held that, where a quarter's rent (payable in advance) became due whilst administrators were using the property for the purposes of the administration, the rent was payable as an administration expense, even if the administrators ceased to occupy the property in the same quarter. In the *Luminar* case, the judge had held that, where a quarter's rent (payable in advance) fell due before the company's entry into administration, none of it was payable as an administration expense, even if the administrators continued to use the property for the purposes of the administration; the rent was a provable debt in the administration.

At first instance, the judge had followed the decisions in *Goldacre* and *Luminar* but granted the landlords permission to appeal to the Court of Appeal that the part of an instalment of rent payable in advance can be treated as an administration expense. This was then subject to a contingent cross-appeal from Game Retail Ltd that any expenses be apportioned.

Decision
The Court of Appeal unanimously overruled *Goldacre* and *Luminar*. Where an administrator or liquidator was in the possession of property for the benefit of an administration or liquidation, rent payments would be payable by the office holder as expenses of the administration or liquidation and would accrue on a daily basis under the equitable salvage principle. The duration of the period would be a question of fact.

Comment
As Lord Justice Lewison pointed out, the decisions in *Goldacre* and *Luminar* had had significant commercial consequences. It suited companies to go into administration on the day after a quarter day, since it meant that they could avoid liability for paying rent for the quarter, whilst retaining possession of the property. Landlords were less than happy, however, particularly where a quick sale of the business meant that the purchaser was able to trade for three months, rent free. From the perspective of an administrator, under the *Goldacre* decision, more than the benefit received would be paid for whilst, under the *Luminar* decision, an administrator would be required to pay less than the benefit received. The outcome of this case is, therefore, of considerable importance and the judgment provides a helpful overview of the law in this area.

It was common ground at the outset of the hearing that, at common law, rent is not apportionable in respect of time (regardless of whether it is paid in advance or in arrears), nor is rent payable in advance apportionable under the Apportionment Act 1870. It was also agreed that it was not a matter of the court's discretion as to whether rent was an administration expense or not: under the Insolvency Rules 1986 (the "Rules") it was either an expense, or it was not.

Broadly, a liability to pay rent that accrues prior to a company's administration or liquidation will be a provable debt for the landlord under Rules 12.3 and 2.87. The landlord can also prove for a debt not yet due at the date of administration or liquidation. The right to prove for a debt does not, however, mean that the equitable “salvage principle” (also known as the “liquidation expenses principle” or the “*Lundy Granite* principle” from *Re Lundy Granite Co ex p Heavan (1870-71) LR 6 Ch App 462)* cannot apply. In accordance with the decision of Lord Hoffmann in *Toshoku Finance Ltd [2002] UKHL 6*, rent falling within the salvage principle would be an administration expense under Rule 2.67(1)(a).

The principle from *Lundy Granite* was outlined by James LJ in that case as follows: “if the company for its own purposes, and with a view to the realisation of the property to better advantage, remains in possession of the estate, which the lessor is therefore not able to obtain possession of, common sense and ordinary justice require the Court to see that the landlord receives the full value of the property”. In *Toshoku,* Lord Hoffmann explained the historical development of the salvage principle from its roots in a statutory discretion to allow a distress or execution against a company’s assets to a recognition by the courts that its effect could be to promote a creditor from merely having a claim in the liquidation to having a prior right to payment in full. Lewison LJ reviewed *Toshoku* as well as some of the nineteenth century cases on the salvage principle and concluded that the principle applied both to rent payable in advance and rent payable in arrear and that, as *Tokoshu* made clear, it had continued to be applied this way for the next century.

This was significant for the apportionment point: just because rent was payable in advance did not mean that the salvage principle did not apply. Apportionment corrected the liability for rent as between tenants. In cases where the salvage principle had applied, there had been no termination of the lease or change of tenant: the non- payment of the rental instalment was a provable debt and the tenant was liable to pay it. The salvage principle did not create or transfer liability; rather it acted to treat part of a single liability as an insolvency expense by requiring that it be paid in full.
The purpose of the salvage principle as outlined in *Lundy Granite* was to ensure that the landlord was paid. The landlord was entitled to receive the “full value” for the property (i.e. the rent due under the lease) and, as a matter of both common sense and ordinary justice, this should not be defeated just because the date that the rent was due occurred the day before administrators were appointed. It was only necessary to treat the rent as accruing from day to day and payable by the administrator for as long as the premises were in the possession of the administrator for the benefit of the administration, which will always be a question of fact.

****
ADMINISTRATION: PENSIONS

In the matters of Storm Funding Limited (in Administration) and other companies in administration and in the matter of the Insolvency Act 1986 [2013] EWHC 4019 (Ch)

Executive summary
Under the Pensions Act 2004, Contribution Notices may be issued to more than one qualifying target which, in aggregate, specify a sum in excess of the maximum shortfall sum and an aggregate sum in excess of the shortfall sum may be recovered under those Contribution Notices.

Facts
The administrators of fourteen companies (the "Applicant Companies") within the Lehman Brothers group applied to the court for directions as to the extent of their potential liabilities under the Lehman Brothers Pension Scheme (the "Scheme"). The Scheme had been established mainly for the employees of Lehman Brothers Limited ("LBL"), a service company, whose employees were seconded to work for other group companies.

In September 2008 LBL, along with the principal Lehman Brothers companies in the UK, went into administration. LBL's administration was a "relevant event" for the purposes of the Pensions Act 1995 (the "1995 Act") triggering a liability from LBL to the Scheme trustees for an amount equal to its share of the Scheme deficit under section 75 of the 1995 Act (the "section 75 debt"). This was later set at £121 million. The section 75 debt was a provable debt in the administration

In May 2010, the Pensions Regulator (the "Regulator") issued a warning notice to certain Lehman Brothers companies under the Pensions Act 2004 (the "2004 Act") indicating that those companies needed to put financial support in place for the Scheme. In September 2010, the Determinations Panel (an independent statutory panel of the Regulator) concluded that a financial support direction ("FSD") be issued to certain Lehman Brothers entities including the Applicant Companies. Once an FSD was served, the Applicant Companies could, potentially, be served with a Contribution Notice and required to meet the section 75 debt. The administrators sought directions as to the construction of the relevant provisions of the 2004 Act. Could the Regulator issue Contribution Notices to more than one of the Applicant Companies which, in aggregate, specified a sum greater than the section 75 debt, so as to enable recovery from the Applicant companies of an aggregate sum greater than the shortfall sum specified as the section 75 debt?

Although the section 75 debt had been identified as £121 million in 2008, the buy-out deficit on the Scheme fluctuated from month to month and the deficit had since been calculated as being within the region of £214 - 275 million. In *Re Nortel and Lehman Brothers [2013] UKSC 52*, the Supreme Court had held that potential claims under Contribution Notices were contingent liabilities. This meant that the Applicant Companies each needed to make a reserve against their contingent liabilities in order to contribute to the Scheme.

In June 2013, the Applicant Companies had been given permission to make distributions to their unsecured creditors. In view of this, they needed to know whether they were likely to be exposed to additional liabilities in excess of £100 million.

Decision
The judge held that, on a true construction of the relevant provisions of the 2004 Act, Contribution Notices may be issued under section 47 to more than one qualifying target (here the Applicant Companies) which in aggregate specify a sum in excess of the maximum shortfall sum (as defined in section 48(2)) and an aggregate sum excess of the shortfall sum may be recovered under those Contribution Notices.

Comment
From the administrators' perspective, this must have been quite trying: the original Scheme shortfall (the section 75 debt) was set at £121 million in 2008, but the liability of the Applicant Companies could potentially have doubled on the basis of later valuations of the deficit.

Counsel for the administrators had argued in his written submissions that it would be "contrary to the *pari passu* rule and the rule that contingent liabilities are valued as at the date of insolvency, if a total in excess of the section 75 debt could be recovered through enforcement of Contribution Notices" particularly, in his view, where the excess amount was determined as a consequence of changes to market valuations that occurred after the insolvency commenced. (He did not pursue this contention in his oral submissions.)

The judge rejected this argument. He considered that, when estimating contingent liabilities, later events could be taken into consideration as, for example, in the context of a guarantee of a fluctuating debt. Subsequent events could cause the amount admitted to proof to be more or less than the estimate made on the information known at the date of insolvency. The estimation of a contingent liability under a potential Contribution Notice was, in principle, no different. In his view, there was nothing in insolvency law which restricted the Applicant Companies liability to the section 75 debt alone.

Counsel for the Scheme trustees referred to the purpose of the 2004 Act: essentially, it was to protect members of pension schemes and to reduce the number of calls that could be made upon the Pension Protection Fund. To this end, he argued, the amount recoverable under Contribution Notices should not be limited to a historic deficit. The judge considered that this was an important point: Contribution Notices could only be served following the decision of the independent Determinations Panel whose decision could be reviewed if necessary by the Upper Tribunal. This tended to an argument against the imposition of implied limitations on liability.

The judge considered that section 48 of the 2004 Act simply specified the maximum sum which could be stated in a Contribution Notice. The service of Contribution Notices was a response to non-compliance with one or more FSDs. The purpose of FSDs was to ensure financial support for a scheme and the amount specified could be a different amount to any section 75 debt. In view of this, he could see no logic in linking the aggregate amounts stated in Contribution Notices to the section 75 debt.

****

LIQUIDATION

In the matter of D & D Wines International Limited (in Creditors' Voluntary Liquidation) and in the matter of the Insolvency Act 1986 [2014] EWCA Civ 215

Executive summary

Under the terms of an agency agreement, D&D was entitled to collect payment from customers for goods ordered and delivered prior to the termination of the agreement on D&D's insolvency and these payments were accordingly payable to the liquidators and not to the agent.

Facts

D & D Wines International Limited ("D&D") had acted as sole agent and distributor in the UK for Angove Pty Limited ("Angove") under an Agency and Distribution Agreement dated November 2011 (the "Agreement"). D&D had supplied wine to two third party customers, Direct Wines Limited ("DWL") and PLB Group Limited ("PLB").

In April 2012, D&D went into administration and Angove terminated the Agreement. The termination notice expressly terminated D&D's authority to collect payments from DWL and PLB.

D&D received payments from both DWL and PLB totalling approximately A$ 570,000 and A$ 302,000 in the period after the termination of the Agreement in order to recoup commission due to D&D from Angove. The money from DWL was paid into an account with the administrators who gave undertakings that any monies would be held in their general client account and were not to be released except with the consent of Angove or in accordance with a court order determining ownership of the funds. When D&D went into voluntary liquidation, the DWL monies were transferred to the Liquidators' escrow account on similar terms. It was contemplated that the PLB monies would be paid into the Liquidators' escrow account, but in fact these monies were paid direct to Angove. Angove arranged for the PLB monies to be held in an escrow account on the same terms the Liquidators pending the outcome of the litigation.

Angove applied for directions under section 112 Insolvency Act 1986 to determine whether the monies paid by DWL and PLB were held on trust for Angove or were monies payable to D&D and therefore part of D&D's estate available to its general body of creditors.

The judge at first instance held that the relationship between Angove and D&D was that of principal and agent and not buyer and seller. The agency of D&D and its authority to collect the payment from

DWL and PLB had been terminated so that any sums received after that date must be held on trust for the payers. The judge ordered the escrow fund to be paid to Angove.

Issue in the Court of Appeal

The issue identified before the Court of Appeal was whether, notwithstanding the termination of the Agreement, the Liquidators were entitled to collect payments from DWL and PBL in order recoup commission due to D&D. If this were the case, the intervening insolvency of D&D would prevent D&D from accounting to Angove for the balance and Angove would have to prove in the liquidation. Angove submitted in the alternative, that a constructive trust would arise in its favour since it would be unconscionable for the court to allow the Liquidators to benefit under the Agreement but not meet D&D's obligations under it.

Decision

The Court of Appeal unanimously held that the order of the judge be set aside and the escrow fund be paid to the Liquidators. Although the insolvency of D&D had unfortunate consequences for Angove, this was not sufficient to make it unconscionable for D&D to receive payment from the escrow fund. This was simply the product of the contractual arrangements to which both parties had agreed.

Comment

There was something of a timing issue in the way in which the Agreement had been drafted. Essentially, D&D was entitled to collect what was due to customers for goods ordered and delivered prior to the termination of the Agreement, as had happened here. It was because of this that the Liquidators retained control of the escrow monies.