"TRADING PLACES"

Insolvency Lawyers' Association - 11 November 2015

The pre-dinner speakers at the last two ILA Dinners were Mr. Justice (very soon to be Lord Justice) David Richards and Judge James Peck of the US Bankruptcy Court for the Southern District of New York. It would be hard to imagine two more distinguished and experienced judges in the field of insolvency.

So it was something of a surprise for me to be asked to give this talk, only six months into my fledgling judicial career. But that, Dan Hamilton assured me, was the very reason for the invitation. It would be interesting to practitioners, he said, to hear of my first impressions of judging insolvency cases so soon after I had been arguing them.

Before turning to a few specific topics, I should say a few words about my change from QC to Judge in general terms.

The thought that has obviously occurred to most people was typified by the headline that appeared about me in October's Global Turnaround magazine: "London's Poacher turned Gamekeeper". For my part, Dan's suggestion for my topic tonight immediately brought to my mind the 1983 film "Trading Places". Film-buffs among you will recall that movie starred Eddie Murphy as a street con-artist, and Dan Ackroyd as an upper-class commodities broker in Philadelphia, who find their positions reversed as part of a bet devised as a social experiment by the two millionaire owners of the broking firm.

One or two of the more astute among you immediately pointed out to me that I don't look anything like Eddie Murphy. That's true. I am, of course, amused that in addition to being thought of as a poacher, the other immediate reaction was to compare my previous existence to that of a con-artist.

In fact, I was thinking more of the commodities broker. He was a senior figure in his industry, respected and comfortably off. But overnight he was deprived of his job, cut-off from his established friends and colleagues, and thrown into a challenging new environment. As a Judge you of course have many compensating benefits denied to Dan Ackroyd's character, but the speed of the transition from cosseted QC, supported by talented juniors and solicitors, is just as dramatic.

So what it is like? Those of you who are avid readers of the FT will have seen Jeremy Paxman's article on 1 November about judges, which included a quotation attributed to Sir Alan Moses about what it was like to become a Judge. Sir Alan said,

> "It is such a relief not to have clients. You don't have to be nice to anyone. People treat you with respect in court. They laugh at your jokes. There are long holidays. All in all, it's a far more relaxed life".

It may be that some day I will reach that state of Nirvana that Sir Alan Moses found, but in my limited experience over the last six months, he was wrong on almost every count.

It is not a relief not to have clients: I miss having clients to fight for. You could impress them if you won, and provided that you fought hard, they didn't generally hold it against you if you

lost; because it was the judge's fault. Now I am that judge: the winners think that all you have done is what you should obviously have done anyway; and the losers still blame you for getting hold of the wrong end of the stick or for just being plain stupid.

I also don't share Sir Alan's view that being a judge means that you can stop being nice to people: if anything, the reverse is true. Judges appreciate that being in court is a stressful experience for litigants and lawyers alike. It is the job of the judge to ensure that parties feel that, win or lose, they have had their day in court and a fair hearing. And as an advocate I well recall the anxiety I felt before every hearing. A judge is quite entitled to put advocates through their intellectual paces, but I don't think that it is any part of my job to make the task of the conscientious advocate any more difficult than it already is by being what George Orwell described as "a grouty old bully".

Moreover, as I shall mention in a few minutes, even in the space of six months I have come to appreciate just how much the hard-pressed judge relies on the advocates appearing before him, particularly in the specialist field.

Sir Alan Moses thought that people treat judges with respect in court and laugh at their jokes. But surely that is to confuse real respect which has to be earned, with benefitting from the good manners which come naturally to members of the legal profession. I also do not delude myself that my talents as a comedian were latent and just needed elevation and a captive audience for them to be fully appreciated.

And as for a more relaxed life as a Judge – well that really isn't right. The court hearings and paper applications are relentless, and the biggest problem is finding time to write the judgments. But perhaps the most scary and least relaxing thing about being a Judge is this. As an advocate, you don't have to do anything other than put the best argument on your client's behalf that you can. You certainly don't have to believe that your submissions are right, though doubtless it helps if you can persuade yourself that they are. You can make your submissions and then leave it up to someone else to decide what the correct answer is. But as a judge, you <u>are</u> that someone else. You <u>do</u> have to decide what is right; and, most worryingly of all, for the first time in your professional life, people are entitled to assume that you <u>do</u> genuinely believe what you say.

So that is the greatest challenge – but of course, it is also the greatest pleasure about the job. For the first time you do actually get a chance to say what you really think and leave some mark on the law….. subject only to the Court of Appeal!

So that is the general picture. What about the specifics of insolvency? What has struck me in the last few months?

The first thing I should mention is that coming from the relative heights of international corporate insolvency, and even now that the worst of the recession has passed, I have been very much surprised by the very high volume of cases generated by personal bankruptcy. There are, for example, very many appeals and applications to prevent possession and sale of the bankrupt's house. In many, if not most of these cases, the bankrupt appears in person. Most are dealt with by the Registrars and District Judges, but a good number still filter through to the Chancery Division Judges.

Dealing with litigants in person can take a significant amount of time to get to the point that is being made, even assuming that you can figure out what the point is. The relevant documents are very rarely available. Now this is not in any way to disparage litigants in person. The judicial oath requires a judge to do right by all manner of people, and that includes litigants in person. But an increase in the number of litigants in person is the inevitable result of cuts to legal aid in civil cases, and the system is under strain.

So what can you do – and more to the point why should you do it? The answer to the first part of that question is to do some *pro bono* work. Sign up to the CLIPS scheme or the equivalent that operates for bankruptcy cases in front of the registrars. I could give you a glib answer to the second part of the question by suggesting that you have a moral duty to help. But the last few months have demonstrated two much more pragmatic reasons. The first is because for every extra hour it takes a judge to get to the bottom of the case of a litigant in person, he or she will spend one less hour considering the finally crafted submissions which advocates make on behalf of their paying clients, who may think that they get a raw deal for their money as a result. Secondly, because, without exception, the judges are genuinely and deeply appreciative of any help that they can get with LIPs, which can do *pro bono* advocates no harm for future hearings.

The second area that has struck me with some force are cases concerning schemes of arrangement – especially those for companies incorporated abroad. This is, of course, the area in which I have some form, and was the topic which prompted the "Poacher turned Gamekeeper" article in Global Turnaround.

The background, as you probably know, is that an increasing number of overseas companies, have been turning to the English courts to restructure their financial obligations using a scheme of arrangement under the Companies Act 2006. A creditors' scheme for an overseas company would be uncontroversial if the company had genuinely (and I stress that word) moved its COMI to this country or created an establishment here.

But the more controversial development has been for schemes to be proposed by overseas companies that do not have their COMI, an establishment or any assets here. The motivation for such companies seeking the assistance of the English court will very often be the absence of any procedure in their home country which enables them to restructure their debts without going into a formal insolvency process. Many EU member states do not have anything like a scheme, even though all member states were told by the European Commission in March 2014 to make available to debtors a procedure under which they could prevent insolvency and adopt a restructuring plan with the approval of a majority of creditors and the confirmation of a court.

The other common motivation for seeking the assistance of the English court is where there is a pan-European group of companies who are joint obligors or who have given cross-guarantees and who have their COMIs in different member states. The continued lack of any effective means of dealing with group insolvencies means that it would be impossible to co-ordinate different formal insolvencies in various member states.

The key justification for the English court becoming involved in such cases has been the enduring popularity of English law as the governing law of the debt to be restructured. Building upon the internationally recognised conflict of laws principle that most countries recognise a discharge of a debt in accordance with its governing law, the English courts have

been prepared to proceed on the basis that a group of creditors, such as those participating in a syndicated bank facility or buying notes in a series of debt instruments issued by the company, whose debt is governed by English law, can be taken collectively to have agreed to the application to them of the English court's scheme jurisdiction to compromise or restructure their claims against the company.

On this basis, the choice of English law has been held to be a sufficient connection to justify the exercise of the English court's scheme jurisdiction. If it is backed up by a clause under which the creditors submit to jurisdiction of the English court in respect of disputes arising out of that debt, so much the better. Note that it must be the creditors who submit: the company will be voluntarily promoting the scheme in any event.

Provided that the predicted outcome is better than the alternative in the absence of the scheme and there is sufficient evidence that the scheme will be recognised in other jurisdictions in which the company has material assets that could be attacked by dissentient creditors, the English court has generally been prepared to assist.

There are, however, still many unanswered questions. Thus far, for example, the courts have been able to sanction schemes without answering the difficult question of whether, on the assumption that a scheme is not an insolvency proceeding governed by the Insolvency Regulation, but is a civil and commercial matter, jurisdiction to bind creditors domiciled in other EU member states needs to be established under the EU Jurisdiction and Judgments Regulation; and if so, how that is to be achieved. But a time will come when that issue cannot be avoided. I also do not think that the last word has been written on lock-up agreements, consent fees and other inducements to support a scheme.

The nature of the insolvency profession is to innovate and to push the envelope. It is that which has made the UK insolvency profession the envy of Europe, and admired throughout the world. But in the rush to offer the English scheme to the world, it should not be forgotten that Rodenstock and its more exotic derivatives have never been tested at an appellate level, and permission to appeal was given by the Court of Appeal in APCOA before a deal was done between the warring factions.

At this stage I should declare that I am an unashamed fan of the scheme of arrangement. It has been a spectacular success story for English law. It is a testament to its flexibility and enduring utility of the scheme that the basic wording of the statute has remained unchanged for well over a century. I think that it is important that the scheme of arrangement should retain its vitality and utility in insolvency cases.

But moving from the role of advocate to that of judge has given me a slightly different perspective. One of the roles of a gamekeeper (if that is what I have become), is to protect and ensure the continued well-being of the stock under his control.

In the context of the type of international schemes that I have been talking about, one of the most important things to ensure that the scheme continues in robust health, is that it should be recognised and given effect in other jurisdictions. That will only occur if the scheme of arrangement is, and is seen by other jurisdictions to be, a rigorous judicial process, even if it is not opposed. It is only in that way that the court's sanction for a scheme will merit international recognition in the same way as a judgment in contested litigation.

It is therefore important firstly, that the presentation of schemes does not become routine or commoditised. As David Richards J said in a recent lecture, because the majority of schemes are unopposed, the process can only work if practitioners exhibit the utmost candour in dealings with the court. If a scheme raises new or controversial issues, they must be clearly highlighted and explored in argument.

Secondly, as I said in VGG, the court is not a rubber stamp. As an advocate, questioning by the court might be seen as tiresome. Having traded places, I will make no apologies for kicking the tyres and looking under the bonnet. I see it as a necessary part of protecting the international reputation of the schemes that practitioners are so busy devising.

For much the same reasons, whilst innovation is important and welcome, it must be recognised that there are conceptual and jurisdictional limits to what a scheme can achieve, as the rejection of the schemes in BAIC and Lehmans rightly proved. So, for example, Mr. Justice Hildyard made an important statement in APCOA that the fact that a company may be on the brink of insolvency, and that the proposed scheme is predicted to provide a better solution than the alternative of insolvency proceedings, does not provide a solution for all class questions.

So where does all this leave me after six months? In the Global Turnaround article, it was suggested that my judgment in VGG indicated that I wanted to "tighten things up and return to the old standards". For my part I can't recall ever having been told that there were any new, looser standards.

To avoid any further accusations of being old fashioned, I now need to pick up the tempo by mentioning two recent and exciting (at least in judicial terms) developments that have fortuitously happened in my first few months on the bench.

When I mentioned to a friend that the title of my talk tonight was "Trading Places" she immediately asked whether I was going to talk about the Lehmans cases. I wasn't, but that set me thinking. As many of you will know, the new Financial List was launched on 1 October as a joint venture between the Chancery Division and the Commercial Court. It is a list of designated specialist judges to try high value cases with particular importance for the financial markets and structured finance products. There are a cadre of judges just itching to get their teeth into suitable cases which will be given suitable priority in listing and on appeal.

Well what has that got to do with insolvency I hear you ask? The answer became very clear during a training day held for the designated judges at the end of September. The overwhelming majority of cases decided in recent years that were mentioned as being suitable for inclusion in the Financial List were cases borne out of the financial crisis in 2008 and the insolvency proceedings that followed in the Chancery Division. Many of the uncertainties which still exist in relation to standard form documents are likely to fall to be tested in the event of insolvency of a counterparty and the need to close out the contracts. Even this week, for example, Mr. Justice Hildyard is hearing Lehmans Waterfall No. 4¾ (or something like that) in the Chancery Division which raises generic issues relating to the ISDA Master Agreement. In the future, issuing appropriate cases in the Financial List is something to be borne in mind by all insolvency lawyers.

The second development, which has received far less publicity but is of potentially greater importance for insolvency lawyers are the pilot schemes in the Rolls Building for Short and Flexible Trials for business related litigation. The aim is to provide shorter and earlier trials in the High Court at lower cost.

The Shorter Trial procedure offers case management by a docketed judge for cases of 4 days or less with the aim of reaching trial in 10 months or less and judgment within six weeks. There is a standard procedure for limited disclosure and restricted oral evidence. Critically, costs budgeting will not apply, and the judge will summarily assess costs when giving judgment.

The Flexible Trial procedure invites the parties to agree their own simplified procedures to suit the case. This might, for example, involve asking the court to adjudicate on agreed facts or written evidence with limited disclosure. The key is flexibility and choice.

Although insolvency cases are not singled out for a special mention, it seems to me to be obvious that these two pilot schemes must be highly suitable for a good number of cases thrown up by an insolvency, where costs are often at a premium, speed is important, and many disputes can be boiled down to limited factual disputes capable of being resolved largely on the basis of documentary evidence. But the pilot schemes only last for two years: so it is important that insolvency practitioners and litigators should consider using them and making the courts and judges work to provide a bespoke and streamlined service.

So there you have it.

Returning to my Trading Places theme, I certainly haven't fallen as far down the slope to ruin as Dan Ackroyd's commodities broker. But nor have I yet met Jamie Lee Curtis.

What I still hope to do is to finish in the same way as the film: on a beach in the Caribbean, sipping a cocktail. Until then, after fielding any questions you may have, I will have to make do with the champagne downstairs. For which, in advance, I thank the ILA.