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UPDATE

Takeaways from the Mourant and South Square Litigation Forum 2024

The highly successful annual Mourant and South Square Litigation Forum took place once again on 18 September 2024 in London. This year's Forum was co-chaired by Clara Johnson, of South Square, and Peter Hayden, of Mourant, both seasoned experts in domestic and cross-border insolvency litigation.

After two informative panel discussions, a keynote address was delivered by former senior parliamentarian Luciana Berger.

Session 1: Injunctions in Fraud Litigation

In the first panel, Stephen Robins KC (South Square), Jonathan Moffatt (Mourant), Tal Goldsmith (Stephenson Harwood) and Chloe Edworthy (Macfarlanes) discussed recent developments in the use of injunctions in fraud litigation.

Stephen Robins KC opened the panel with a discussion of the approach taken to the payment of a defendant's legal expenses under a freezing injunction versus a proprietary injunction, drawing on his recent experience acting for the claimants in *London Capital & Finance PLC (In Administration) and another v Thompson and others*.

A freezing injunction attaches to a defendant's assets where the claimant has a 'good, arguable claim' and there is a 'real risk of dissipation', whereas a proprietary injunction relates to specific assets over which a claimant asserts a sufficiently strong proprietary claim. Under a freezing injunction, the court will permit a defendant to spend a reasonable sum on legal expenses whereas with a proprietary injunction the court will release a bare minimum sum to enable a defendant to be represented. In the case of propriety injunction the audience keenly noted that historic legal expenses already incurred may not even be covered, although it will still likely be more than a claimant would want to allow.

Next the panel discussed developments in the cross-undertaking in damages. The panel discussed the Court of Appeal's 'neat' judgment of Hunt v Ubhi [2023] EWCA Civ 417; [2023] 4 All E.R. 530 ('Hunt') which concisely summarises (at [29]) the relevant legal principles laid down in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, [2016] 1 WLR 160 ('Pugachev').

Tal Goldsmith highlighted the practical steps applicants will need to consider if they want the Court to make a freezing order (or other interim order) on a limited undertaking. Following the decisions in *Pugachev* and Hunt, it is clear that the simple fact that the applicant is an insolvency office holder is not, by itself, enough to displace the usual position that an unlimited undertaking should be given. The panel discussed the evidence that an applicant should provide if they wish to rely on a more limited undertaking, which includes sounding out the creditor base for support and seeking insurance quotations, noting that an unlimited undertaking is practically uninsurable.

Next, Jonathan Moffatt commented on the more liberal application of the *Pugachev* principles in the Cayman Islands, where for example in *Ascentra Holdings, Inc. (in Official Liquidation) v Ryunosuke Yoshida & Ors* (Case FSD 300 of 2023) ('Ascentra') the Grand Court decided that, taking into account all the circumstances including the defendants' conduct, the Joint Official Liquidators could offer a cross-undertaking limited to the value of the unencumbered assets of the estate remaining at the end of the proceedings. The case law position may not be settled, however, given that the decision in Hunt was given

only shortly before that in Ascentra which may explain why it was not referenced in the Grand Court's judgment.

Chloe Edworthy then turned to a recent decision by Mr Justice Foxton J in *LAX SA v JBC SA* [2024] EWHC 2042 (Comm); [2024] 7 WLUK 642 where at the return date for the hearing, the Judge refused to order that LAX SA provide fortification for its cross-undertaking in circumstances where JBC SA could not articulate what its loss would be. Nevertheless, recognising the 'asymmetry' between the parties, the Judge ordered that LAX SA provide asset disclosure in order to continue the injunction.

The panel concluded with the remarks on the somewhat vexed status of the 'good, arguable claim' test, which has been in flux since *Lakatamia Shipping Co. Ltd. v Morimoto* [2019] EWCA Civ 2203; [2020] 2 All E.R. (Comm) 359 which referred to both the traditional approach from *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The 'Niedersachsen')* [1983] 2 Lloyd's Rep 600 ('Niedersachsen') and the three limb test that derives from applications to serve outside of the jurisdiction as articulated by the Supreme Court in *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80; [2018] 1 W.L.R. 192 ('Brownlie'). At the time of the conference, the position was not settled, out of four recent cases, two have followed the *Niedersachsen* approach and two have applied *Brownlie*.[1] The panel therefore urged the audience to look out for the Court of Appeal's forthcoming decision in *Isabel dos Santos v Unitel SA* which is expected to clarify the position.[2]

Judgment in that case was subsequently handed down by the Court of Appeal on 30 September 2024, confirming that the correct test as to what constitutes a 'good arguable case' for the grant of a freezing injunction is that formulated in Niedersachsen, namely that a 'good arguable case' is 'one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.' A 'good arguable case' in the freezing injunction context is not to be assessed by reference to the (higher) test from Brownlie for determining whether a claim fell within a jurisdictional gateway for the purposes of service out of the jurisdiction.[3]

Session 2: In conversation with Mr Justice Segal

The second panel was a 'fireside chat' with Mr Justice Segal (Judge of the Grand Court of the Cayman Islands and Assistant Justice of the Supreme Court of Bermuda) conducted by Georgina Peters (South Square) and Michael Popkin (Mourant). The theme of the discussion was topical issues in cross-border insolvency for 2024/2025.

The conversation began with a discussion of cross-border recognition and assistance, drawing on Mr Justice Segal's 'tour de force' exploration of the applicable common law principles in his judgment in *Re China Agrotech Holdings Limited* [2017 (2) CILR 526] where the judge recognised Hong Kong liquidators and sanctioned a Cayman Islands scheme of arrangement.

Mr Justice Segal highlighted the flexibility of the common law approach, which enables judges to make a reasoned assessment as to what makes sense for the benefit of all creditors and stakeholders when considering recognition applications.

The panel then considered the relatively new Cayman Restructuring Officer regime. Mr Justice Segal commented on the flexible nature of the regime which enables the company and the court to design and describe the powers which the Restructuring Officer should be granted to meet the needs and to fit the particular case.

The judge then remarked that any recognition and assistance application by a RO will require two steps. First, assistance must be sought in the foreign jurisdiction to give effect to the automatic moratorium which arises under the Cayman Companies Act. Second, the foreign court will need to recognise the powers of the Restructuring Officer as set out in the order of the Cayman court. How foreign jurisdictions approach any such application remains to be seen. The judge suggested that RO's (with the approval of the Cayman

[1] The decisions of Bright J in *Unitel SA v Unitel International Holdings BV* [2023] EWHC 3231 (Comm); [2023] 12 WLUK 272 ('Unitel') and Butcher J in *Magomedov v TPG Group Holdings (SBS) LP* [2023] EWHC 3134 (Comm) [2024] 1 W.L.R. 2205 follow the *Niedersachsen* approach and the decisions of Edwin Johnson J in *Harrington & Charles Trading Co. Ltd. v Mehta* [2022] EWHC 2960 (Ch) and Dias J in *Chowgule & Co Pte. Ltd. v Shire* [2023] EWHC 2815 (Comm) follow *Brownlie*.

[2] See *Mex Group Worldwide Limited v Ford* [2024] EWCA Civ 959; [2024] 8 WLUK 60 at [38].

[3] *Isabel dos Santos v Unitel SA* [2024] EWCA Civ 1109.

court) might need to apply to the foreign court on the basis that they would also become subject to that court's supervisory powers and jurisdiction (and demonstrate why a local procedure would be damaging to the interests of creditors).

The panel then moved on to consider whether the Cayman Islands restructuring regime would benefit from the introduction of a cross-class cram down provision and the form that any such provision might take. The panel observed that most financial centre jurisdictions have some sort of equivalent provision, and it may be in the interests of the jurisdiction to incorporate a similar tool to remain competitive. Mr Justice Segal compared the comprehensive and carefully calibrated chapter 11 statutory regime in the United States with the light statutory framework providing the court with a broad discretion in England and Wales. The judge considered that the insolvency and litigation context of the Cayman Islands is closer to the English system, and therefore the English model might be a better foundation, although some modifications might be made inspired by the US code regulating cram-downs, to improve predictability.

Mr Justice Segal noted in particular that statutory guidance on the criteria to which courts should have regard when exercising a discretion to sanction a cross class cramdown would be welcome. Determining the treatment of out of the money creditors, the extent to which the absolute priority rule should be adopted and the treatment of shareholders required careful consideration.

There followed a brief discussion of the recent decision of the United States Supreme Court in *Harrington v. Purdue Pharma L.P.*, 603 U.S. ___ (2024) where a 5-4 majority ruled that third party releases were no longer permissible in restructuring plans or arrangements. The judge commented that this was premised on a strict interpretation of the Chapter 11 Bankruptcy Code and a consequentially narrow view of the Chapter 11 process. But the recognition of foreign schemes that contain third party releases involves different parts of the US Code and different issues which may permit US courts, who have a long tradition of adopting a constructive and innovative approach based on comity to assisting foreign restructurings, nonetheless to grant chapter 15 relief. This is a matter which will undoubtedly require appellate review in due course.

The panel concluded with Mr Justice Segal's reflections on his appointment to the Supreme Court of Bermuda and his appreciation of the different cultures, concerns, policies, and issues between the Cayman and Bermudan courts.

Session 3: Keynote Speaker Luciana Berger

Elected as an MP in 2010, Luciana served in three shadow cabinet positions: as Shadow Minister for Energy and Climate Change, followed by Public Health, before being appointed as the first ever Shadow Minister for Mental Health. Today Luciana is an influential figure whose political, charity, and advisory work spanning health, sustainability, energy, and climate change continues to shape public policy and discourse throughout the UK.

Luciana drew on her extensive experience of parliament and public policy to offer insightful commentary on Labour's electoral victory and (then) first days in power and shared her thoughts on the factors behind Labour's electoral success, including the dramatic turnaround strategy led by Sir Keir Starmer, before commenting on the highs and lows that might be expected from this new government.

This was followed by a lively Q&A from the audience, addressing issues ranging from Trump and the United States' election, antisemitism in the Labour party, ways to tackle generational inequality, and relations with Europe in a post-Brexit world.

These top takeaways were kindly provided by Charlotte Ward and Angus Groom from South Square.

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