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UPDATE

Report on the South Square and Mourant Ozannes Litigation Forum on 4 November 2015

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A report on the South Square and Mourant Ozannes Litigation Forum on 4 November 2015, which addressed key developments in financial litigation and insolvency and restructuring.

Introduction and keynote speech of Mr Justice David Richards

Mourant Ozannes and leading insolvency set, South Square, hosted their latest Litigation Forum in London on 4 November 2015.

The Forum was co-chaired by Mark Phillips QC of South Square and Jeremy Wessels of Mourant Ozannes. The Forum was attended by over 200 delegates from a wide range of firms based in onshore and offshore jurisdictions.

Mr Justice David Richards (since appointed as a Court of Appeal judge, so now Lord Justice David Richards) delivered the keynote session of the Forum which focussed on some of the significant changes which have occurred to the insolvency landscape over the last decade. As the assigned judge for major administrations including T&N, MF Global and Lehman Brothers, Lord Justice David Richards gave a retrospective of major cases over the last 12 years during which he has been a judge at the High Court – these include *Cambridge Gas, Nortel, Rubin and Singularis*. He discussed the impact of the Enterprise Act 2002, the advent of the Special Administration Regime, the streamlining of cross-border insolvency via the EU insolvency regulations introduced in 2002 and the 1997 UNCITRAL Model Law. David Richards LJ highlighted the introduction of the EU insolvency regulations and the 1997 UNCITRAL Model Law as progress towards greater cooperation between EU member state and international courts. He concluded by summarising the main challenges faced by courts and practitioners in dealing with cross-border insolvency and assistance, particularly in the context of the insolvency of group structures operating across multiple jurisdictions.

First panel session: 'Capital Markets Litigation in the English Courts and Overseas'

The first panel session, entitled 'Capital Markets Litigation in the English Courts and Overseas', featured panellists Euan Clarke of Linklaters, Professor Jeffrey Golden of P.R.I.M.E. Finance and the LSE and Jeremy Goldring QC, panel chair, and Hilary Stonefrost, both of South Square. The session centred on a case study concerning a company of doubtful solvency faced with claims brought by both noteholders in connection with purported events of default and a counterparty to certain derivative agreements on ISDA standard terms. The panel commenced by discussing the legal process by which the counterparty could seek redress and the importance of jurisdiction provisions within such derivative agreements. The case study highlighted that where the agreements were subject to the non-exclusive jurisdiction of the New York courts, there was considerable flexibility for claimant counterparties to seek redress in the jurisdictions in which they considered would enable them to achieve the greatest likelihood of success. Negotiation on such terms therefore could be a key strategic issue at the drafting stage of the agreements. The panel also discussed the benefits of dispute determination by the ISDA arbitration panel as opposed to court proceedings, a point reflected by the comments of the ISDA External Review Panel Determination in the February 2015 decision of *In Caesar's Entertainment Operating Company, Inc*. In particular, it was noted that parties to ISDA disputes in the United States frequently refer disputes to an independent, expert arbitration panel, as is permitted under the ISDA standard terms, in the expectation that it will avoid perceived large costs and

delay involved in court proceedings and to enable experts specialised in these financial arrangements to deal with the disputes. Discussion then turned to issues concerning the company's capacity to enter into the derivative agreement and the means by which the company may be able to rely upon a lack of capacity as a defence to the counterparty claim. It was noted that an analysis of corporate capacity, by reference to the governing law of the derivative agreement, would be central to any judicial analysis of this issue. The panel session concluded with debate on the cross-jurisdictional issues arising from an insolvency process triggered by the noteholder claims. Particular focus turned on the relevance of the jurisdiction and governing law clauses of the notes and the possibility of the company entering into a scheme of arrangement under English law.

Second panel session: 'The Duties of Directors: Protection for Investors and Creditors'

The second panel session, entitled 'The Duties of Directors: Protection for Investors and Creditors', was chaired by Justin Harvey-Hills of Mourant Ozannes (Jersey) with co-panellists Lynn Dunne of Ashurst, Christopher Harlowe of Mourant Ozannes (Cayman Islands), and Felicity Toube QC of South Square. The session centred on a case study concerning a unit trust structure, involving a Jersey registered unit trust, companies registered in the Cayman Islands, England and Jersey and various unit holders based in England and elsewhere.

The panel considered questions relating to the potential claims and liabilities of trustees and trust managers, liquidators and directors of subsidiary companies respectively in circumstances where a unit trust (and related companies in its structure) enters into the realm of insolvency or doubtful solvency. One key area of discussion related to claims that unit holders could bring against the trustee and manager of the unit trust. The panel discussed one of the few examples of a unit trust dispute being the subject of judicial scrutiny, namely the recent decisions of the Royal Court of Jersey in the litigation concerning Barclays *Wealth Trustees (Jersey) Limited and Barclays Wealth Fund Managers (Jersey) Limited v Equity Trust (Jersey) Limited and Equity Trust Services Limited* in which Mourant Ozannes acted for the plaintiff trustee in an action against the former trustee and manager.

One of the central issues discussed were the duties of the directors of the Cayman Islands, Jersey and English companies in this scenario. The common starting point across the three jurisdictions was that the directors were obliged to discharge their duties in the best interests of the company and that, where a company was solvent, the duties would equate to acting in the interests of the general body of shareholders. However, where that company entered into the realm of insolvency or doubtful solvency, the duties would equate to acting in the interests of the general body of creditors. Particular differences in the jurisdictions arose with respect to the degree to which directors could avail themselves of liability by reliance on indemnification and exculpation provisions where the Cayman Islands differs significantly from Jersey and England. The panel also raised, in this context, other liabilities that the directors may face regarding fraudulent and wrongful trading and in particular additional statutory duties on directors of UK banks.

Discussion then turned to the possible winding up of the Cayman Islands company in the structure. There was particular focus on whether, in view of the disagreements between the company's shareholders, the directors of the Cayman Islands company could petition the Cayman Islands Grand Court for orders that the company be wound up on the just and equitable basis.

Third panel session: 'International Cooperation in Cross-Border Restructuring and Insolvency'

The third panel session, 'International Cooperation in Cross-Border Restructuring and Insolvency', was chaired by Mark Phillips QC of South Square who was joined by panellists Simon Dickson of Mourant Ozannes (Cayman Islands), Jason Karas of Lipman Karas (Hong Kong), and Nick Segal of Freshfields Bruckhaus Deringer LLP (Mr Segal also sits as a part-time Judge of Grand Court of the Cayman Islands, within the Financial Services Division).

The panel began by discussing the Judicial Committee of the Privy Council's decision in *Singularis Holdings Ltd v PricewaterhouseCoopers*. Discussion focussed on the implications of the Privy Council's disapproval of the broad application of modified universalism as envisaged by the Privy Council in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* and its finding that common law assistance in foreign insolvencies is subject to local law and policy and that the domestic court can only ever act within the limits of its own powers. The panel also addressed the continued application of the English law rule, based on the Court of Appeal case of *Gibbs & Sons v Societe*

Industrielle et Commerciale de Metaux, that an English law governed debt cannot be discharged by foreign insolvency arrangements. The panel reflected on several court decisions over recent years in England and elsewhere where the courts have questioned the continued operation of the rule within the modern context of modified universalism and cross-border assistance. Another related aspect of the panel's discussion concerned the issue of establishing jurisdiction to open insolvency proceedings. The issue was discussed in the context of the recent Supreme Court decision in *Trustees of Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA*. In that decision, the Supreme Court outlined what is necessary in order for there to be an 'establishment' (for the purposes of council regulation EC 1346/2000 on insolvency proceedings) entitling an English court to wind up a company which has its centre of main interests in another member state of the European Union. The Supreme Court ruled, in particular, that the existence of economic activity in England was essential and that, where the company had no subsisting business in England, a winding up would not be ordered.

The panel session concluded with a discussion on the continued importance, in the context of proceedings before United States courts for recognition of the powers of liquidators of Cayman Islands and British Virgin Islands companies, of the analysis of the insolvent foreign debtor's centre of main interests and the jurisdiction of its economic activities.

About Mourant Ozannes and South Square

Mourant Ozannes continues to play a leading role in the largest and most high profile insolvency and restructuring related cases in the BVI, Cayman Islands, Guernsey and Jersey. These cases, often cross-border in nature, involve advising on all aspects of complex corporate restructurings and providing pragmatic solutions for clients.

South Square is consistently ranked a leading commercial barristers chambers and the top set for insolvency and restructuring. South Square barristers have acted in many of the most important insolvency, restructuring, banking, commercial, company and fraud-related domestic and cross-border disputes of recent years and regularly appear in courts around the world.

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