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Chancery Bar Association's Gibraltar Conference 2017

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The opening address

Chief Justice Anthony Dudley

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Directors' Duties/Liabilities

Chair: Michael Gibbon QC

Panel: James Potts QC
David Eaton Turner

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Disputes against Directors

James Potts QC
Erskine Chambers

Overview

- Relevance to corporate/commercial lawyers and litigators.
- Directors' duties relevant to many disputes and types of claim
  - shareholder disputes,
  - joint venture disputes,
  - personal claims,
  - insolvency,
  - disqualification.
- Proper purpose – Eclairs v JKX
- Remedies – proper claimant
- Remedies
- Practical litigation and advisory tips

What type of claim?

- Various claims where directors' duties may be relevant:
  - Proceedings brought against a director or former director
  - Proceedings brought against a third party (eg unconscionable receipt and dishonest assistance)
- Shareholders may bring claims involving directors' duties:
  - Unfair prejudice petition (ss.145-147 CA 2014)
  - Statutory derivative claim (ss.232-236 CA 2014)
  - Just and equitable winding up (s.149(1)(c) IA 2011)
  - Personal actions
  - Relevant to claims for breach of JVA / shareholders' agreement?

Directors' duties - overview

- English CA 2006 replaced duties owed by directors at common law and in equity: s 170(3) CA 2006
- Common law and equitable principles remain relevant in interpreting statutory duties: s 170(4) CA 2006
- The statutory code is not complete – cases still relevant to Gibraltar
- Summary of general duties: ss 171-178 CA 2006
- Remedies for breach have not been codified and s. 178 preserves common law position

Proper purpose:

- English s.171 CA 2006
- Reflects pre-existing fiduciary duty to exercise powers for proper purposes:
  - *Re West Coast Capital (Lios) Ltd* [2008] CSOH 72 (Court of Session, Outer House)
- Important if director's actions change balance of control between shareholders:
  - eg may not allot shares for purpose of increasing voting power of certain shareholders and diluting that of others: *Howard Smith v Ampol Petroleum* [1974] 1 AC 821
- Recently analysed by Supreme Court:
  - *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] UKSC 71

Proper purpose: *Eclairs v JKX Oil & Gas Plc*

- Two shareholders (with blocking minority) proposed resolutions for removal of two directors and appointment of three new directors who were associates of theirs.
- Board issued disclosure notices to them seeking information about interests in shares under s 793 CA 2006. Board deemed responses inadequate and therefore exercised power under articles to prevent them from voting at AGM and restricting right of transfer.
- Mann J at first instance held that primary purpose in imposing restrictions was to influence fate of resolutions rather than to ensure provision of information sought, and that was beyond the purpose for which power was conferred.

Proper purpose: *Eclairs v JKX Oil & Gas Plc*

- Court of Appeal (Briggs LJ dissenting) allowed appeal on basis that proper purpose doctrine had no significant place in operation of company's articles
- Supreme Court did not agree:
  - Lord Sumption at [30]: "*The rule is not a term of the contract and does not necessarily depend on any limitation on the scope of the power as a matter of construction. The proper purpose rule is a principle by which equity controls the exercise of a fiduciary's powers in respects which are not, or not necessarily, determined by the instrument. Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court's understanding of the business context.*"

Proper purpose: *Eclairs v JKX Oil & Gas Plc*

- Lord Sumption also emphasized importance of proper purpose rule in context of a battle for control at [37]:

  - *"The rule that the fiduciary powers of directors may be exercised only for the purposes for which they were conferred is one of the main means by which equity enforces the proper conduct of directors. It is also fundamental to the constitutional distinction between the respective domains of the board and the shareholders … Of all the situations in which directors may be called upon to exercise fiduciary powers with incidental implications for the balance of forces among shareholders, a battle for control of the company is probably the one in which the proper purpose rule has the most valuable part to play."*

Proper purpose: *Eclairs v JKX Oil & Gas Plc*

- However *Eclairs v JKX* did not resolve issue of "mixed" purposes:
  - Lord Sumption at [21]: statutory duty is to exercise powers "only" for the purposes for which they are conferred (though equity might not intervene if power would still have been exercised).
  - At [22] he favoured Australian "but for" test: exercise would be invalidated if, but for the impermissible purpose, the power would not have been exercised.
  - Rest of Supreme Court declined to express any firm or concluded view on the point because it was not raised on appeal. Lord Mance supports the view that the exercise of power would be good if principal or primary purpose were proper (even if exercised for mixed purposes). See also Willers v Joyce [2016] UKSC 43 at [140]

Proper purpose: *Eclairs v JKX Oil & Gas Plc*

- Practical consequences of *Eclairs v JKX*:
  - Directors should properly consider and identify scope of purpose for which power is conferred before exercising power
  - Essential for directors to take legal advice in context of battle for control

Remedies: correct claimant?

- As a general rule, duties are owed by the director to the company, not the shareholders
- Limited circumstances in which duties are owed to shareholders
  - *Peskin v Anderson* [2001] 1 BCLC 372, CA
- Personal actions to enforce personal constitutional rights

- Injunctive relief to prevent board from acting in breach of duties
- Proceedings to set aside board resolution
- *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] UKSC 71

Remedies

- "Unfair prejudice" petition under ss.145-147 CA 2014
  - *Meyer v Scottish Co-operative Wholesale Society Ltd* [1959] A.C. 324 (HL)
  - Wide power to grant relief under s 147 CA 2014
  - Normal remedy: compulsory share purchase order
- Derivative Claims (ss.232-236 CA 2014)
- Just and equitable winding up

Company's role in shareholders' disputes

- Company's role in unfair prejudice / just and equitable winding up petitions?
  - *Re a Company (No 1126 of 1992)* [1994] 2 BCLC 146
  - Generally a nominal respondent. Its participation will generally be limited to (i) disclosure; and (ii) attending at delivery of judgment and making submissions as to the form of any order
- Derivative claims
  - Company may be more active participant
  - May explain why claim has not been pursued by company
  - Court may also take into account views of other members – sometimes company will canvas views at AGM / by questionnaire

Company's role in shareholders' disputes

- Who is your client?
  - Is advice required by the company, the directors individually or the majority shareholder?
  - If necessary, open a new client file
- Has company authorised proceedings?
  - Generally decision for board
  - Particular difficulties if dispute over who controls company
  - *Airways Ltd v Bowen* [1985] BCLC 355

Use of company funds

- A petitioner may seek to restrain a company from expending its funds on participation in proceedings under s. 994 where:

  - the company's participation goes beyond that reasonably to expected of a company as respondent to the petition; and
  - the proceedings, or manner in which the company seeks to take part, are not of such an exceptional nature as to justify a departure from the general rule

  Arrow Trading & Investments v Edwardian Group [2004] BCC 955.

Privilege and Confidence

- What advice is a shareholder entitled to see?
- When can a company rely on legal advice/litigation privilege against a shareholder?
  - *Woodhouse & Co Ltd v Woodhouse* (1914) 30 TLR 559
  - *Re Hydrosan Ltd* [1991] BCLC 418
  - *CAS (Nominees) Ltd v Nottingham Forest plc* [2000] 1 All ER 954
  - *Arrow Trading & Investments v Edwardian Group Ltd* [2005] 1 BCLC 696
  - *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch. 296

Directors' Information Rights

- The common law right
  - *Conway v Petronius* [1978] 1 WLR 72
  - *Oxford Legal v Sibbasbridge* [2008] EWCA Civ 387
- Right is conferred in order to enable director to carry out role as officer of the company
- Cannot be exercised where purpose of inspection is (i) improper or (ii) to injure the company
- Probably includes right to be accompanied by agent or for agent to carry out inspection (but possibly subject to confidentiality undertaking):
  - *Edman v Ross* (1992) 22 SR (NSW) 351

Concluding comments

- For corporate advisors
  - Consider who your client is
  - Proper purpose – of the company, not the majority
  - Role of the company
  - Will your advice be privileged against shareholders
- For litigators
  - Who is the proper claimant?
  - What relief are you after?
  - Obtaining information – as a director or as a shareholder
  - Privilege – potential minefield

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Directors' Duties/Liabilities

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The Duty of Directors to Take Account of the Interests of Creditors

David Eaton Turner

New Square Chambers

Lincoln's Inn

www.newsquarechambers.co.uk

Companies Act 2006

Section 172 - Duty to promote the success of the company

'(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to-

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) - (f) … [*etc*.]

(2) …

(3) The duty imposed by this section has effect **subject to** any enactment or **rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company**.'

The rule of law requiring directors to consider or act in the interests of creditors

Winkworth v Baron Development Ltd [1986] 1 WLR 1512, HL

Lord Templeman:

> 'But a company owes a duty to its creditors, present and future. The company is not bound to pay off every debt as soon as it is incurred, and **the company is not obliged to avoid all ventures which involve an element of risk but the company owes a duty to its creditors to keep its property inviolate and available for the repayment of its debts**. The conscience of the company, as well as its management, is confided to its directors. A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors.'

Australian and New Zealand Cases

Nicholson and others v Permakraft (N.Z.) Ltd. (in liq) [1985] 1 NZLR 242

Cooke J: '… creditors are entitled to consideration, in my opinion, if the company is **insolvent, or near-insolvent, or of doubtful solvency**, or if a contemplated payment or other course of action would jeopardise its solvency.'

Kinsela & another v Russell Kinsela Pty Ltd (in liq) (1986) 10 ACLR 395.

Street CJ: 'But where a company is insolvent the **interests of the creditors intrude**.'

Grove v Flavel (1986) 11 ACLR 161 - a **real as opposed to remote** risk

Court of Appeal, E&W

Liquidator of West Mercia Safetywear Ltd v Dodd & anor (1988) 4 BCC 30

When does the duty arise?

In *Kinsela* Street CJ said it was not necessary to consider the **degree** of financial instability which would impose the creditors' interests duty on directors since in that case the company was plainly insolvent and about to collapse.

***The Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 239**
Owen J

'[I]n my view Street CJ [in *Kinsela*] was right when he pointed out that the **degree of financial instability and the degree of risk to the creditors are interrelated**. This ties back into the ability of the company to continue its existence. The same can be said for the statement that the plainer it is that the creditors' money ... is at risk, the lower may be the level of risk to which the directors can justifiably expose the company.

...

[A] decision that has adverse consequences for creditors might also be adverse to the interests of the company. **Adversity might strike short of actual insolvency and might propel the company towards an insolvency administration. And that is where the interests of creditors come to the fore**.'

Bell v Westpac (cont.)

Owen J also adopted, at [4444] the statement by Giles JA in *Kalls Enterprises Pty Ltd v Baloglow* [2007] NSWCA 191:

'It is sufficient for present purposes that, in accord with the reason for regard to the interests of creditors, **the company need not be insolvent at the time** and the directors must consider their interests if there is **a real and not remote risk** that they will be prejudiced by the dealing in question.'

BTI 2014 LLC v Sequana SA [2016] EWHC 1686 (Ch)

Rose J stated that in the great majority of reported cases the facts were clear. The companies in question in previous cases had been variously:

'hopelessly insolvent'

'very close to insolvency'

'plainly insolvent and about to collapse'

'on a knife edge'

at the time of the impugned transactions. Accordingly, it was unlikely that the courts had in such cases turned its mind to the **precise point** at which a solvent company crosses some threshold which causes the creditors' interest duty to arise.

In ***Sequana*** C cited the Australian case of ***Grove v Flavel*** **(1986) 11 ACLR 161,** the first case in which the formulation of a **real as opposed to remote risk** was used

Rose J quoted John Randall QC (sitting as a deputy High Court Judge) in

Re HLC Environmental Projects (in liq.) [2013] EWHC 2878 (Ch):

> 'For my part, I do not detect any difference in principle behind these varying verbal formulations. It is clear that established, definite insolvency before the transaction or dealing in question is not a pre-requisite for a duty to consider the interests of creditors to arise. **The underlying principle is that directors are not free to take action which puts at real (as opposed to remote) risk the creditors' prospects of being paid,** without first having considered their interests rather than those of the company and its shareholders.'

How should the directors act when the duty arises?

Facia Footwear v Hinchcliffe [1988] 1 BCLC 218, Sir Richard Scott V.-C.

'It is clear enough that in continuing to trade ... [the directors] were taking a risk. But **the boundary between an acceptable risk that an entrepreneur may properly take and an unacceptable risk the taking of which constitutes misfeasance is not always, perhaps not usually, clear cut** …'

Facia Footwear (cont.)

‘But the creditors of the group, and of [the company] in particular, would clearly have been best served by a refinancing that could support a continuation of profitable trading. The cessation of trading followed by the disposal of the assets of the companies on a forced sale basis would, it was always realised, lead to heavy losses for the creditors. **The creditors' only chance of being paid in full lay in a continuation of trading. A continuation of trading might mean a reduction in the dividend eventually payable to creditors but it represented the creditors’ only chance of full payment.** It is, therefore, not in the least obvious that in continuing to trade … the directors were ignoring the interests of creditors.’

What weight should be given to the creditors' interests?

The Bell Group Ltd v Westpac Banking Corporation [2008] WASC 239 Owen J:

'I have previously mentioned that circumstances will wax and wane. It may be, therefore, that in particular circumstances the **only reasonable conclusion to draw**, once the interests of creditors have been taken into account, is that a contemplated transaction will be so prejudicial to creditors that it could not be in the interests of the company as a whole. But that will be because of the particular circumstances and **not because a general principle has mandated that the treatment of the creditors' interests is paramount**.'

Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd.
[2003] 2 BCLC 153

Leslie Kosmin QC (sitting as a deputy judge of the High Court):

> 'When a company is **insolvent or of doubtful solvency or on the verge of insolvency** and it is the creditors' money which is at risk the directors, when carrying out their duty to the company, **must consider the interests of the creditors as paramount** and take those into account when exercising their discretion.'

A balancing exercise?

***The Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 239**

Owen J:

'But **the law does not shy away from concepts simply because they are difficult. And nor do business people.** Men and women in commerce make decisions every day. They bring to bear their experiences, expertise and commonsense to assess advice they receive and to make decisions that they believe to be in the best interests of the business. They often do so in situations of great complexity, both in a conceptual and practical sense.

…

The same applies to decisions that are sensitive to the financial position of a business. … **I am not convinced that the consideration of other financial states, short of actual insolvency, as a practical test of directors' actions would necessarily cross the line from difficult to impossible**, as the banks seem to contend.'

Thaumaturgy?
[‘miracle-working’ - Early C18, Shorter Oxford English Dictionary]

Owen J. (in ***Bell v Westpac***):

> ‘I am not suggesting that it is always easy to decide when the obligation to consider the interests of creditors is triggered. But the law (both general law and statute) prescribes codes of conduct. Company directors have to comply with the codes to which they are subject and the courts have to ensure that they do. As a general rule, the simpler a code is the better it is.

> But simplicity is a relative term. **Judges are paid to make difficult decisions. So too are company directors. But there is a wealth of difference between an assessment that is difficult and one that can be resolved only by thaumaturgy.** When confronted by difficult decisions I often bring to mind the comment of Samuel Johnson: 'Difficult do you call it, Sir? I wish it were impossible'.

The application of the duty to the declaration of dividends

BTI 2014 LLC v Sequana SA [2016] EWHC 1686 (Ch)

C challenged a reduction of capital (so as to create distributable reserves) and the payment of two dividends by D2 to its (then) parent company D1 contending that:

- The dividends contravened part 23 of CA 2006 as the accounts relied upon did not give a true picture of D2's finances, and that inadequate provision had been made for an indemnity liability owed by D2 to C.
- The directors were in breach of their fiduciary duties as the accounts were prepared on the basis of estimates of certain contingent liabilities, and those estimates were surrounded by great uncertainty. There was a risk that those liabilities might turn out to be much greater that the provisions made for them.
- The dividends constituted transactions contravening s. 423 IA 1986.

Sequana (cont.)

Rose J.

‘[478] … This case is very different from the other cases in which the triggering of the creditors' interests duty has been considered. AWA's balance sheet showed no deficit of liabilities over assets and there were no unpaid creditors knocking at AWA's door. It was not in the downward spiral of accumulating trading losses, with no income and no prospect of any income that is typical of the companies where the duty has been held to have arisen. …’.

Sequana (cont.)
Rose J.

'[479] In the instant case, there was a real possibility that AWA would never become insolvent or even close to insolvent. The best estimate of the Fox River liability might turn out to be accurate in which case the company's assets would be sufficient to meet the liability even without the need to rely on proceeds from the historic insurance policies.

It cannot be right that whenever a company has on its balance sheet a provision in respect of a long term liability which might turn out to be larger than the provision made, the creditors' interests duty applies for the whole period during which there is a risk that there will be insufficient assets to meet that liability.

That would result in directors having to take account of creditors' rather than shareholders' interests when running a business over an extended period.

Sequana (cont.)
Rose J.

[479] … This would be a significant inroad into the normal application of directors' duties. To hold that the creditors' interests duty arises in a situation where the directors make proper provision for a liability in the company's accounts **but where there is a real risk that that provision will turn out to be inadequate** would be a significant lowering of the threshold as currently described and applied in the cases to which I have referred. I can see no justification in principle for such a change.'

Sequana (cont.)

Liability under s. 423 IA 1986

After considering the first two claims, both of which it dismissed, the court found that there was evidence that the directors had, in relation to the second dividend, the necessary intention, within section 423 IA 1986, of putting assets beyond the reach of the Claimant or otherwise prejudicing its interests.

David Eaton Turner

New Square Chambers

Lincoln's Inn

DET@newsquarechambers.co.uk

www.newsquarechambers.co.uk

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Gibraltar & Brexit

Chair: Keith Azopardi QC

Panel: Peter Dodge

Harriet Brown

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Gibraltar and Brexit

The funds and investment sectors

Peter Dodge
Radcliffe Chambers

The funds and Investment sectors

- The current position: Alternative Investment Fund Managers (AIFMs) and Undertakings for Collective Investment in Transferable Securities (UCITS)
- The role of national private placement regimes (NPPRs)
- AIFMs post-Brexit: marketing, management and depositories
- UCITS post-Brexit: the marketing of funds
- The special position of Gibraltar: might Brexit provide opportunities?

UCITS IV

Full title

Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)

Date of entry into force

7 December 2009

Date that the rules apply

30 June 2011

UCITS IV

UCITS IV was transposed into Gibraltar law by

- Financial Services (Collective Investment Schemes) Act 2011
- Financial Services (Collective Investment Schemes) Regulations 2011
- various other Regulations

UCITS IV (other Gibraltar Regulations)

- Financial Services (Collective Investment Schemes) (Corporate Restructuring) Regulations 2011
- Financial Services (Collective Investment Schemes) (Conduct of Business) Regulations 2011
- Financial Services (Collective Investment Schemes) (Key Investor Information) Regulations 2011
- Financial Services (Collective Investment Schemes) (Miscellaneous Provisions) Regulations 2011

AIFMD

Full title

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010

Date of entry into force

21 July 2011

Date that the rules apply

22 July 2013

AIFMD

AIFMD was transposed into Gibraltar law by:

- Financial Services (Alternative Investment Fund Managers) Regulations 2013

NPPRs

A national private placement regime (NPPR) allows alternative investment fund managers (AIFMs) to market alternative investment funds (AIFs) that otherwise cannot be marketed under the AIFMD domestic marketing or passporting regimes.

A NPPR was implemented in Gibraltar by the inclusion of AIFMD NPPR provisions in the Financial Services (Alternative Investment Fund Managers) Regulations 2013

The funds and Investment sectors

- The current position: Alternative Investment Fund Managers (AIFMs) and Undertakings for Collective Investment in Transferable Securities (UCITS)
- The role of national private placement regimes (NPPRs)
- AIFMs post-Brexit: marketing, management and depositories
- UCITS post-Brexit: the marketing of funds
- The special position of Gibraltar: might Brexit provide opportunities?

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Gibraltar & Brexit

Chair: Keith Azopardi QC

Panel: Peter Dodge
Harriet Brown

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Gibraltar and Brexit: Gibraltar and the EU

HARRIET BROWN
BARRISTER AND JERSEY ADVOCATE
OLD SQUARE TAX CHAMBERS

Gibraltar's current status: international context

- Article 3(5) TEU states:

  In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter

- Gibraltar Constitution Order 2006: *"…the people of Gibraltar that degree of self-government which is compatible with British sovereignty of Gibraltar and with the fact that the United Kingdom remains fully responsible for Gibraltar's external relations".*

Gibraltar's current status: why does it matter in a tax context?

- The existing case law shows that the status of Gibraltar within the EU is relevant for a number of purposes

- It is important in a tax context because whether or not Gibraltar is a separate MS or a "third country" as against the UK will determine whether important freedoms apply as between Gibraltar and the UK

- In particular in a tax context:
  - Freedom of establishment
  - Free movement of capital
  - Freedom to provide services

- Also, the general EU prohibition on discrimination

Gibraltar's current status: why does it matter in a tax context?

- Provisions that remain challengeable on the basis that they infringe the fundamental freedom of establishment and free movement of capital:
  - Transfer of assets abroad (assign income of non-UK "persons" to UK resident individuals if certain conditions are met)
  - TCGA, section 13 (attributes gains of non-UK "close" company to UK resident shareholders – and can attribute through multiple corporate entities)
  - TCGA, sections 86 (attributes gains of non-UK trusts to UK resident or domiciled settlor) and 87 (attributes gains of non-UK trust to UK beneficiary receiving a "capital payment")
  - Transactions in securities regime (also in ITA, part 13)
  - Offshore income gains regime (Offshore Funds (Tax) Regulations 2009)
  - Offshore insurance bond provisions (found in the Income Tax (Trading and Other Income) Act 2005)

Gibraltar's current status: existing case law

- *Gibraltar & the UK v European Commission* T-211/04 & T- 215/04
- *Spain v UK* C-145/04
- *Matthews v UK* [GC] (1999) 28 EHRR 361

GBGA 2

- The question was whether Gibraltar betting companies can rely on the freedom to provide services in resisting a restrictive UK tax regime.

Three choices were identified:

i) Gibraltar and the UK are parts of a single Member State for the purposes of EU law and so Article 56 does not apply, save to the extent that it can apply to an internal measure;

ii) Gibraltar is to be treated as a Member State for the purposes of Article 56 or as a separate territory with the effect that trade between Gibraltar and the UK is to be treated as intra-EU trade between Member States;

iii) Gibraltar is a third country or territory with the effect that EU law is only engaged in respect of trade between the two in circumstances where EU law has effect between a Member State and a non-Member State.

GBGA 2: decision

- Gibraltar argued that since art 355(3) TFEU must be interpreted by reference to its object and purpose, which is to ensure the effective application of EU law in relation to the European territories concerned by that provision and since this purpose includes the creation of an internal market 'without internal frontiers' (see art 26(2) TFEU), the proper construction of art 355(3) TFEU therefore requires that there be free movement of services between Gibraltar and the UK.

- Relied on an analogy between Gibraltar and the Channel Islands and the Isle of Man—to which art 355(5)(c) TFEU applies

- AG's opinion found this analogy to be misplaced

GBGA 2: decision

CJEU said:

- The conditions under which art 56 TFEU is to apply to Gibraltar, it is true that art 355(3) TFEU does not state that art 56 is to apply to Gibraltar 'under the same conditions as they apply to the United Kingdom'.
- Art 355(3) TFEU extends the applicability of the provisions of EU law to the territory of Gibraltar, subject to the exclusions expressly provided for in the 1972 Act of Accession, which do not, however, cover freedom to provide services
- the fact, relied on by the government of Gibraltar, that art 56 TFEU is applicable to Gibraltar, by virtue of art 355(3) TFEU, and to the United Kingdom, by virtue of art 52(1) TEU, was irrelevant in that regard.

Fisher: questions referred

1. For the purposes of Article 49 TFEU (freedom of establishment) and in the light of the constitutional relationship between Gibraltar and the United Kingdom:

1.1. Are Gibraltar and the UK to be treated as if they were part of a single Member State (a) for the purposes of EU law and if so, does that have the consequence that Article 49 TFEU has no application as between the UK and Gibraltar save to the extent that it can apply to an internal measure, or alternatively (b) for the purposes of Article 49 TFEU taken individually, so that that article does not apply save to the extent that it can apply to an internal measure? Alternatively,

Fisher: questions referred

1.2 Having regard to Article 355(3) TFEU, does Gibraltar have the constitutional status of a separate territory to the UK within the EU such that either (a) the exercise of the right of establishment as between Gibraltar and the UK is to be treated as intra-EU trade for the purposes of Article 49 TFEU, or (b) Article 49 TFEU applies to prohibit restrictions on the exercise of the right of establishment by nationals in the UK in Gibraltar (as a separate entity)? Alternatively,

1.3. Is Gibraltar to be treated as a third country or territory with the effect that EU law is only engaged in respect of transactions between the two in circumstances where EU law has effect between a Member State and a non- Member State? Alternatively,

1.4. Is the constitutional relationship between Gibraltar and the UK to be treated in some other way for the purposes of Article 49 TFEU?

2. How, if at all, does the answer to the above questions differ when considered in the context of Article 63 TFEU (and consequently as regards the freedom of movement of capital) rather than Article 49 TFEU?

Brexit: what will change?

- Seems clear that – despite Gibraltar's vote to remain – it will leave with the UK

- But on what terms? This is what we can't say.

- Theresa May:

"We're very clear on that and we have been continuing to hold talks with the Gibraltar Government to make sure that they are fully aware of the negotiations as those negotiations go along, as indeed we have with others."

"We're very clear about the position of Gibraltar."

Brexit: what won't change

- Brexit unlikely to have "retrospective" effect – tax charges before Brexit should still be subject to the fundamental freedoms and the oversight of the CJEU

- Depends what sort of Brexit we get going forward; Gibraltar may still get benefits in its status for tax

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Chancery Bar Association's Gibraltar Conference 2017

AFTERNOON TEA BREAK

CHANCERY BAR

Chancery Miscellany

Chair: Penelope Reed QC

Panel: Kathryn Purkis

William East

CHANCERY BAR

Kathryn Purkis
Serle Court

BUSTING TRUSTS AND LIFTING VEILS

Introduction

Not with me, gov’; over there!

Insolvency law remedies

Part X Insolvency Act 2011, ss433 – 441

- Undervalue transactions or unfair preferences

BUT

- Bankruptcy order required
- Debtor to have been, or been made, insolvent
- Time constraints
- Exceptions: ordinary course, and BFP

Companies

- Rule in *Salomon v Salomon* [1897] AC 22 – company owns its own property absolutely

- But … personal orders against a shareholder can be made to unlock the continuing economic value of shareholdings, which are only delimited by creditor claims against assets

Companies

- What about orders against the companies directly?
- *Prest v Petrodel Resources Ltd* [2013] UKSC 34: concealment versus evasion
- Mostly **not**, because:
  - Relationship usually one of agency, nomineeship or resulting trust (concealment)
  - All highly fact and context specific (importance of whether payment was made)

Companies

Very limited possibility of piercing the corporate veil (evasion):

> *"the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement."*
> (Sumption JSC, [28])

Companies

- Examples of evasion?
  - *Gilford Motor Co v Horne* [1933] Ch 935
  - *Jones v Lipman* [1962] 1 WLR 832

- Neither case about money claims…

- Probably, an order to reflect judicial displeasure at abuse of the privilege of corporate personality

Trusts

- Piercing the veil is not a doctrine that applies to trusts to unlock access by settlor's creditors: *re Esteem* [2003] JLR 188:
  - Title and economic interest in settled funds has passed to others legally and beneficially (cf companies where only title passes)
  - Trust is a relationship, not an entity
  - This relationship should preclude settlor control over assets and may be enforced
  - "...*no halfway house between sham & validity*" [110]

Trusts

Sham:-

Snook v London & West Riding [1967] 2 QB 786 @ 802, Diplock LJ:

> *"it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."*

Trusts

- Intent not to give effect to the documents executed (the trusts) is required from **both** parties, ie the trustee as well as S: *re Esteem* [2003] JLR 188 @ [53-54]; *MacKinnon v Regent Trust Co* [2005] JLR 198; *Shalson v Russo* [2005] Ch 281
- *Snook* requires intent by both sides to give a false impression of their arrangements to 3P/the court: *Hitch v Stone* [2001] EWCA Civ 63 @ [66]

Trusts

- Strong presumption of regularity: see *JSC BTA Bank v Ablyazov* [2016] EWHC 3071 (Comm)
- Court very picky as to whether there is "intent to give a false impression": *Pankhania v Chandegra* [2012] EWCA Civ 1438
- Shamming intent at the outset: cannot undermine a valid trust by appointing shamming trustees, but can convert a sham into a genuine trust: *A v A* [2007] EWHC 99

Trusts

- Finding formalities problems, or legality problems, overall not a bad line of attack: *Hamilton v Hamilton* [2016] EWHC 1132
- Or, if you have to deal with the trust, can you milk it? Issues with the meaning of "benefit":
  - Not per se beneficial to pay a debt, must confer a real benefit: *re Esteem* [2001] JLR 7
  - Easier to find benefit where moral or family reasons: eg *Mubarak v Mubarak* [2008] JLR 250

Trusts

- Or, would you find it helpful to have assistance from a receiver? *Mubarak* (ibid); see also *re Z Trusts* [2015] 2 JLR 175

- Utility well demonstrated by *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17

Foundations

- *Dalemont v Senatorov* (unrep, Jsy):
  - Foundation as agent/nominee? A toughie.
  - Cf *Hamilton v Hamilton* [2016] EWHC 1132

- Or, could the veil be pierced?

Foundations

Which?

Foundations under the PFA 2017

Company-like	Trust-like
Owns its own property and beneficiaries have no interest in it	Founder has no ongoing economic interest
Council like a board and owes duties to Foundation itself	Board not ultimately susceptible to control
Incorporation, registration, filing requirements, charter/regulations	Court supervisory jurisdiction
Winding-up regimes	Many recognisable trust-like features, eg: limited founder reserved powers, provisions regarding councillor liability in line with Armitage v Nurse

Foundations

- But just maybe…. if the “concealment-type claims are impossible, you might find this “remedy of last resort” is available if you have **very** strong facts involving a quiescent or disempowered Category VII licensee
- Would be a welcome method of reflecting judicial displeasure at abuse of the privilege of incorporated personality – and provide the answer for the creditor, of course!

Questions?

Kathryn Purkis

kpurkis@serlecourt.co.uk

CHANCERY BAR

Chancery Miscellany

Chair: Penelope Reed QC

Panel: Kathryn Purkis
William East

#chbaconferences

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The Law of Capacity: Some key principles
William East (5 Stone Buildings)

Topics to be covered:

- Testamentary capacity
- Lifetime capacity
- What happens when a person (P) loses capacity
- Impact of the new Gibraltar Mental Health Act 2016

Key point: law of capacity is decision-specific and time-specific

- Common law tests lay out specific tests for different acts which (largely) need to be satisfied at the material time. Examples:
  - *Banks v Goodfellow; Perrins v Holland* (capacity to make a Will)
  - *Re Beaney; Singellos v Singellos* (capacity to make a gift, including into settlement)
  - *Masterman-Lister v Brutton & Co; Dunhill v Burgin (capacity to litigate)*
- This approach to capacity reflected in nature of test in ss. 1-3 of English Mental Capacity Act 2005 ('MCA 2005'), which will be implemented in Gibraltar Mental Health Act 2016, ss. 86-88.

Testamentary capacity

Under *Banks v Goodfellow,* a testator:-

(1) Needs to have capacity to understand that he is making a will, and that it will have the effect of carrying out his wishes on death;

(2) He must be able to understand the extent of the property he is disposing of;

(3) He must recall those who have claims on him and understand the nature of those claims so that he can both include and exclude beneficiaries from the will; and, with a view to the latter object

(4) No disorder of the mind should poison his affections, pervert his sense of right or prevent the exercise of his natural faculties and no insane delusions should influence his will or poison his mind.

Testamentary capacity

Key points to remember:

(1) Court looking for capacity to understand matters in question not proof of actual understanding

(2) Law regarding burden of proof (contrasts with MCA 2005)

(3) The 'golden rule' – obtaining a medical opinion to support a will made by a testator who is elderly or suffers from a serious illness

(4) Even serious mental illness may not mean a lack of capacity

(5) Rule in *Parker v Felgate* (confirmed by C of A in *Perrins v Holland*) – possible exception to principle that capacity is 'time specific'

Capacity to make lifetime gifts (including into settlement)

Key points to remember (*Re Beaney*):

(1) Degree of understanding depends on the particular transaction being effected

(2) Low level of understanding if the subject-matter and value are trivial

(3) Capacity required as high as that required for a will where the donor is giving away only asset of value

(4) Burden of proof of showing lack of capacity lies on person alleging it, but evidential burden can shift in course of case

(5) Rule in *Parker v Felgate* applies; see *Singellos v Singellos.*

What happens when a person loses capacity to make a will, make gifts, or manage their property and affairs?

- At this point, the jurisdiction of both the English and Gibraltar Court of Protection are engaged. Legislation dealing with Court of Protection has a ‘ gateway’ test which must be satisfied before court’s powers are engaged.
- Section 45 of Gibraltar Mental Health Act 1968 (‘MHA 1968’): general test as to whether P lacks capacity to manage property and affairs. Anomaly – not decision specific.
- Sections 86-88 Mental Health Act 2016 (‘MHA 2016’) – important shift in way capacity is assessed in Gibraltar law. In line with ss. 1-3 MCA 2005.

The principles applying in the Court of Protection: section 1 MCA 2005, section 86 MHA 2016

The principles.

86.(1) The following principles apply for the purposes of this Part.

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Part for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

The ‘diagnostic’ and ‘functional’ tests for capacity: section 2 MCA 2005, section 87 MHA 2016

People who lack capacity.

87.(1) For the purposes of this Part, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to–

(a) a person's age or appearance; or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Part, any question whether a person lacks capacity within the meaning of this Part must be decided on the balance of probabilities.

Focusing in on the decision at hand: section 3 MCA 2005, section 88 MHA 2016

Inability to make decisions

88.(1) For the purposes of section 87, a person is unable to make a decision for himself if he is unable–

(a) to understand the information relevant to the decision;

(b) to retain that information;

(c) to use or weigh that information as part of the process of making the decision; or

(d) to communicate his decision (whether by talking, using sign language or any other means).

....

- Can have capacity to do some things and not others
- Court can really focus on individual functions required: e.g. *Re SL*

Has the test in the MCA 2005 displaced the common law tests?

- Point that is matter of interest for Gibraltar practitioners given imminent effect of ss. 86-88 MHA 2016
- English court conclusion after some debate: not displaced (*Re Walker, Kicks v Leigh*)
- Law Commission has suggested that *Banks v Goodfellow* test should be replaced in future with MCA 2005 test.

What will the powers of the Gibraltar Court of Protection be when the MHA 2016 comes into force?

- General powers re property and affairs, including re:

(a) the control and management of P's property;

(b) the sale, exchange, charging, ***gift or other disposition of P's property;***

(c) the acquisition of property in P's name or on P's behalf;

(d) the carrying on, on P's behalf, of any profession, trade or business;

(e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member;

(f) the carrying out of any contract entered into by P;

(g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not;

(h) ***the settlement of any of P's property, whether for P's benefit or for the benefit of others;***

(i) the execution for P of a will;

(j) the exercise of any power (including a power to consent) vested in P, whether beneficially or as trustee, or otherwise;

(k) the conduct of legal proceedings in P's name or on P's behalf.

The best interests test under Mental Health Act 2016

- Section 1 (5) will require that any decision taken on behalf of P taken in his or her best interests. Definition of 'best interests' given more flesh in section 89.
- Objective consideration by court of all relevant circumstances. Contrast to old 'substituted judgment' approach, although court can still take into account what P would have done in the scenario at hand.
- Consider various factors including P's past and present wishes and feelings, beliefs and values which would likely influence the decision, views of those close to P.
- Wishes and feelings important part of picture, but weight attached to them is case specific.
- Idea of 'doing the right thing'

CHANCERY BAR

The internet bites back?

Chair: Amanda Tipples QC

Panel: Leigh Sagar

Richard Spearman QC

CHANCERY BAR

Fighting over nothing:

Cryptocurrency litigation issues

Leigh Sagar
New Square Chambers, Lincoln's Inn

Largest Transactions

57c287e9aefe46d385d41220033275a51aac563b207c28adabef5b49615fbfd1			**2017-10-09 09:15:27**
3QEJwXJyuAsxJwHPFe5x64f1WdvspYMkbJ	→	3EBpPRb5zerb8SAAVtmx1PorTpEUSjw2EQ 35fUea4rGnUwjSAwvtGxz7CctdAWDMriV9	1,083.47254587 BTC 0.0035564 BTC
			1,083.47610227 BTC
9317a9d1c36096c47f3aa3fbb251f6331dab55210842690bd50c1751ac42f655			**2017-10-09 09:18:42**
3EBpPRb5zerb8SAAVtmx1PorTpEUSjw2EQ	→	3KjepNwzWMPTgMC5La72kwVeCuWj34VZ26 3EY7brSXodkvfVbG3RVGhG88rPVoFxMJ3A	0.0111128 BTC 1,083.46087357 BTC
			1,083.47198637 BTC
4a5d4b13576249ff4651cd52f3c12c667bb57ec956cd35e2eb0fa1cc587571c8			**2017-10-09 09:17:18**
17JNE2n2ZnJvzC7BHQZXN3DxNVkZyvawTn	→	12PsyeJ2EsaLARZuu5Rcx3oScandiQFYT6 13ntPkSW4bptr2munbsZC8Y1aqCpidzbZr	0.09589013 BTC 577.58104116 BTC
			577.67693129 BTC
58efbaef852766ac6abb5d405c48cad7c71e2ea7b5ede23674d85b556cdbac83			**2017-10-09 09:15:14**
3FYUJ8xBUe5xxhvfQMdQ3PVaucjMQ3UXwL	→	1JTkNKqpVPScWpHcAXtdzHz7rmVpVZUHoA 3EUVgNYS3eica742sckkXRM3PyK2jBLmet 1AXVoQTu9o7UCUcVRoNkdSXpJne6F8yhEP 1DgiNnsMFM4HzkHHD5UWbZww3BVyRVuWsg 1BJJsDpMow5dfM6s6fJhGcdtjoygBFUk66 18jfHey1nHVtfVvNLVM9WNTWyEHbMXy6eh 1Axe89jH4WggKKPMm1LvWPLobBUapinNJu	0.25 BTC 383.06534197 BTC 0.77279 BTC 0.07653 BTC 0.03863686 BTC 0.07132 BTC 0.51606 BTC
			384.79067883 BTC

Issues

- Regulatory
- Substantive
- Procedural

Substantive

- Nature
  - Coin token
  - Utility token
  - Tokenised security
- Cause of action
  - Protocol claim
  - Gateway claim
  - Smart contracts

Procedural

- Self-help
- Causes of action
  - Unjust enrichment
  - Breach of contract
  - Fraud

Procedural (2)

- Jurisdiction
  - Distributed ledger
    - Rome II – unjust enrichment, fraud
    - Rome I – contract

Procedural (3)

- Parties
  - Pseudonymity
    - Chainalysis.com
    - *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133
    - *Bloomsbury Publishing Group plc and another v News Group Newspapers Ltd* [2003] 1 WLR 1633
    - United Nations model law adoption

Procedural (4)

- Service
  - Service by an alternative method
  - Dispense with service
- Evidence

Transaction 0x6b2718e643316d045b4aa66d69a0fc33651500dace076b3318463014ea18a0c7

Sponsored Link: **Bankera** - *the bank for the blockchain era*. **Participate in the initial coin offering.**

Overview | Event Logs | Comments

Transaction Information

Tools & Utilities

TxHash:	0x6b2718e643316d045b4aa66d69a0fc33651500dace076b3318463014ea18a0c7
Block Height:	4348517 (1 block confirmation)
TimeStamp:	1 min ago (Oct-08-2017 07:34:44 PM +UTC)
From:	0x143eb51efa42cf721c93288f50a10e1e103f0426
To:	Contract 0xae4191a7eb25713ac90483ea75828ae8038f94dc 13,440 ERC20 (eZEC) TOKEN Transfer From 0x143eb51efa42cf721c932... to 0x6feafd882f8b5d193462d...
Value:	0 Ether ($0.00)
Gas Limit:	51950
Gas Used By Txn:	51950
Gas Price:	0.000000005 Ether (5 Gwei)
Actual Tx Cost/Fee:	0.00025975 Ether ($0.08)
Cumulative Gas Used:	6699736
Nonce:	43
Input Data:	Function: transfer(address _to, uint256 _value) *** MethodID: 0xa9059cbb [0]:0000000000000000000000006feafd882f8b5d193462d756a70571c99f78eea6 [1]:000000000000000000000000000000000000000000000002d89577d7d402000000

Convert To Ascii

Height	Age	Transactions	Mined by	Size
488914	4 minutes ago	1489		991713
488913	11 minutes ago	2041	AntMiner	985798
488912	15 minutes ago	2205	BTCC Pool	983719
488911	20 minutes ago	2145	BTCC Pool	990108
488910	an hour ago	1518		563428

See all blocks

Latest Transactions

blockexplorer.com

Hash	Value Out
2740dc9fab0cbc13399630fa424ce169445f14f76d55...	0.00177708 BTC
ffee77b9bc360b9c96f12a283461f0a489de41b4137a...	0.00027599 BTC
b7863bb14fd1fda24e808f119561675acc28ae86e35...	0.00973466 BTC
5350f47746948e30ff7cb2049fc6ac83357f67d7162f...	0.14108264 BTC
8e6b63722d45dabebc0cabae9aa9d6ddf5421dba331...	0.0000273 BTC
9ec84750c455613d9e37e0d8216f3c249eaf285e571...	0.0498433 BTC
02b9993d5b290ed4e182623488813af781932b8d54...	0.01843225 BTC
da35dcb49e3b36691eb9dacf84690812ff09a233d9e...	0.0859887 BTC
01be0e1c17fe5113be1d2a93926c799276834bfa2bb...	0.00169093 BTC
de642faedcb488a5a14297152c950da6ac1ab481f2ff...	14.85233535 BTC

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Misinformation and the internet

Richard Spearman QC

39 Essex Street

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Chancery Bar Association's Gibraltar Conference 2017

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