SC Ref.No.SC(1)-S58

SECURITIES AND FUTURES COMMISSION
證券及期貨事務監察委員會

Responses to the issues arising from the hearings attended by Mr Harold Ko

9 March 2010

1. **Regarding the responsibilities of the Prospectus Team (PT) of the Corporate Finance Division (CFD) and the Investment Products Department (IPD) of the Intermediaries and Investment Products Division (IIPD), please advise:**

   (a) the differences between the functions and responsibilities of PT of CFD and those of IPD of IIPD in the authorization of offers of investment products;
   (b) whether there were any overlapping in the respective jurisdictions of the two divisions;
   (c) if yes, please give particulars of such overlapping and the principles applied in determining which division should have jurisdiction;
   (d) please give examples of the investment products that may fall within the jurisdictions of both divisions; and
   (e) Whether there is a mechanism within SFC to assess whether certain applications for authorization of product documentation should be handled by PT or by IPD.

1.1 The term "functions" is defined as "powers and duties" in Part 1 of Schedule 1 to the Securities and Futures Ordinance ("SFO"). The powers and duties of all Divisions of the SFC, including CFD and IPD under Part IV of the SFO and Parts II and XII of Companies Ordinance ("CO") are the same. This is because the SFC has delegated its delegable functions under both the SFO and the CO to each Executive Director with authority for each Executive Director to sub-delegate to staff in his or her Division. However, because the powers and duties under the CO are different from the powers and duties under the SFO the responsibilities of the staff administering each regime are different.

1.2 The legal form of an investment product, not the SFC, determines whether it falls under the SFO regime or under the CO regime. It is for the issuers to decide (having taken legal advice where appropriate) whether or not a product is a share, a debenture, a regulated investment agreement or a collective investment scheme and to comply with the applicable regime.

CO Regime	Examples
Shares	
Debentures	Corporate bonds and notes Structured notes (such as Credit Linked Notes (CLN) Equity Linked Notes (ELN) and Fund Linked Notes (FLN))

1.3 CLNs, ELNs and FLNs fall within the definition of "debentures" and thus are subject to the prospectus regime of the CO. The documents for these products are authorized by CFD which is responsible for the CO regime.

Part IV Regime	Examples
Securities	
Regulated Investment Agreements (RIA)	Equity Linked Deposits (ELD)
Collective Investment Schemes (CIS)	Unit Trusts Mutual funds REITs Investment-Linked Assurance Schemes (ILAS)

1.4 IPD is primarily responsible for the authorization of collective investment schemes (CIS) (pursuant to powers under section 104 of the SFO) and their offering documents and advertisements under section 105 of the SFO. The more common types of CIS are funds and investment-linked assurance schemes. IPD is also responsible for the authorization of the offering documents and advertisements under the SFO in respect of equity-linked deposits (ELDs) which are regulated investment agreements (RIA).

1.6 IPD is responsible for administering various products codes made under the SFO namely the Code on Unit Trusts and Mutual Funds, the SFC Code on MPF Products, the Code on Pooled Retirement Funds, the Code on Real Estate Investment Trusts, the Code on Immigration-Linked Investment Schemes and the Code on Investment-Linked Assurance Schemes.

1.7 Responsibilities of the Prospectus Team of CFD include authorizing offering documents and marketing materials relating to unlisted shares and debentures as well as equity-linked investments under the CO and the SFO.

2. **Under the existing CO prospectus regime, when authorizing the product documentation of Lehman Brothers (LB)-related Minibonds and structured financial products, apart from ensuring "disclosure" of product information, did CFD also vet the product "structure" (e.g. whether the parties involved in the product such as the guarantor were suitably qualified)? If yes, please provide the details; if no, the reasons. Using the Minibonds and Constellation Notes series as examples, please explain whether the guarantors for these products were subject to any prudential regulation by the relevant regulator?**

2.1 As stated in the answers to question 3 in the written statement of Mr Brian Ho of 7 July 2009, when reviewing a prospectus, CFD's staff reviewing the document first check precedents, that the document contains the information specified in the Third Schedule to the CO, and consult any relevant internal practices [1] or policy. Reviewers seek to ensure that, on the basis of information provided by the issuers or its advisers, there is disclosure of sufficient particulars and information about product features and risks in prospectuses as at the time of issue, so as to enable a reasonable person to form as a result of reading the particulars and information a valid and justifiable opinion of the shares or debentures and the financial condition and profitability of the company in question, taking into account the nature of the shares or debentures being offered and the nature of the company, and the nature of the persons likely to consider acquiring them. W17(C)

2.2 In addition, as stated in the answers to question 10 of my first written statement dated 10 June 2009, the SFC applies eligibility requirements applicable to listed structured products mirroring those in Chapter 15A of the Main Board Listing Rules. These include a financial requirement of a minimum net asset value for issuer/guarantor of HK$2 billion and for the issuer/guarantor/collateral to either be regulated or to have a credit rating of the top three investment grades [2]. CFD requires issuers/guarantors/swap counterparty/swap counterparty guarantors of unlisted structured products to comply with these requirements as appropriate. These are akin to structural requirements which are imposed through administrative means. W13(C)

2.3 Both Minibonds and Constellation Notes are credit-linked notes (CLNs), and under their respective structures, because the notes are secured on collateral, there is no guarantor in respect of the financial obligations of the issuer, but the investors should look to the value of the collateral for repayment[3]. Credit-linked notes (CLNs) typically involve swap arrangements between the issuer and a swap counterparty. In the case of Minibonds the swap counterparty was a Lehman financing company, whose obligations were guaranteed by Lehman Brothers Holdings Inc. ("LBHI") as the swap counterparty guarantor.

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[1] A summary of points compiled from CFD's internal manual has been submitted to the Subcommittee as Appendix C to the written statement of Mr. Brian Ho of 7 July 2009.

[2] See also Para 6.2.2, Appendix 2, Report to the Financial Secretary on Issues raised by the Lehman Minibonds crisis of December 2008.

[3] For Series 5, 6, 7 and 9, the proceeds of the issue were invested in notes issued by Lehman Brothers Treasury Co. B.V. (Treasury) and Lehman Brothers Holdings Inc. ("LBHI") guaranteed payments under these notes in the event that Treasury defaulted i.e. the guarantee was to the issuer. LBHI did not give the noteholders any guarantee and the prospectus stated "The notes are not capital guaranteed investments". From Series 10 to 36 LBHI only guaranteed the due and punctual payment of amounts payable by the swap counterparty (Lehman Brothers Special Financing Inc). These amounts were the premiums paid by the swap counterparty for the issuer entering into the swaps. In the event of a default by the swap counterparty, the issuer could make a claim against LBHI for the premiums not paid. The guarantee was again to the issuer, not the noteholders.

It must be noted that LBHI was only guaranteeing the obligations owed by the swap counterparty towards the issuer. The investors are not parties to the swap arrangements. In the case of Constellation Notes, DBS Bank was the swap counterparty itself and there was no swap counterparty guarantor.

2.4 Although in both cases the swap counterparty or swap guarantor was not a "guarantor", the SFC nevertheless applied the above eligibility requirements on the swap counterparty / swap counterparty guarantor and the collateral.

Prudential regulation of LBHI and DBS Bank

2.4 LBHI the swap counterparty guarantor, was the fourth largest investment bank holding company in the US and was regulated by the US Securities and Exchange Commission which has stated that it is a prudential regulator. Commissioner Annette L. Nazareth said this in March 2007[4] -

> "The best example, to date, of our adoption of a prudential regulatory approach is our Consolidated Supervised Entity (CSE) Program. Under this prudential regime we supervise five of our largest investment bank holding companies. The Program is crafted to allow the Commission to monitor for, and act quickly in response to, financial or operational weaknesses in a supervised entity's holding company or unregulated affiliates — that may jeopardize bank and broker affiliates or the broader financial system. I believe the success the Commission has had to date in its oversight of CSEs presages the direction regulation needs to take in the future.
>
> The aim of the Consolidated Supervised Entity Program is to supervise holding companies of well-capitalized broker-dealers in a manner broadly consistent with the Federal Reserve's bank holding company oversight. The Program operates along side, but not in lieu of, the Commission's compliance program for broker-dealers. The aim is to effectively monitor the holding company, and unregulated entities within the group, for financial and operational weaknesses that might place regulated entities or the broader financial system at risk. The Commission has authority under its CSE rules to take action in the event of a weakness or potential weakness."

2.5 DBS Bank was regulated by The Monetary Authority of Singapore which is also a prudential regulator.

Six pillars

2.5 I would add that disclosure is one of the six pillars to achieve investor protection. Other pillars include conduct regulation to ensure that products sold to investors are suitable to them.

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[4] http://www.sec.gov/news/speech/2007/spch032607aln.htm

3. **What were the exemptions, if any, granted to the issuer of Minibonds under section 342A(1) of CO? Please advise whether SFC is empowered under CO to authorize the registration of prospectuses (such as those of Minibonds and other LB-related credit linked notes) subject to conditions. If no, please provide the reasons; if yes, what conditions SFC may impose and whether SFC had in fact done so in relation to the aforesaid products before mid-September 2008.**

3.1 The SFC has power under sections 38A and 342A(1) of the CO to grant exemptions, or waivers, from compliance with the requirement that a prospectus must contain the information set out in applicable sections of the CO and paragraphs of the Third Schedule to the CO. However, the applicant for a waiver must satisfy the SFC that the exemption will not prejudice the interest of the investing public and justify the waiver by reference to one of the two grounds laid down in the section i.e. that compliance with any or all of those requirements –

(a) would be irrelevant or unduly burdensome; or
(b) is otherwise unnecessary or inappropriate.

3.2 For each Series of Minibonds the issuer was granted an exemption, separately for the programme prospectus and the issue prospectus, from compliance with the requirement that a prospectus must contain the information set out in those sections of the CO and those paragraphs of the the Third Schedule to the CO which were specified in the notice of exemption.

3.3 By way of example, in respect of the issue prospectus for Minibond Series 36, the issuer was exempted from compliance with section 342(1)(b) of the Companies Ordinance (in relation to the requirement for the Issue Prospectus to contain a Chinese translation) on the ground that it would be unduly burdensome for the Issuer to so provide and irrelevant to prospective investors, since a separate Chinese language version of the Issue Prospectus has been prepared and will be made available simultaneously with the English language version of the Issue Prospectus and a prospective investor will decide which language version best suit their circumstances.

3.4 In respect of the issue prospectus for Minibond Series 36, the issuer was also exempted from compliance with paragraphs 27 and 31 of the Third Schedule to the CO on the grounds that producing financial statements or auditor's report would be unduly burdensome for the Issuer since the Issuer was not required to do so under Cayman Islands law. Furthermore, the inclusion of such financial statements or auditor's report would be irrelevant in the context of the Issuer as a special purpose company and would not impact on a prospective investor's decision to purchase the Notes, the obligations of the Issuer under the Notes being secured on the collateral and the swap arrangements.

3.5 Waivers are also often granted from including information in the issue prospectus because the necessary information can be found in the programme prospectus, or by reading the two prospectuses together.

3.6 Under section 342A(1) the SFC can agree to waive a requirement and impose a condition related to the requirement in the Third Schedule which is being waived. However, the SFC cannot agree to waive a requirement

relating to the contents of the prospectus (and the disclosures made) and then impose a condition relating to a completely different matter such as the structure of the product. To do so would be ultra vires.

3.7 Details of the exemptions granted to the issuer of Minibonds, and indeed all product issuers, under section 342A(1) of the CO, with supporting reasons and conditions to the waivers are available on the SFC's website.

3.8 In the latter part of this question we are asked whether SFC is empowered under CO to authorize the registration of prospectuses subject to conditions. The SFC is empowered to authorize prospectuses under sections 38D and 342C of the CO. Sections 38D and 342C of the CO do not provide for a power to impose conditions on an authorization of a prospectus for registration.

4. **Please explain whether SFC had ever considered suggesting to the Financial Secretary to prescribe structured notes as "collective investment schemes" under section 393 of SFO in order to bring the notes within the ambit of section 104 of SFO? If no, please provide the reasons; if yes, why this had not been done.**

4.1 Since structured notes take the legal form of "debentures", the relevant prospectuses have to comply with the registration and applicable disclosure requirements in the CO. As they are already regulated under the CO prospectus regime, the prospectuses of structured notes are therefore exempted from the offers of investments regime in Part IV of the SFO under section 103(3)(a).

4.2 We can find no evidence of the SFC considering suggesting to the Financial Secretary ("FS") that he should prescribe structured notes as "collective investment schemes". The reason being that the suggestion would not work.

4.3 If the FS were to prescribe structured notes as "collective investment schemes" under section 393 of SFO, the prospectus would still be a prospectus which would have to be authorized under the CO regime. Section 103(3)(a)(ii) of the SFO provides section 103(1) of the SFO does not apply to a prospectus which complies with Part XII of the CO. Accordingly, there would be no need for an issuer to seek authorization under section 104 of the SFO. The issuer could issue the prospectus to the public without authorization under section 104 of the SFO.

4.4 Section 393 of SFO confers no power on the FS to disapply the provisions of the CO in relation to products which are structured as debentures. Any proposal to bring structured notes under the SFO requires amendment to both the SFO and the CO. This proposal would therefore be subject to public discussion/ market consultation before any legislative amendments proposals, if any, could be introduced into the LegCo for consideration.

5. Please provide, preferably in the form of a table, a comparison of the regulatory requirements for public offers of investment products under the CO prospectus regime and the SFO offers of investments regime, including how the investing public are accorded protection under each of the two regimes. Please also explain the differences between SFC's duties under section 104 of SFO and those under section 105 of SFO.

5.1 We attach a table with a comparison of the regulatory requirements for public offers of investment products under the CO prospectus regime and the SFO offers of investments regime *(Annex 1)*.

5.2 The first pillar in our regulatory regime (i.e. disclosure) operates by authorizing the documents which fully disclose the features and risks of the product (whether under section 38D or 342C of the CO or section 105 of the SFO). Investor protection is achieved by disclosure supported by a range of other measures including conduct regulation to ensure suitability, effective enforcement against those who fail to comply and appropriate investor education[5]. Reliance on the disclosure in a prospectus or offering document is also supported by statutory liability for untrue statements under the CO regime and liability for fraudulent or reckless misrepresentations under the SFO regime[6].

5.3 In section 8 and Appendix 2 to the Report to the Financial Secretary on Issues raised by the Lehman Minibonds crisis of December 2008 ("the FS Report") we explain the process of authorization of product documentation by the SFC under both the CO and the SFO. I will not repeat what is said there but will only expand on certain points. The key areas we look at in the vetting process are summarised in paragraphs 16 and 17 of my written statement to the Subcommittee dated 10 June 2009 and there is a flowchart of the procedure in Appendix 4 to that statement. S36 W13(C)

Product categorization

5.4 The regulatory regime that applies depends upon the nature of the product. I will start by explaining briefly the product categorization.

CO Regime	Examples	Exceptions (Sch. 17, CO)
Shares		Examples of commonly used exceptions : Offers to professional investors
Debentures	Corporate bonds and notes Structured notes (such as Credit Linked Notes (CLN) Equity Linked Notes (ELN) and Fund Linked Notes (FLN))	Offers to not more than 50 persons Offers where the minimum principal amount is HK$500,000 or more Offers of interests in a collective investment scheme where the offer document has been authorized under section 105 of the SFO[7]

[5] This is amplified at paragraph 27 et seq of my first statement.

[6] See sections 40, 40A, 342E and 342F of the CO and sections 107 and 108 of the SFO.

[7] See sections 1, 2, and 4 of the Seventeenth Schedule to the CO.

5.5 CLNs, ELNs and FLNs fall within the definition of "debentures" and thus are subject to the prospectus regime of the CO. The documents for these products are authorized by CFD which is responsible for the CO regime.

Part IV Regime	Examples	Exceptions (s.103(2)-(10))
Securities		Examples of commonly used exceptions : Documents [8] issued by an intermediary licensed or registered for Type 1, 4 or 6 regulated activity A prospectus which complies with, or is exempt from[9], Part II or XII of the CO Marketing materials falling within s.38B(2) of the CO[10] Listed securities and Government securities
Regulated Investment Agreements (RIA)	Equity Linked Deposits (ELD))	
Collective Investment Schemes (CIS)	Unit Trusts Mutual funds REITs Investment-Linked Assurance Schemes (ILAS)	A prospectus which complies with, or is exempt from, Part II or XII of the CO (relevant only to mutual funds) Marketing materials falling within s.38B(2) of the CO[11]

5.6 IPD is primarily responsible for the authorization of collective investment schemes (CIS) (pursuant to powers under section 104 of the SFO) and their offering documents and advertisements under section 105 of the SFO. The more common types of CIS are funds and investment-linked assurance schemes. IPD is also responsible for the authorization of the offering documents and advertisements under the SFO in respect of equity-linked deposits (ELDs) which are regulated investment agreements (RIA).It will be apparent that products whose offering documents are regulated under the CO regime are exempted from the application of the SFO regime.

Code of Conduct

5.7 It is important to mention that, regardless of whether the CO or the SFO regime applied, the Code of Conduct imposes a duty on the intermediary to ensure that the product is suitable for the customer.

CO regime or "prospectus regime"

5.8 Parts II and XII of the CO prohibit the issue of an offer document for shares

[8] The term "Documents" includes any advertisement, invitation or document.

[9] Advertisements relating to offers which are exempt under the Seventeenth Schedule to the CO fall into this category.

[10] This category mainly relates to extracts from or an abridged version of a prospectus.

[11] This category relates to advertisements which have been authorized under s.105 of the SFO.

and debentures unless the document (the "prospectus") contains the information set out in the Third Schedule to the CO and the issue is authorized. For structured products that take the form of debentures, the prospectus regime applies.

5.9 The SFC has power under sections 38A and 342A(1) of the CO to grant waivers from compliance with the requirement that a prospectus contains the information set out in the Third Schedule to the CO. However, the applicant for a waiver must satisfy the SFC that the exemption will not prejudice the interest of the investing public and justify the waiver by reference to one of the two grounds laid down in the section i.e. that compliance with any or all of those requirements –

(a) would be irrelevant or unduly burdensome; or
(b) is otherwise unnecessary or inappropriate.

5.10 Under section 342A(1) of the CO the SFC can agree to waive a requirement and impose a condition related to the requirement in the Third Schedule to the CO which is being waived. However, the SFC cannot agree to waive a requirement relating to the contents of the prospectus and the disclosures made and impose a condition relating to a completely different matter such as the structure of the product. To do so would be ultra vires.

5.11 CFD did require issuers to meet the eligibility requirements applicable to listed structured products under Chapter 15A of the Main Board Listing Rules. These include a financial requirement of a minimum net asset value for issuer/guarantor of HK$2 billion and for the issuer/guarantor/collateral to either be regulated or to have a credit rating of the top three investment grades [12] . CFD requires issuers/guarantors/swap counterparty/swap counterparty guarantors of unlisted structured products to comply with these requirements as appropriate. These are akin to structural requirements which are imposed through administrative means.

5.12 There are 12 exceptions to the prospectus regime set out in the Seventeenth Schedule to the CO. These include exemptions for offers which are offers to professional investors, offers to not more than 50 persons, offers where the minimum principal amount is HK$500,000 or more and offers of interests in a collective investment scheme where the offer document has been authorized under section 105 of the SFO. These exceptions, which generally codified long standing market practice, were approved by LegCo in 2004.

SFO regime ("Part IV Regime")

5.13 The Part IV regime applies to "securities", "regulated investment agreements" ("RIA") and "collective investment schemes" ("CIS"). The term CIS encompasses all unit trusts, mutual funds, REITs and investment-linked assurance schemes. The term RIA covers ELDs[13].

5.14 There are three key sections in Part IV of the SFO: sections 103, 104 and 105.

5.15 Under section 103 of the SFO there is a general prohibition on the issue to the public of advertisements, invitations and documents relating to securities, RIAs and CISs. This prohibition is subject to a large number of exceptions.

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[12] See Para 6.2.2, Appendix 2, Report to the Financial Secretary on Issues raised by the Lehman Minibonds crisis of December 2008.

[13] It would also cover CLNs, ELNs and FLNs but the documentation relating to those structured products is exempt as it falls within the CO prospectus regime.

Three of these are particularly relevant –

(1) Intermediaries may issue advertisements, invitations or documents relating to securities. This exemption is not available for securities which are a CIS which has not been authorized.

(2) Prospectuses which comply with or are exempt from compliance with Part II or XII of the CO. This means that structured products which are debentures (a form of "securities") are not subject to the general prohibition in section103.

(3) Marketing materials falling within section 38B(2) of the CO which mainly relates to extracts from or an abridged version of a prospectus. This means that most marketing materials for structured products in the form of debentures are not subject to the general prohibition in section 103.

5.16 Under section 104 of the SFO the SFC may authorize CISs before they are offered to the public. The SFC has published product codes relating to the main product groups such as the Code on Unit Trusts and Mutual Funds. However the SFC cannot authorize products such as ELDs and other RIAs as these products are not CISs and the provisions of section 104 do not apply to them. The SFC has therefore not published codes relating to these products. However, the SFC may authorize the issue of an advertisement for non-CIS products such as ELDs.

5.17 Section 105 of the SFO provides that the SFC may authorize the issue of any advertisement, invitation or document which is or contains an invitation to do any act referred to in section 103(1)(a) or (b). As subsections 103(2) to (11) provide that subsection 103(1) does not apply to a wide range of documents, the power to authorize documents under section 105 is more restricted than might appear at first sight. For example it does not apply to –

(1) Prospectuses which comply with or are exempt from compliance with Part II or XII of the CO (see section 103(3)). This means that prospectuses for structured products (CLNs, ELNs or FLNs) which are debentures are not authorized under section105 of the SFO.

(2) Marketing materials falling within section 38B(2) of the CO which mainly relates to extracts from or an abridged version of a prospectus (see section 103(3)). This means that most marketing materials for structured products (CLNs, ELNs or FLNs) which are debentures are not required to be authorized under section 105 of the SFO[14].

5.18 There is power in section 105(1) to impose conditions "on the matter to which the advertisement, invitation or document relates" and a power under section 105(5) to refuse to authorize the issue of an advertisement where it is not satisfied that the subject matter is not in the interest of the investing public.

[14] In relation to debentures like structured notes, an advertisement can be submitted for authorization under both section 38B(2A)(b) of the CO and section 105(1) of the SFO or under section 105 of the SFO only. See also SFC's Review Report to the FS, paragraphs 5.5.1 and 5.5.2 of Appendix 2.

6. Paragraph 7 of Mr Harold KO's written statement (W23(C)) stated that there was a so-called "Harmonization Project" which was kicked-off in early 2005. Please advise:

(a) whether the work of the aforesaid Project was related in anyway to the consultation exercise conducted by SFC through the "Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance" (Appendix 7 to S1) in August 2005; and

(b) whether any of the results from the "Harmonization Project" were incorporated in the consultation paper or subsequently taken on board in formulating any of SFC's policies? If yes, please provide the particulars; if no, the reasons.

6.1 The summary in Paragraph 7 of the Mr Harold Ko's written statement distorts the facts. First, there were not different approaches adopted by different departments of the SFC - IPD and CFD. There were two different regimes under the CO and SFO and the responsibility of the SFC was to administer both regimes at the same time. The harmonization of these systems was not a matter of internal organisation or discretion because it involved major changes to legislation as well as substantial changes for established market industries affecting not only structured products like Minibonds. The harmonization project was simply a part of a much larger project and progressed as part of of that larger project. W23(C)

6.2 In 2001, there was an internal debate on how structured products including listed ones should be regulated. Part and parcel of this debate related to whether structured products in the form of debentures should remain to be regulated under the CO or should there be changes for them to be regulated under the Protection of Investors Ordinance ("PIO") having regard to the greater flexibility afforded in that regime. However, after some discussion, the SFC recognized that the proposal could not be implemented without at the same time conducting a wholesale review of relevant legislation.

6.3 As I explain at paragraph 4. of my first written statement submitted to the Subcommittee on 10 June 2009, the former FS stated in his Budget Speech in 2002 that the Government would work together with the regulators to increase liquidity, attract more financial product issuers to Hong Kong, as well as capital and investors from the Mainland and overseas. The Financial Market Development Task Force, set up under the former FS's direction to provide a high level forum to coordinate new initiatives on the development of Hong Kong's financial markets, endorsed a three-phase approach to review and reform the CO which was designed to modernise the regime for the public offering of shares and debentures, which had been in place since the 1980s. W13(C)

Phases I and 2

6.4 Phase 1 - in February 2003 the SFC issued various guidelines (including the CO Offer Awareness Guidelines[15], and the Guidelines on Using a Dual

[15] Guidelines on applying for a relaxation from the procedural formalities to be fulfilled upon registration of a prospectus under the Companies Ordinance.

Prospectus Structure[16]) to streamline the procedures for registration and issue of prospectuses.

6.5 Phase 2 - completed in December 2004. This phase involved legislative amendments to the CO, namely, the introduction of the safe harbours, and the advertising regime in respect of CO prospectuses. One of the most significant measures towards enhancing investor protection is the extension of prospectus liability to advertisements issued in connection with public offers of shares and debentures under the CO (by virtue of section 40(6) of the CO). This extension in effect closed the so-called "regulatory gap" under the PIO. As a result of this extension, it is practically no longer viable for a licensed corporation (Types 1, 4 and 6) to rely on section 103(2)(a)(i) of the SFO (then section 4(3)(a)(i) of the PIO) to issue advertisements for unlisted structured notes/debentures without SFC's prior authorization. This means from then on, advertisements in relation to unlisted retail structured products were brought to the SFC for authorization under section 38B(2) of the CO.

Phase 3

6.6 Phase 3 – this was a comprehensive review of the CO prospectus regime. This was a massive project involving a full scale reform containing 21 proposals in conceptual form, many of which did not specifically cater for structured products alone. The goal was to create a legal framework that would accommodate the financial market's needs in the 21st century, cater for issuers and investors alike, and support Hong Kong's continuing role as an international financial center. **S1-Appendix 7**

6.7 The 2005 Phase 3 consultation paper included proposals which affected a wide arrange of securities offerings and their related matters. To name a few, there were proposals in connection with Initial Public Offerings ("IPOs") – for example, prohibition of pre-IPO research reports, allowing incorporation by reference, and alteration of the scope of CO prospectus liability to include IPO sponsors.

6.8 The SFC also took this opportunity to explore the proposal on harmonization and in its consultation paper released in August 2005, the SFC noted that: (i) the inconclusive case law on the definition of "debenture" created the potential for some investments to be regulated under either CO or SFO; (ii) although CO was originally intended for capital raising, in recent years there was a trend for other types of non capital raising investments to go down the CO route; (iii) whilst the SFC had power to grant exemptions from some of the rigid requirements under the CO, the exercise of such power was constrained by statute; (iv) by contrast, the SFO regime is more flexible and caters for the issue of codes and guidelines tailored to take into account the nature of the product.

6.9 As stated in the August 2005 consultation paper, the SFC believed that it was desirable to harmonize the legal and regulatory treatment of investment arrangements and instruments having similar characteristics. The SFC also stated in its Regulatory Challenges and Responses of March 2006 that it would ensure similar regulation of functionally similar investment products. **S23**

[16] Guidelines on using a "dual prospectus" structure to conduct programme offers of shares or debentures requiring a prospectus under the Companies Ordinance.

6.10 The proposal for harmonization under Phase 3 initially suggested the merging of the CO prospectus regime into the SFO investment advertisement regime, thereby creating a unified offering regime.

6.11 Whilst the SFC recognised that it was premature to issue any guidelines or codes under section 399 of the SFO without a revised legal framework in place, with a view to eventually achieving harmonization, the SFC at working level started discussion and there was an internal project to prepare a draft code on investment-linked products. Meanwhile, the CO reform underwent the Phase 3 consultation.

6.12 As noted in the Phase 3 consultation conclusions published in September 2006, in response to the public comments received, the original proposal to unify the CO and SFO was to be modified. Instead, the SFC proposed an alternative approach to achieve the same harmonization objective – this is by way of keeping the respective existing public offer regimes under CO and SFO as two separate regimes and carving out "structured products" from the definition of "debenture" under the CO.

6.13 Since Phase 3 consultation conclusions in September 2006, the SFC undertook a substantial amount of work to take forward the various initiatives that were in many cases only conceptual approaches. This included formulating detailed proposals to implement each of the initiatives, soft-consulting different stakeholders on different sets of detailed proposals, reviewing comments from soft consultations and revising the detailed proposals to address stakeholder comments. A substantial amount of soft consulting was needed on the detailed logistics and technical aspects of certain proposals to reduce any process risk associated with implementation of these proposals. For example, on the detailed proposals for one initiative concerning withdrawal mechanism during an IPO which was widely supported in the Phase 3 consultation, we sent letters to 37 key market practitioners to seek their views. It took some of these practitioners several months to provide their responses. We had also briefed the Standing Committee on Company Law Reform on the detailed proposal for this initiative. S17

6.14 Notwithstanding the strong support the initiative received in the Phase 3 consultation, responses received during the soft consultation on the detailed proposals indicated that the initiative needed revision. The SFC then had to conduct research into a different proposal which could be offered as an alternative. This was just one of the 15 proposals and consumed a substantial amount of time to complete. The SFC also engaged an external legal consultant since June 2007 to assist in preparing the draft drafting instructions to take forward the details to implement the conceptual initiatives. The drafting exercise was complex as initial detailed proposals had to be continuously refined to take into account comments received during the various soft consultation exercises as well as comments from within the SFC. The initial draft of the Draft Drafting Instructions, which consisted of more than 200 pages, was in close to final form at the brink of Lehman's bankruptcy in September 2008.

Further steps to harmonize – SFC's September and October 2009 consultation papers

6.15 In September 2009, the SFC published the Consultation Paper on Proposals to Enhance Protection for the Investing Public ("Consultation Paper"). The Consultation Paper. The Consultation Paper proposes enhancements to the

regulation of the sale of retail products in response to issues highlighted by the early termination of Lehman products. One of the key proposals is the SFC Products Handbook. The Handbook consolidates the criteria that the SFC will normally consider in authorizing offering documentation and advertisements. Whilst the Handbook covers unit trusts and mutual funds, and investment-linked assurance schemes, it also contains a new Code on Unlisted Structured Products.

6.16 The main proposals in the Code on Unlisted Structured Products include eligibility requirements for issuers and guarantors, appointment of a Hong Kong product arranger, and eligibility requirements for collateral (where applicable), content requirement for offering documents, and advertising guidelines. Many of these had in the past been applied in practice by way of administrative measures, but in light of the expectation that the structured products market will re-establish itself after the current financial crisis, the SFC believes that it is helpful to codify certain existing practices and augment certain existing requirements.

6.17 It was stated in the September 2009 consultation paper, that there would be a separate consultation on certain legislative reforms relating to the prospectus provisions in the CO, including proposed legislative amendments to the CO and the SFO respectively.

6.18 The October 2009 consultation paper on possible reforms to the prospectus regime in the CO and the offers of investments regime in the SFO is a further step in the process of CO reform in light of the Phase 3 consultation and its feedback. The aim of the October 2009 consultation paper is to transfer the regulation of the public offering of structured products in the form of debentures from the CO prospectus regime to the offers of investments regime in the SFO, under which the intended Code on Unlisted Structured Products would apply on such products. Other outstanding initiatives mentioned in the Phase 3 consultation paper will be a subject of further CO reform exercise.

7. Had the Harmonization Project ever been included under SFC's Corporate Plan for any year before 2007 as a "deliverable"? If yes, please provide the details; if no, what was the status of the Project in SFC's work plan?

7.1 In our reply to Q. 6 we have explained that the harmonization project was simply a part of a much larger project and progressed within that larger project. It was not included under SFC's Corporate Plan for any year before 2007 as a "deliverable". It involves changes to primary legislation which is not a matter which is solely under our control. Such proposal would be subject to public discussion / market consultation involving relevant stakeholders, before legislative amendments proposals, if any, could be introduced into the LegCo for consideration.

7.2 At paragraph 63 of my first written statement submitted to the Subcommittee on 10 June 2009 I explained that the SFC issued the document "Regulatory Challenges and Responses" in March 2006. This document sets out the key regulatory challenges and issues the SFC would face from 2006 to 2009 and identified the strategic initiatives that would be implemented to respond to these challenges. It included a general objective to - W13(C) S23

- Work with the Government and other agencies to address gaps and inconsistencies in the regulation of sales practices of functionally similar products.

8. Mr Harold Ko said that instead of a set of guidelines on suitability of recommendations or solicitations concerning investment products, SFC issued in May 2007 the Questions and Answers on Suitability Obligations (FAQ) (M4). Please explain SFC's considerations for not issuing the relevant requirements in the form of guidelines under section 399 of SFO. What are the differences, in terms of compliance obligations on the part of intermediaries and the protection to investors, between a set of FAQ and a set of guidelines?

8.1 The suitability requirements are already set out in paragraph 5.2 of the Code of Conduct published under section 169 of the SFO. Failure to comply with the Code would adversely affect a regulated person's fitness and properness to be licensed or registered. **S1-Appendix 11**

8.2 In the light of the findings of the thematic review of investment advisers conducted in 2004 which were reported in 2005 (similar issues were also identified in 2006 and covered in the 2007 report), it was decided that some elaboration of the SFC's expectations of how intermediaries should comply with paragraph 5.2 of the Code of Conduct would help raise industry standards (see paragraph 66 of my written statement submitted to the Subcommittee dated 10 June 2009). Since the regulatory requirements were already set out in the Code of Conduct, it was not necessary to issue new ones. Rather, we wanted to reinforce and remind intermediaries of their obligations under the Code of Conduct. **W13(C)**

8.3 The Code of Conduct has been in place for a long time and is a clear, simple, well-understood statement of conduct standards. The cardinal obligations in the Code of Conduct have been especially paramount and clear for a very long time and are entirely consistent with international standards. The Towry Law Agreement and the Court of Appeal decision in Barber (see page 37 of the ~~Second~~ Written Statement dated 8 March 2010 of the CEO/SFC) raised the prominence of the Code of Conduct. The Barber case specifically demonstrates the enforceability of the Code of Conduct especially paragraph 5.2 thereof on suitability. Hence we chose to issue FAQs for this purpose as we were articulating our understanding of what paragraph 5.2 of the Code of Conduct already required and making it very clear to the industry our expectations under that paragraph so no public consultation was necessary. Both SFC and Hong Kong Monetary Authority informed the intermediaries of such FAQ in May 2007. **S57**

8.4 Issuing guidance in the form of FAQ is one of the tools SFC uses to explain to the market how we interpret certain regulatory requirements, including the Code of Conduct. Other tools are guidelines and circulars. Whether they take the form of FAQs and guidelines, these do not have the force of law but non-compliance with such would affect the fitness and properness of licensed persons. **M4**

8.5 Although the FAQ was not issued under section 399 of SFO, it is clearly specified in the introduction to the FAQ that "the SFC will take into account compliance with guidance in the FAQ to determine whether a licensed or registered person is fit and proper to carry out financial planning and wealth management business in Hong Kong." In taking regulatory action against intermediaries in mis-selling cases for their breach of suitability obligations

under the Code of Conduct the SFC has taken into account the extent to which the guidance set out in the FAQ has been followed. Hence, in practice, there is no difference between FAQ and guidelines in terms of compliance since an intermediary's failure to comply with FAQ will be equally relevant to an assessment of its fitness and properness as its failure to comply with guidelines.

8.6 As to the legitimacy of taking the FAQs into account in a fitness and properness assessment, section 129(1) SFO provides that –

> "In considering whether a person is a fit and proper person for the purposes of any provision of this Part, the Commission...shall, in addition to any other matter that the Commission...may consider relevant, but subject to section 134, have regard to - (a)...". (Emphasis added)

8.7 In the disciplinary context, section 194(3) provides as follows:

> "The Commission, in determining whether a regulated person is a fit and proper person within the meaning of subsection (1)(b) or (2)(b), may, among other matters (including those specified in section 129), take into account such present or past conduct of the regulated person as it considers appropriate in the circumstances of the case". (Emphasis added)

8.8 There is therefore no need for the FAQs to be made under section 399 of the SFO. The FAQs will be taken into account in assessing the fitness and properness of an intermediary and the SFC may impose sanctions on an intermediary, ranging from fines to revocation of licence, where its fitness and properness has been impugned.

8.9 SFC's enforcement experience is that the FAQs have been instrumental in enforcing key conduct requirements in the Code of Conduct as well as in establishing key criteria in assessing fitness and properness in the sale of securities. The FAQs need to be read with the Code of Conduct. No material difference arises by virtue of the fact that the FAQs were not made under section 399.

10. In addition to the information stated in paragraphs 14.1 to 14.3 of SFC's review report entitled "Issues raised by the Lehman Minibonds crisis – Report to the Financial Secretary December 2008" (S36), please provide information to confirm whether LB-related structured financial products (similar to Minibonds and Constellation Notes) were available for sale to retail investors in major international financial centers, notably the United States, the United Kingdom and Australia.

10.1 You have requested information to confirm whether LB-related structured financial products (similar to Minibonds and Constellation Notes) were available for sale to retail investors in major international financial centers.

10.2 As we explained in the SFC's Review Report to the FS **(S36)** similar Lehman related products were sold overseas :

- In Asia examples include Lehman-arranged CLNs sold under the name Minibonds which are found in Hong Kong and Singapore. Lehman-linked CLNs were also sold in Hong Kong, Singapore and Indonesia. Taiwan's Financial Supervisory Commission reported that domestic financial institutions, including banks, securities firms, fund managers and insurance firms, were holding Lehman related products totalling NT $ 40 billion in value, while their wealth management clients also held some NT $ 40 billion worth of Lehman related structured notes.

- In Europe examples include Lehman issued products sold in Spain. Protestors claim that almost 3,500 Spanish investors have lost a combined EUR 3 billion after investing in products issued by Lehman Brothers under advice from Spanish private banks. In Germany, the product with the name "Zertifikate", or Certificate in English, was sold by banks to around 60,000 small investors, according to the Berlin-based German Institute for Investor Protection. The overall losses are said to be up to EUR 500 million. These Certificates are structured financial products in the form of bearer instruments of Lehman Brothers and the returns are linked to the performance of certain stocks or indices.

- In the USA examples include Lehman issued Principal Protected Notes designed to return the principal invested at maturity along with gains from a broad index such as S&P 500. These were unsecured debts of Lehman Brothers. According to StructuredRetailProducts.com Lehman Brothers sold over US $ 900 million of retail structured products in 2008.

10.3 Retail credit-linked notes (CLNs) were sold in a number of other jurisdictions, including Australia (e.g. Mahogany Notes), Ireland (e.g. Security Note), Japan (e.g. Secured Fixed Rate Credit Linked Notes), Germany (e.g. DZ Bank Cobold 74), Denmark (e.g. Kreditinderekserede obligationer 2003/2008), Norway, Switzerland (e.g. DREEM FTD Note) and the Netherlands (e.g. Managed Rente Plus Note). .

10.4 We attach a copy of a press report dated 8 November 2009 which comments on UK court proceedings by Perpetual Trustee Company Ltd. ("Perpetual") against Lehman Brothers Special Financing Inc. ("LBSF") *(Annex 2)*. The UK court action was commenced by Perpetual to recover collateral held as security in respect of the Mahogany Notes. The decision of the Court of

Appeal in the UK explains the structure (see para 5) *(Annex 3)*. It will be seen that the structure of the Mahogany Notes was similar to that of Minibonds.

Structured Products sold in the United Kingdom and the United States

10.5 Sarah McCarthy-Fry, the Exchequer Secretary to the UK Treasury told parliament in July 2009 that according to Financial Services Authority ("FSA") statistics, around 5,620 investors in the UK bought Lehman backed structured products, and £107 million was invested in 23 products, with an average investment size of £14,000. Approximately 95% were sold by 800 intermediaries, and the majority were sold in Q2 and Q3 2008, with a maturity of either 2013 or 2014, said McCarthy-Fry. (See attached article "UK Treasury questioned over Lehman structured products" *(Annex 4)*)

10.6 In December 2009 it was reported that the Financial Services Compensation Scheme ("FSCS") has said it is ready to start processing claims from investors who lost money on structured products hit by the collapse of Lehman Brothers. However, it is currently only willing to pay compensation to those who brought structured products offering the promise of capital security, and not those who were sold capital at risk products.(See attached article "FSCS begins payment over Lehman Backed Products" *(Annex 5)*)

10.7 The UK has also experienced problems with mis-selling of Lehman structured products. For example, the FSA in the UK has this month fined RSM Tenon Financial Services Limited £700,000 for significant failings in its advice and sales processes relating to Lehman-backed structured products. The FSA determined that RSM Tenon breached principles requiring that RSM Tenon ensure the suitability of its advice and discretionary decisions for any customer who is entitled to reply upon its judgment.

10.8 The US Structured Products Association estimates the dollar value of investments in structured products rose to US$70 billion in 2006 and US$120 billion in 2007, almost half of which was sold to individual investors. According to Financial Industry Regulatory Authority's ("FINRA's") arbitration statistics, as of June 2009 nearly 400 arbitration claims have been filed with FINRA for investment products categorized as "Derivative Securities" and suitability claims for the first half of 2009 were more than double the number of claims for all of 2006, and misrepresentation claims have more than tripled the number filed in 2006. (see attached article "Lehman Principal Protected Note Arbitrations on the Rise" *(Annex 6)*)

Comparison of the CO Prospectus Regime and the SFO Offers of Investments Regime

		CO Prospectus Regime	SFO Offers of Investments Regime
1.	SFC authorisation	Required - *sections 38D/342C of CO*	Required – *sections 103(1) and 105 of SFO*
2.	Prospectus registration at the Companies Registry	Required – *sections 38D/342C of CO*	Not required
3.	Expert's written consent to the issue of the prospectus containing a statement by such expert	Required – *sections 38C/342B of CO*	Not required
4.	Content requirements – what information needs to be set out in the prospectus/offering document?	Specific disclosure requirements prescribed in *3rd Schedule to CO.* Overall disclosure standard described in *paragraph 3 of Part I to 3rd Schedule to CO*: "Sufficient particulars and information to enable a reasonable person to form as a result thereof a valid and justifiable opinion of the shares or debentures and the financial condition and profitability of the company at the time of the issue of the prospectus, taking into account the nature of the shares or debentures being offered and the nature of the company, and the nature of the persons likely to consider acquiring them."	No statutory requirements specifying the contents or level of disclosure in offering documents authorised for issue under SFO. Under section 104 of the SFO the SFC may authorize CISs (such as Unit Trusts, Mutual funds and REITs). The SFC has published Codes which set out disclosure requirements for the offering documents of CISs (e.g. The Code on Unit Trusts and Mutual Funds, where the information required to be disclosed in the Offering Document is set out in Appendix C.) In vetting and authorising documents under section 105 of SFO, the SFC largely refers to requirements that apply to products that have broadly similar risk and reward exposure.
5.	Safe harbours	12 exemptions are set out in *Part 1 of 17th Schedule to CO*, and some examples are:	The exemptions are set out in *sections 103(2), 103(3) and 103(5) to (8) of SFO.* Some examples are:

		CO Prospectus Regime	SFO Offers of Investments Regime
		(a) an offer to not more than 50 persons; (b) an offer with a minimum subscription size of HK$500,000; (c) an offer with a maximum size of HK$5 million; and (d) an offer to professional investors (within the meaning of section 1 of Part 1 of Schedule 1 to SFO).	(a) an offer to professional investors; (b) an offer made by or on behalf of intermediaries licensed or registered for Type 1, type 4 or Type 6 regulated activity (whether acting as principal or agent) in respect of securities; (c) an offer to persons outside HK; (d) the issue of a prospectus registered under CO; and (e) documents issued in relation to an offer of shares/debentures that falls within any exemption under 17th Schedule to CO.
6.	Liabilities for untrue statement in prospectus, misrepresentation, etc	(I) Civil liabilities *Sections 40/342E of CO* – liability to pay compensation to all persons who subscribe for or purchase any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement included in the prospectus (including a material omission). Defences are set out in s*ections 40(2) and 40(3) of CO*, and some examples are: (a) the person liable proves that, having consented to become a director of the	(I) Civil liabilities *Section 108 of SFO* – private right of action for investors to recover compensation for any pecuniary loss sustained in consequence of the reliance by that person on any fraudulent, reckless or negligent misrepresentation made to induce that person to invest in securities, CISs or RIAs. Where a court has jurisdiction to determine such an action, it may, where it is within its jurisdiction to entertain an application for an injunction, grant an injunction in addition to, or in substitution for, damages, on such terms

		CO Prospectus Regime	SFO Offers of Investments Regime
		company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or (b) the person liable proves that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or (c) the person liable proves that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto and gave reasonable public notice of the withdrawal and of the reason therefore. <u>(II) Criminal liabilities</u> *Sections 40A/342F of CO* – criminal liabilities (ie, imprisonment and fine) on any person who authorized the issue (in the case of a company incorporated outside HK, "the issue, circulation or distribution") of a prospectus which includes any untrue statement (including a material omission). Defence - the person liable proves either that the statement was immaterial or that he had reasonable grounds to believe and did up to the time of the issue (in the case of a company	and conditions as it considers appropriate. Defences: [not specified] <u>(II) Criminal liabilities</u> *Section 107 of SFO* – offence for a person to induce another, by any fraudulent or reckless misrepresentation, to invest in securities, CISs or RIAs. Defences: [not specified] Maximum penalty for contravention of section 107 of SFO: (a) on conviction on indictment – fine of HK$1,000,000 and 7 years imprisonment; or (b) on summary conviction – fine of HK$100,000 and 6 months imprisonment.

		CO Prospectus Regime	SFO Offers of Investments Regime
		incorporated outside HK, "the time of the issue, circulation or distribution") of the prospectus believe that the statement was true. Maximum penalty for contravention of section 40A of CO: (a) on conviction on indictment – fine of HK$700,000 and 3 years imprisonment; or (b) on summary conviction – fine of HK$150,000 and 12 months imprisonment. Maximum penalty for contravention of section 342F of CO: (a) on conviction on indictment – fine of HK$550,000 and 3 years imprisonment; or (b) on summary conviction – fine of HK$150,000 and 12 months imprisonment.	
7.	Categories of persons liable for untrue statement in prospectus, misrepresentation, etc	(I) Civil liabilities *Sections 40/342E of CO* – the following persons shall be liable: (a) every person who is a director of the company at the time of the issue of the prospectus; (b) every person who has authorized himself	(I) Civil liabilities *Section 108 of SFO* – the person who makes the fraudulent, reckless or negligent misrepresentation by which the investor is induced shall be liable. Note: where a company or other body corporate has made any fraudulent, reckless or negligent misrepresentation by which the

		CO Prospectus Regime	SFO Offers of Investments Regime
		to be named and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time; (c) every person being a promoter of the company; and (d) every person who has authorized the issue (in the case of a company incorporated outside HK, "the issue, circulation or distribution") of the prospectus. (II) Criminal liabilities *Sections 40A/342F of CO* – any person who authorized the issue (in the case of a company incorporated outside HK, "the issue, circulation or distribution") of a prospectus which includes any untrue statement (including a material omission) shall be liable. Note: an expert who has given his consent for his statement to be included in the prospectus shall not be deemed to have authorised the issue of the prospectus by reason only of his having given such consent.	investor is induced, any person who was a director of the company or body corporate at the time when the misrepresentation was made shall, unless it is proved that he did not authorise the making of the misrepresentation, be presumed also to have made the misrepresentation. Note: "Promoters" is not a category of persons identified as being liable for misrepresentations in offering documents. (II) Criminal liabilities *Section 107 of SFO* - any person who makes any fraudulent or reckless misrepresentation for the purpose of inducing another person to invest in securities, CISs or RIAs shall be liable. *Section 390(1) of SFO* - where the commission of an offence under the SFO by a corporation is proved to have been aided, abetted, counselled, procured or induced by, or committed with the consent or connivance of, or attributable to any recklessness on the part of, any officer of the corporation, or any person who was purporting to act in any such capacity, that person, as well as the corporation, is guilty of the offence and is liable to be proceeded against and punished accordingly.
8.	Penalties in case of unauthorised	(I) Company incorporated in HK	*Section 103(1) of SFO* – a person commits a

		CO Prospectus Regime	SFO Offers of Investments Regime
	offers	*Section 38D(8) of CO* - if a prospectus is issued without having been registered by the Registrar of Companies (or without the requisite endorsements), the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable. Maximum penalty for contravention of section 38D(8) of CO (on summary conviction) – fine of HK$100,000 and for continued default, a daily default fine of HK$300 from the date of the issue of the prospectus until a copy thereof is so registered (or until the required documents are endorsed or attached, as the case may be). <u>(II) Company incorporated outside HK</u> *Section 342D of CO* - any person who is knowingly responsible for the issue, circulation or distribution of a prospectus in contravention of the authorisation requirements set out in section 342C of CO shall be liable to a fine. The maximum penalty (on summary conviction) is a fine of HK$150,000.	criminal offence if he issues, or has in his possession for the purposes of issue, whether in HK or elsewhere, an advertisement, invitation or document which to his knowledge is or contains an invitation to the public to participate in an unauthorised investment scheme involving securities, CISs or RIAs. Defence – the person charged proves that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence with which he is charged (*section 103(9) of SFO*). Maximum penalty for contravention of section 103(1) of SFO: (a) on conviction on indictment – fine of HK$500,000 and 3 years imprisonment and in the case of a continuing offence, a further fine of HK$20,000 for every day during which the offence continues; or (b) on summary conviction – fine of HK$100,000 and 6 months imprisonment and in the case of a continuing offence, a further fine of HK$10,000 for every day during which the offence continues.
9.	Appeal mechanism	*Sections 38D(9) and 342C(8) of CO* – any person aggrieved by the refusal to authorize the	*Section 105(7) of SFO* - where the SFC refuses to authorize the issue of any

		CO Prospectus Regime	SFO Offers of Investments Regime
		registration of a prospectus may appeal to the court and the court may either dismiss the appeal or order that the registration of the prospectus be authorized by the SFC.	advertisement, invitation or document, it shall by notice in writing notify the person making the application in question of the decision and the reasons for which it is made. *Section 217 of SFO* - a person aggrieved by the SFC's refusal to authorize the issue of any advertisement, invitation or document may, by notice in writing given to the Securities and Futures Appeals Tribunal (the "**Tribunal**"), apply to the Tribunal for a review of the SFC's decision. Following the review, the Tribunal may: (a) confirm, vary or set aside the decision, and, where the decision is set aside, substitute for the decision any other decision which the Tribunal considers appropriate; or (b) remit the matter in question to the SFC with the directions it considers appropriate, which may include a direction to the SFC to make a decision afresh in respect of any matter specified by the Tribunal.
10.	Intermediaries' responsibilities	The intermediaries selling the product will be subject to the SFC's Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission and any other applicable codes or guidelines published by the SFC.	Same as under the CO prospectus regime.

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Perpetual braces for more court action

XAVIER LA CANNA

November 8, 2009

AAP

Fund manager Perpetual Ltd says it may face further court action after its opponents moved to appeal a recent UK court decision that could ultimately affect billions of dollars.

Perpetual Trustee Company Ltd won a Court of Appeal decision in London on Friday (local time) that sought $125 million frozen from Mahogany Capital noteholders since the collapse of Lehman Brothers financial-services firm last year.

The decision could act as a precedent to eventually unlock up to $12.5 billion.

Perpetual, wholly owned by the Australian-listed Perpetual Ltd, took the court action because it is trustee for $A125 million of notes issued by Mahogany Capital Ltd to retail investors in Australia, New Zealand and Papua New Guinea.

The UK Court of Appeal ruled the Mahogany noteholders have priority over Lehman Brothers Special Financing Inc (LBSF) in relation to the collateral.

LBSF had argued they should have priority for the funds.

Group executive of the corporate trust division at Perpetual, Chris Green told AAP LBSF had sought leave to appeal the most recent decision to the Supreme Court.

"The Court of Appeal are going to consider that this week," he said.

He said huge amounts of money could ultimately be at stake.

"Mahogany invested in a UK program that has about $12.5 billion in these types of deals and we are the first to go into litigation," Mr Green said.

"This will be a precedent for a lot of those deals.

Lawyers for Perpetual, Henry Davis York, said market participants should take some comfort from the latest decision, which goes a long way to settling the law.

In September last year the 158-year-old Lehman Brothers Holdings Inc filed for bankruptcy in the USA, making it the largest company ever forced to take such action in that country.

附件 3
Annex 3

Neutral Citation Number: [2009] EWCA Civ 1160

Cases Nos: A3/2009/1794, 2037, 2043, 2047

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(The Rt Hon Sir Andrew Morritt, Chancellor)
(Claims Nos HC09CO1612 and HC09CO1931)
(The Hon Mr Justice Peter Smith)
Case No 10689/2009

Royal Courts of Justice
Strand, London, WC2A 2LL
6th November 2009

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE LONGMORE
and
LORD JUSTICE PATTEN

Between:

PERPETUAL TRUSTEE COMPANY LIMITED **BELMONT PARK INVESTMENTS PTY LIMITED**	**Respondents** **Claimants**
- and -	
BNY CORPORATE TRUSTEE SERVICES LIMITED **LEHMAN BROTHERS SPECIAL FINANCING INC**	**Appellants** **Defendants**
- AND -	
(1) DANIEL FRANCIS BUTTERS **(2) NEVILLE BARRY KAHN**	**Claimants** **Appellants**

(3) NICHOLAS JAMES DARGAN
(Joint Administrators of WW Realisation 8 Limited and Woolworths Group plc)

- and -

(1) BBC WORLDWIDE LIMITED
(2) 2 ENTERTAIN LIMITED
(3) BBC VIDEO LIMITED

Defendants
Respondents

Mr Richard Snowden QC and Mr James Potts (instructed by Weil, Gotshal & Manges) for Lehman Brothers Special Financing Inc
Mr Gabriel Moss QC and Mr David Allison (instructed by Sidley Austin LLP) for Perpetual Trustee Co Ltd
Mr Richard Salter QC and Mr Jonathan Davies-Jones (instructed by Lawrence Graham LLP) for Belmont Park Investments Pty Ltd
Mr Stephen Midwinter (instructed by Lovells LLP) for BNY Corporate Trustee Services Ltd
Mr Richard Sheldon QC and Mr Barry Isaacs (instructed by Denton Wilde Sapte LLP) for Messrs Butters, Kahn and Dargan
Mr Mark Howard QC, Mr Daniel Jowell and Mr Mark Arnold (instructed by Olswang LLP) for BBC Worldwide Ltd
Mr Edmund Cullen (instructed by Wiggin LLP) for BBC Video Ltd
Hearing dates : 13th, 14th and 15th October 2009

HTML VERSION OF JUDGMENT

The Master of the Rolls :

Introductory

1. The main issue raised on these appeals concerns the extent of the so-called anti-deprivation rule ("the rule"). This rule, which has been expressed in slightly different ways in the cases, was put in these terms in *Ex p Jay; In re Harrison* (1880) 14

Ch D 19, 26 by Cotton LJ: "there cannot be a valid contract that a man's property shall remain his until his bankruptcy, and on the happening of that event shall go over to someone else, and be taken away from his creditors."

2. In the *Perpetual* appeal, those administering the estate of Lehman Brothers Special Financing Inc ("LBSF") contends that the Chancellor was wrong to hold that the rule did not apply to a number of so-called synthetic collateralised debt obligations, set up through the medium of a special purpose vehicle ("SPV"), so as to vitiate provisions which, on an insolvency event, (a) switched the priority, which was enjoyed over the assets in the SPV between the credit default swap counterparty (LBSF) and the Noteholders, in favour of the Noteholders, and (b) changed the allocation of the so-called "unwind costs" in favour of the Noteholders to the potential detriment of LBSF. The Chancellor held that the rule did not apply for two reasons. First, the nature of the disadvantage suffered by LBSF did not fall within the rule; secondly, even if the rule would otherwise have applied, the two provisions were operated by an event before LBSF filed for Chapter 11 US Bankruptcy Code ("Chapter 11") protection in the US Bankruptcy Court (which is agreed to be the equivalent of the making of a winding up order for the purposes of the application of the rule). Perpetual Trustee Co Ltd ("Perpetual") and Belmont Park Investment Pty Ltd ("Belmont"), representing the Noteholders, say the Chancellor was right on each of those two grounds in holding that the rule did not apply. The Trustee adopted a neutral position on the appeal.

3. In the *Butters* appeal, the administrators of WW Realisation 8 Ltd (formerly Woolworths Media Plc – "Media") and of Woolworths Group Plc ("Group") contend that, while he was right to conclude that the provisions in question, as drafted, offended the rule, Peter Smith J was wrong in the way in which he effectively deleted parts of (a) a provision in a Joint Venture Agreement ("the JVA") which enabled BBC Worldwide Limited ("BBCW") to purchase Media's shares in 2 entertain Ltd ("2e", a company it jointly owned with Media), on an insolvency event, and (b) a provision in a Master Licence ("the MLA") granted by BBCW to BBC Video Ltd ("Video", a company owned by 2e), which entitled BBCW to determine the MLA on an insolvency event. BBCW argue that the Judge was wrong to hold that the rule applied at all, as, first, even if the provisions had been operated after Media went into administration, the rule was not apt to apply on the facts, and, alternatively, if it would otherwise have applied, the rule was not engaged as the notice which operated the provisions was served before Media had been placed into administration. In the alternative, BBCW contend that, if the rule applied, the Judge was right to give effect to the two provisions as he did. There is a separate issue, which is whether the Judge was right to conclude that the grant of a temporary licence by BBCW to Video operated to determine the MLA in any event.

4. I propose first to describe the relevant documentation and events which give rise to the issues in the *Perpetual* appeal, and then do the same thing in relation to the *Butters* appeal; next, I shall turn to the cases on, and general approach to, the anti-deprivation rule; I shall then discuss the application of the rule to the facts of the two appeals in turn; I shall finally deal with the temporary licence issue in the *Butters* appeal.

The facts in the *Perpetual* appeal

5. In his judgment, [2009] EWHC 1912 (Ch), the Chancellor set out in summary form the effect of the documentation involved in the *Perpetual* case, in the following terms:

> "(1) the issue of Notes ("the Notes") to investors by an SPV ("the issuer") formed by a Lehman company in a tax friendly jurisdiction;
>
> (2) the purchase by the issuer with the subscription money paid for the Notes of government bonds or other secure investments ("the collateral") vested in a trust corporation;
>
> (3) a swap agreement entered into by a Lehman company and the issuer under which the Lehman company paid the issuer the amounts due by the issuer to the Noteholders in exchange for sums equal to the yield on the collateral;
>
> (4) the amount by which the sum payable under the swap agreement by the Lehman company exceeded the yield on the collateral represented the premium for the, in effect, credit insurance provided by the Noteholders;
>
> (5) the amount payable by the Lehman company to the issuer on the maturity of the Notes (or on early redemption or termination) was the initial principal amount subscribed by the investors less amounts calculated by reference to events defined as credit events occurring during a specified period by reference to one or more reference entities, thereby giving effect to the effective insurance aspect of the programme;
>
> (6) the collateral was charged by the issuer in favour of the trust corporation to secure its obligations to the Noteholders and the Lehman company on terms which changed their respective priorities on the occurrence of certain specified events, including the insolvency of the Lehman company,

(7) each of the transactions summarised above (except the purchase of the collateral) is governed by English law."

6. It is necessary, for present purposes, to describe in a little more detail the relevant provisions in the voluminous documentation in which the terms of these arrangements were recorded, and to set out briefly the events which give rise to the dispute.

7. There are twelve relevant issues of Notes, two being the subject of claims by Perpetual, and ten by Belmont. Subject to a few small exceptions, the documentation in relation to all twelve Notes issues is essentially in the same form, and the facts relating to the Notes are, with one or two possible exceptions, the same so far as they affect the disputes in this appeal. Accordingly, I shall limit myself, for the moment, to the documentation and facts relating to one of the Notes issues in Perpetual's case, known as Saphir I. Some provisions are in more than one document, and I shall not identify such provisions more than once.

8. Saphir I was governed by three documents, (i) a Principal Trust Deed ("the PTD") between Dante Finance Public Limited Company ("Dante", the first issuer under the programme) and the BNY Corporate Trustee Services Limited ("the Trustee"), (ii) a Supplemental Trust Deed and Drawdown Agreement ("the STD") made between the issuer, the Trustee (together with its associated custodian and paying agent), LBSF (described as the swap counterparty) and the Lehman company which established these Notes issues, Lehman Brothers International Europe ("LBIE"), and (iii) the Terms and Conditions ("the T & C") which were attached to the prospectus sent to potential investors. The swap agreement was regulated by two documents, (i) an ISDA Master Agreement ("the ISDA") between Dante and LBSF, and (ii) a swap confirmation.

9. By clause 5.1 of the PTD, the issuer granted "as continuing security" the charge and security interest set out in the STD. Clause 5.5 of the PTD provided that the security so granted shall become enforceable "if (i) any amount due in respect of the Notes is not paid or delivered when due or (ii) a Swap Agreement terminates with sums due to the Swap Counterparty [i.e. LBSF]." Clause 5.6 provided that the Trustee was bound "at any time after any security...shall have become enforceable" to enforce the security over the collateral, if requested by at least one fifth of the Noteholders, or by LBSF, in certain specified events, or otherwise at its discretion.

10. Clause 6.1 of the PTD stated that moneys, received otherwise than in connection with the realisation or enforcement of the security, were to be held by the Trustee, after payment of the Trustee's costs, on trust to pay, first, the amounts due to LBSF, the

Noteholders and others *pari passu*, and, secondly, the amounts due to the issuer. Clause 6.2 of the PTD directed the Trustee "to apply all moneys received by it under [the PTD] and the [STD] in connection with the realisation or enforcement of the security as follows...". There followed a number of orders of priority, which were defined in detail, two of which were "Swap Counterparty Priority" and "Noteholder Priority". The priority which was to apply in any particular case was that specified in the STD.

11. Condition 6(d)(ii) of Part C of Schedule 2 to the PTD provided for the early redemption of the Notes if a swap agreement was terminated. In that event, the issuer was required to give the Trustee, the Noteholders and LBSF notice, at the expiration of which the Notes were to be redeemed at their early redemption amount. Condition 10 defined events of default in relation to the Notes as including default in payment of any sum due in respect of the Notes for a period of 14 days or more.

12. Clause 5.2 of the STD contained a charge by the issuer "as continuing security in favour of the Trustee" over the collateral and other property representing it from time to time. Clause 5.3 provided that such security was "granted to the Trustee as trustee for itself and/or the holders of Notes and [LBSF] as continuing security (i) for the payment of all sums due under the Trust Deed and the Notes (ii) for the performance of the Issuer's obligations (if any) under the Swap Agreement...". Clause 5.5 of the STD ("clause 5.5") is of particular relevance, and it was in these terms:

> "The Trustee shall apply all moneys received by it under this Deed in connection with the realisation or enforcement of the Mortgaged Property as follows: Swap Counterparty Priority unless ... an Event of Default ... occurs under the Swap Agreement and the Swap Counterparty is the Defaulting Party...in which case Noteholder Priority shall apply."

13. Clause 6.2 of the PTD provided that "Swap Counterparty Priority" meant that the claims of LBSF were payable in priority to the claims of the Noteholders, whereas "Noteholder Priority" meant the converse, in each case after providing for payment of certain specified costs and charges. Clause 9.3 of the STD stated, so far as material:

> "[LBSF] hereby agrees that, if an Event of Default ... occurs under the Swap Agreement and [LBSF] is the Defaulting Party ....and Unwind Costs are payable by the Issuer to [LBSF], the Issuer shall apply the net proceeds from the sale or realisation of the Collateral first in redeeming the Notes in an

amount as set out in the Conditions and thereafter in payment of such Unwind Costs to [LBSF]."

14. The T & C were included in the prospectus, which pointed out that the Notes were 'credit-linked' to the reference entities (i.e. the securities whose credit was being, in effect, insured). The prospectus also pointed out that, in addition, the Notes had exposure to the value of the collateral so that "Impairment of the Collateral may result in a negative rating action on the Notes". Condition 6 of the T & C contained the details of how and by how much the principal amount due on the Notes was reducible in the event of credit events affecting a reference entity, the details of which are not material. Condition 38 provided that early redemption would be triggered by the issuer serving a notice, which was required to be done on the happening of an Event of Default under the Notes. Condition 43 of the T & C concerned the calculation of the redemption amount to be paid by the swap counterparty on the maturity of the Notes.

15. Condition 44 of the T & C, like clause 5.5, is of central significance. It dealt with the early redemption amounts referred to in condition 6(d)(ii) of Part C of Schedule 2 to the STD. It also included a definition of "Unwind Costs". These were the amounts due to or, as the case may be, from LBSF, as the swap counterparty under the Swap Agreement at its termination. These costs were to be assessed by reference to quotations taken in the market, when the Swap Agreement terminated, for what a third party would pay to enter into a swap arrangement on similar terms, or, alternatively, what the issuer would have to pay a third party to enter into such a swap arrangement.

16. The first paragraph of Condition 44 ("Condition 44.1") provided that the amount payable on the Notes should be the amount equal to the Notes' *pro rata* share of the proceeds from the sale or realisation of the collateral, "plus (if payable to the Issuer) or minus (if payable to [LBSF]) the amount of any Unwind Costs". So, under that paragraph, if termination occurred early, an early redemption amount was to be calculated, and if Unwind Costs were payable under the swap to LBSF on termination, they were to be deducted when calculating any amount which would be due to the Noteholders, and if such Unwind Costs were payable the other way, they were to be added to the amount payable to the Noteholders.

17. The second paragraph, rather than the first paragraph, of Condition 44 ("Condition 44.2") applied "if an event of default as defined in the ISDA ... occurs under the Swap Agreement and [LBSF] is the Defaulting Party". In that event, the Noteholders' *pro rata* share of the proceeds from the sale or realisation of the collateral was no longer to be subject to a deduction on account of the Unwind Costs that would be payable to LBSF,

but, if the Unwind Costs were payable by LBSF to the issuer, the amount was still to be added to the amount payable to the Noteholders.

18. Clause 5 of the ISDA defined an event of default as being "[t]he occurrence [of certain specified events] at any time with respect to [LBSF] or any Credit Support Provider" of LBSF, namely, according to 10(iv) of the swap confirmation, the ultimate parent of LBSF, Lehman Brothers Holdings Inc ["LBHI"]". Those events included failure to pay any sums due under the ISDA (after 3 days' notice of such failure), and the institution of any proceedings seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency or other similar law affecting creditors' rights ...".

19. Clause 6 of the ISDA dealt with early termination and provided that:

> "If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party ... may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a date not earlier than the day such notice is effective as an Early Termination Date in respect of outstanding transactions..."

20. Clause 10 of the swap confirmation included an acknowledgement by the issuer and LBSF that the transaction was not intended to constitute insurance business so that payments by each party under the transaction were independent and not dependent on proof of economic loss of the other.

21. As to the facts giving rise to the dispute, I gratefully adopt the Chancellor's summary of them (in a slightly modified form) as regards Saphir I:

> (1) On 15 September 2008, LBHI filed for Chapter 11. As it was specified in Clause 10(iv) of the Swap Confirmation as the Credit Support Provider of LBSF, the filing constituted an Event of Default for the purposes of the swap agreements, by virtue of clause 5(a)(vii)(4) of the ISDA. Prima facie, that event gave rise to Noteholder Priority and triggered Condition 44.2.
>
> (2) From 15 September 2008, interest payments due under the Notes were not paid on their respective due dates and remain unpaid. Such non-payment also, at least prima facie, constituted an Event of Default by virtue of Condition 10 in Part C of Schedule 2 to the PTD.

(3) On 3 October 2008 LBSF filed for Chapter 11. Such filing also constituted an Event of Default for the purposes of the swap agreements, and, prima facie, gave rise to Noteholder Priority and triggered Condition 44.2.

(4) Between 28 November and 3 December 2008 the Noteholders gave notice to the Trustee in reliance on the Event of Default constituted by the filing for Chapter 11 effected by LBSF on 3 October 2008, designating 1 December 2008 as the Early Termination Date under clause 6(a) of the ISDA. The Trustee caused the issuer to serve swap termination notices in those terms on LBSF on 1 December 2008.

(5) On 8 May 2009 Perpetual passed extraordinary resolutions requiring the Trustee to serve notice on the issuer to the effect that the Notes were immediately due and requiring the Trustee to enforce its security.

22. LBSF contended that Perpetual and Belmont, as Noteholders, were not entitled to rely on these Events of Default as triggering Noteholder Priority under clause 5.5, or triggering Condition 44.2, as this would fall foul of the rule. This argument was rejected by the Chancellor on two grounds. First, he held that, even if the triggering event had been the Chapter 11 filing by LBSF, there would have been nothing to which the rule applied; secondly, he held that, even if that was wrong, as the Event of Default which effected the trigger was the Chapter 11 filing by LBHI, which preceded the Chapter 11 filing of LBSF, so the rule did not apply.

The facts in the Butters appeal

23. BBCW is the proprietor of certain intellectual property rights, including DVD and video rights which it acquired from the BBC, of which it is an indirect wholly owned subsidiary. Media is an indirectly wholly owned subsidiary of Group, which, until it went into administration, operated the well known High Street chain of Woolworths shops throughout the United Kingdom.

24. On 9 July 2004, BBCW entered into the JVA with Media, Group, and 2e, which was the vehicle through which the venture was to be operated. 2e was jointly owned by Media, as to 40%, and by BBCW, as to 60%; Media's shares were known as "V shares", and BBCW's shares as "B shares". As part of the venture, Video became one of 2e's subsidiaries.

25. Clause 26 of the JVA set out various circumstances in which BBCW could require Media to sell the V shares to BBCW (or Media could require BBCW to sell the B shares to Media). In particular, clause 26.7 provided as follows:

> "If [Media] or any parent undertaking of [Media] or (if [Media] is a member of [the Woolworths group]) [Group] suffers an Insolvency Event the following provisions shall apply:
>
> 26.7.1 [BBCW] may by written notice delivered to [Media] require [Media] to sell all ... of the V Shares to them at Fair Value. If any notice is so given, [Media] shall be bound to sell, and [BBCW] shall be bound to buy, all of the V Shares. No notice under this clause 26.7 may be given after sixty ... Business Days following the day on which [Media] notifies [BBCW] that it, any parent undertaking of it and/or [Group] has suffered an Insolvency Event.
>
> 26.7.2 In determining Fair Value for the purpose of this clause 26.7, the Investment Bank shall be directed to take into account the continuation (on the same or on different terms) or the termination in accordance with their terms as a consequence of the Insolvency Event in question of the agreements referred to in this clause 26.7 and the consequences of any such continuation or termination.
>
> 26.7.3 The provisions of clause 16.2.5 of the Master Licence shall apply.
>
> ....."

26. Clause 27 sets out how "Fair Value" is to be assessed; in very summary terms, it is market value, albeit no discount is to be made for the fact that the V shares represent a minority (40%) shareholding. The expression "Insolvency Event" was defined in clause 1.5.2 as including (i) the insolvency of, (ii) the presentation of a winding up petition (unless the petition was withdrawn within 15 working days) against, and (iii) the making of an administration order against, Media, any parent undertaking of Media, or Group (if Media was a member of the Woolworths group).

27. On 27 September 2004, as was anticipated at the time the JVA was entered into, BBCW entered into the MLA with Video. Under the MLA, Video was granted a licence to exploit BBCW's video and DVD catalogue, and certain other rights in respect of the BBC's future television programmes. The MLA included the following termination provision in clause 16.2.5:

> "If [Media] or any parent undertaking of [Media] or (if [Media] is a member of [the Woolworths group]) [Group], suffers an Insolvency Event and [BBCW] serve notice in accordance with the provisions of clause 26.7.1 of the Joint Venture Agreement (and become unconditionally bound to buy V Shares) this Agreement shall immediately terminate...".

28. The Woolworths group suffered well-publicised financial difficulties during the second half of 2008, and, on 2 December, a winding up petition was presented against Group: as it was not withdrawn within 15 working days, it constituted an Insolvency Event. Subsequently, Group went into administration on 27th January 2009, and this constituted a fresh Insolvency Event. Media went into administration two weeks later, a further Insolvency Event. Messrs Kahn, Butters & Dargan of Deloitte LLP are the Joint Administrators of both companies.

29. On 2 February 2009, in reliance on Group's insolvency, the presentation of the winding up petition against Group, and the administration order made against Group, BBCW gave notice (dated 30 January 2009, "the Notice") in accordance with clause 26.7.1 of the JVA. Media went into administration on 11 February 2009. At least according to BBCW, the effect of the Notice was to determine the MLA in accordance with clause 16.2.5 thereof, and to create a binding and enforceable contract for the sale of Media's shares in 2e to BBCW.

30. At the same time as the service of the Notice, BBCW wrote a letter dated 30 January 2009, offering Video a temporary licence, which Video and Media decided to accept.

31. In his judgment, [2009] EWHC 1954 (Ch), Peter Smith J decided that the MLA had determined (a) pursuant to clause 16.2.5 as a result of the service of the Notice, although he held that the parts of clause 26.7 of the JVA and 16.2.5 of the MLA which expressly cross-referred to each other meant that there was an infringement of the rule, which could be cured by "blue-pencilling" (i.e. effectively deleting) those cross-references, or, alternatively, (b) as a result of the grant of the new licence in February 2009. He also decided that, subject to the effect of his blue pencilling, BBCW was entitled to acquire Media's shares in 2e pursuant to clause 26.7 of the JVA.

The anti-deprivation rule

The 19th century and early 20th century authorities

32. The rule has been considered and applied in a number of cases at first instance and the Court of Appeal going back into the 18th century, and probably earlier, although the

observations of Lord Eldon LC in *Wilson v Greenwood* (1818) 1 Sw 471, 482 have often been taken as the starting point. It is not entirely easy to identify the rule's precise limits, or even its precise nature, from these cases, as the reasoning in the various judgments in which the rule has been considered is often a little opaque, and some of the judgments are a little hard to reconcile.

33. The majority of reported cases on the extent and application of the rule to which we were referred were decided between 1860 and 1930. They were *Whitmore v Mason* (1861) 2 J&H 204, *Ex p Mackay. Ex p Brown. In re Jeavons* (1873) LR 8 Ch App 643, *Ex p Williams. In re Thompson* (1877) 7 Ch D 138, *Ex p Jay* 14 Ch D 19, *Ex p Newitt. In re Garrud* (1880) 16 Ch D 522, *Ex p Barter. Ex p Black. In re Walker* (1884) 26 Ch D 510, *In re Detmold. Detmold v Detmold* (1889) 40 Ch D 585, *Borland's Trustee v Steel Brothers & Co Limited* [1901] 1 Ch 279, and *In re Johns* [1928] 1 Ch 737.

34. *Whitmore* 2 J&H 204 concerned a provision in a partnership deed which stated that, in the event of the "bankruptcy or insolvency" of a partner, an account was to be taken, and the bankrupt partner was to lose his interest in the partnership assets at a market valuation (save that his interest in a mining lease was to be excluded from the valuation). Page Wood V-C held that, only in so far as it related to the lease, the provision was void. At 2 J&H 204, 212, he identified the rule as being "no person possessed of property can reserve that property to himself until he shall become bankrupt, and then provide that, in the event of his becoming bankrupt, it shall pass to another and not to his creditors." He also made it clear that his decision would have been different if the other partners had provided the £500 which the bankrupt partner in that case had paid for his interest in the lease - see 2 J&H 204, 212 and 214-5 (and per Giffard QC in argument at 210). He also made it clear that the rule did not extend to invalidate a provision for the determination of a lease on insolvency – on the basis of the maxim *cuius est dare eius est disponere* – see 2 J&H 204, 212-213. Page Wood V-C also held that the fact that the triggering event was Smith's insolvency rather than his bankruptcy, and therefore preceded his bankruptcy, did not enable the rule to be avoided: to hold otherwise, he considered, would mean that "the bankrupt laws might, in all cases, be defeated" – 2 J&H 204, 215.

35. *Mackay* 8 Ch D 643 involved two transactions: the first was the sale of a patent by A to B in return for B paying royalties; the second was a loan of £12,500 from B to A. The two transactions were connected, in that the parties agreed that (i) B would keep half the royalties towards satisfying the debt, and (ii) in the event of A's bankruptcy, B could also keep the other half of the royalties. It was held that, while (i) was valid against A's trustee, (ii) was not. As explained by James LJ at 8 Ch D 643, 647, (i) represented "a

good charge upon one moiety of the royalties", but (ii) "is a clear attempt to evade the operation of the bankruptcy laws" as it "provide[d] for a different distribution of [A's] effects in the event of bankruptcy from that which the law provides". At 8 Ch D 643, 648, Mellish LJ put it this way: "a person cannot make it part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws."

36. The decision in *Williams* 7 Ch D 138 was, as I see it, simply based on the fact that the clause in question "was a mere sham, a mere contrivance and device" the purpose of which was to give a particular creditor additional security on bankruptcy or liquidation, and therefore preference against other creditors, only in the event of the debtor's bankruptcy – per James LJ at 7 Ch D 138, 143 (and similar language was used by Baggallay and Thesiger LJJ at 7 Ch D 138, 143 and 144).

37. In *Jay* 14 Ch D 19, the provision under consideration was a clause which entitled a landowner, who had granted a builder possession of her land, to re-take possession and to forfeit any of the builder's chattels which were on the land, in the event of the latter's bankruptcy. There was no challenge to the right of re-entry onto the land, but the right to forfeit the chattels was held to offend the rule. The fact that the landowner had had no interest in the chattels until the builder became bankrupt seems to have been an essential feature, as is clear from the judgment of Cotton LJ at 14 Ch D 19, 26, where he distinguished two earlier cases where the rule was held not to apply, so that the forfeiture provisions were valid. His ground for distinction was that, in those two cases, "the Court considered the effect of the contract was to give the landlord from the very time when the contract was entered into an equitable interest in the chattels".

38. The facts in *Newitt* 16 Ch D 522 were very similar to those in *Jay* 14 Ch D 19, but the provision was held to be valid. The difference between the two cases was that, in *Newitt* 16 Ch D 522, the bankrupt builder had breached the terms of his agreement with the landowner and it was provided in the agreement that the chattels would be forfeited to the landowner "as and for liquidated damages", whereas in *Jay* 14 Ch D 19, the builder was not in breach of contract, and the right to forfeit was not expressed to be in respect of any money claim. At 16 Ch D 522, 530, James LJ said that the court had "no power to add to the Act for the purpose of making this security for the performance of the contract, which was *bona fide* taken by the landowner, bad by reason of the bankruptcy of the builder." On the following page, he made the point that the "broad general principle is that the trustee in a bankruptcy takes all the bankrupt's property, but takes it subject to all the liabilities which affected it in the bankrupt's hands, unless ... added to by some express provision of the bankrupt law."

39. *Barter* 26 Ch D 510 is another example of the application of the rule. A prospective buyer of a ship had the right to take possession of the ship and use the shipbuilder's premises and chattels to complete the building work, in the event of the builder not proceeding with the shipbuilding or going bankrupt. The Court of Appeal applied the following proposition in *Whitmore* 2 J&H 204, 210:

> "[T]he owner of property may, on alienation, qualify the interest of his alienee by a condition to take effect on bankruptcy; but cannot by contract or otherwise qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors. The *jus disponendi*, which for the first purpose is absolute, being, in the latter instance, subject to the disposition previously prescribed by law."

40. In *Detmold* 40 Ch D 585, the provision under consideration stated that the property in a marriage settlement (originating from the husband) should pass to the wife for life in the event of an alienation by, or the bankruptcy of, the husband. The provision was held valid against the husband's trustee in bankruptcy, on the ground that it had been triggered, prior to the commencement of the bankruptcy, by the alienation effected as the result of the appointment of a receiver of the property in the settlement.

41. In *Borland* [1901] 1 Ch 279, a provision in a company's articles of association, providing for the transfer of a shareholder's shares to the other shareholders in the event of his bankruptcy, would have been held to infringe the rule (consistently with the decision in *Whitmore* 2 J&H 204), but for the fact that, viewed in the context of the provisions of the articles governing the compulsory transfer of shares in other circumstances, the provision was "fair", as explained at [1901] 1 Ch 279, 291. In particular, although the provision limited the price payable for the shares to their par value, it did not "compel ... persons to sell their shares in the event of bankruptcy at something less than the price that they would otherwise obtain"; had it done so, the provision would have been "repugnant to the bankruptcy law".

42. As for *Johns* [1928] 1 Ch 737, it concerned an artificial, transparent arrangement between mother and son, whereby the amount repayable by the son in respect of periodic loans made by the mother (which could not exceed £650, and might be as little as £10, in all) was to increase from £650 to £1,650 (plus interest) in the event of the son's bankruptcy. Unsurprisingly, the Judge described it as "a deliberate device to secure that more money would come to the mother if the son went bankrupt, than would come to her if he did not; and, that being so, ... the device is bad".

The House of Lords' decision in British Eagle [1975] 1 WLR 758

43. All these decisions (save, it would seem, *Williams* 7 Ch D 138, which may have applied on a liquidation) related to bankruptcy. It is common ground, at least at this level, that the rule exists and applies equally to liquidations, not least in the light of the decision of the House of Lords in *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758. It is also common ground that the rule also applies where the company concerned goes into administration (at least where, as in the *Butters* case, the administration is effectively for the purpose of maximising the return on the insolvency and will lead to a winding up order) or where the company concerned files for Chapter 11 protection in the United States (as in the *Perpetual* case) at least where the filing is for the purpose of maximising the return on the insolvency and cessation of business.

44. In *British Eagle* [1975] 1 WLR 758, reversing Templeman J and a unanimous Court of Appeal, the House of Lords, by a bare majority, decided that a clearing house arrangement between a large number of airline companies relating to debts arising as between them was ineffective as against the liquidator of one of the companies, British Eagle, which had gone into liquidation. As explained by Lord Cross of Chelsea (with whom Lord Diplock and Lord Edmund-Davies agreed), this conclusion was reached on the ground that, insofar as the arrangement purported to apply to debts which existed when the members of the company passed the resolution to go into creditors' voluntary liquidation, it would have amounted to contracting out of the statutory requirement that the assets owned by the company at the date of its liquidation should be available to its liquidator, who should use them to meet the company's unsecured liabilities *pari passu*, under section 302 of the Companies Act 1948 (now effectively re-enacted as section 107 of the Insolvency Act 1986).

45. British Eagle had gone into creditors' liquidation as a result of a members' resolution passed on 8 November 1968, having ceased carrying on business two days earlier - [1975] 1 WLR 758, 775H, 776D, and, at 778C Lord Cross said that the contention of the respondents "with regard to the September clearance must succeed" as "[c]learance in respect of business done in September was 'completed' ... on November 4, before the winding up resolution was passed". In other words, he concluded that debts which had effectively ceased to exist by the date of the winding up resolution (8 November 1968), because they had already passed into the clearing house arrangement, were not caught by the rule, which only bit on debts which existed on or after the date of the winding-up.

46. At [1975] 1 WLR 758, 780A, there is reference to *Mackay* 8 Ch App 643, and to the respondents' argument that it "was a very different case from this", as "the provision which was impugned effected a change on bankruptcy", whereas in the case before the House, "there was no change whatever on the winding-up: the same 'clearing house' provisions applied". However, Lord Cross rejected that argument, and, at 780F-G, he relied on the decision in *Mackay* 8 Ch App 643, in which, he said, the court "could only [have] go[ne] behind [the charge on the second half of the royalties] if it was satisfied – as was indeed obvious in that case - that it had been created deliberately in order to provide for a different distribution of the insolvent's property on his bankruptcy from that prescribed by the law", on the basis that it was "irrelevant that the parties to the 'clearing house' arrangements had good business reasons for entering into them and did not direct their minds to the question of how the arrangements might be affected by the insolvency of one or more of the parties.". At [1975] 1 WLR 758, 780H, he said that "[s]uch a 'contracting out' must, to my mind, be contrary to public policy".

47. The main dissenting speech was given by Lord Morris of Borth-y-Gest, with whom Lord Simon of Glaisdale agreed. Lord Morris also cited *Mackay* 8 Ch App 643, and referred to *Johns* [1928] Ch 737, distinguishing them as cases where the relevant provisions were "a clear attempt to evade the operation of", or "a device for defeating", "the bankruptcy laws" (see [1975] 1 WLR 758, 770A-E).

48. *British Eagle* [1975] 1 WLR 758 was applied in *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] 1 Ch 207. At [1985] 1 Ch 207, 226E-F, Peter Gibson J said that "the principle that [he] extracted from" it was that "where the effect of a contract is that an asset which is actually owned by a company at the commencement of its liquidation would be dealt with in a way other than in accordance with section 302 ... then to that extent the contract as a matter of public policy is avoided". He held that the rule did not apply to monies due to the company, but paid, with its agreement because of its financial difficulties, into an account for the benefit of third parties. But he went on to hold that the rule did apply to other sums.

49. The decision of the High Court of Australia in *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] BPIR 57, where *British Eagle* [1975] 1 WLR 758 was discussed and distinguished, should also be mentioned. The agreement creating the clearing house arrangement, as considered by the House of Lords, was redrafted so as to circumvent the rule. The majority of the High Court concluded that the document achieved its aim. At [2008] BPIR 57, para 76, Gummow, Hayne, Heydon, Crennan and Kiefel JJ suggested that the basis of the House of Lords' decision was simply that one could not contract out of section 302. In the following paragraph, they

referred to the contention that "in insolvency law, the *whole* of the debtor's estate should be available for distribution to *all* his creditors, and that no one creditor or group of creditors can lawfully contract in such a manner as to defeat other creditors not parties to the contract". At [2008] BPIR 57, para 79, the Justices said that whether this contention was correct "depend[s] entirely upon what the relevant statute provides". They then rejected the suggestion inherent in the contention "that the public policy achieves what the statute otherwise does not achieve".

The Insolvency Act 1986

50. As explained in the more modern authorities, *British Eagle* [1975] 1 WLR 758, *Carreras Rothmans* [1984] 1 Ch 207 and *Ansett Australia* [2008] BPIR 57, the rule is essentially based on the proposition that one cannot contract out of the provisions of the insolvency legislation which govern the way in which assets are dealt with in a liquidation. It is therefore appropriate briefly to mention the relevant provisions for these purposes, which are, of course, in the Insolvency Act 1986.

51. Section 107 of the 1986 Act (the modern equivalent of section 302 of the 1948 Act relied on in *British Eagle* [1975] 1 WLR 758) provides that, subject to the provisions relating to preferential payments, "the company's property in a [voluntary] winding up [should] be applied in satisfaction of the company's liabilities pari passu", and rule 4.181 of the Insolvency Rules 1986 contains a similar provision where the winding up is pursuant to a court order. Sections 143(1) and 144(1) state that, where a company is subject to a winding up order, the liquidator must "secure that the assets of the company are got in, realised and distributed to the company's creditors ....", and, subject to that, he must "take into his custody or under his control all the property and things in action to which the company is ... entitled".

52. Section 127 of the 1986 Act provides that "any disposition of the company's property ... made after the commencement of the winding up is, unless the court otherwise orders, void." Sections 238 and 239 enable a liquidator to apply to the court for an order "restoring the position", where the company has "at a relevant time" "entered into a transaction with any person at an undervalue", or has done anything which, in the event of the company's insolvent liquidation, would put a creditor (or guarantor) of the company in a better position than he would otherwise be in. The relevant time is backdated from "the onset of insolvency" – i.e. the making of an administration application, the appointment of an administrator or the presentation of a winding up petition, and is 2 years where the person concerned is "connected with the company" and is otherwise six months in the case of a preference. Certain floating charges are

avoided under section 245 if created in favour of a person "connected with the company" within 2 years, and otherwise within 1 year, of "the onset of insolvency".

The ambit of the rule: general approach

53. The present appeals raise a number of questions as to the precise ambit of the rule. When considering any question concerning the ambit of the rule, it seems to me that certain principles should be borne in mind.

54. First, Lord Cross's speech in *British Eagle* [1975] 1 WLR 758, especially at 780C-781B, is high authority for the proposition that the rule is based on public policy, but only to the extent that one cannot contract out of the insolvency legislation. That is supported by what was said by James LJ in the Court of Appeal, in *Mackay* 8 Ch App 643 and, even more clearly, in *Newitt* 16 Ch D 522, and, more recently, by Peter Gibson J in *Carreras Rothman* [1985] 1 Ch 207 and by the majority in the Australian High Court in *Ansett Australia* [2008] BPIR 57.

55. Secondly, as to the nature of the rule, I cannot do better than cite from the majority judgment in *Ansett Australia* [2008] BPIR 57, para 78. The justices there explained that many of the cases where the rule has been considered "can be understood as depending upon the proper application of a ... provision in the relevant statute requiring that all debts proved in an insolvency rank equally and, if the property of the insolvent is insufficient to meet them in full, they are to be paid proportionately", and some other cases "turned upon what was the 'property' of the company that was to be applied in satisfaction of its liabilities". In each case where the rule is invoked "it is essential to begin from the elementary proposition that insolvency law is statutory and primacy must be given to the relevant statutory text."

56. Thirdly, subject to one possible qualification, when considering whether the rule applies to a particular provision, there is, at least in principle, no difference between cases where the provision is expressed to apply on insolvency or liquidation and those where it is not so expressed. That appears to me to follow from the fact that the views expressed by Lord Cross (at 780F-H) prevailed over those of Lord Edmund-Davies (at 770A-E) in *British Eagle* [1975] 1 WLR 758. The possible exception is where the provision is an attempt artificially to avoid the insolvency regime (as in *Williams* 7 Ch D 138 and *Johns* [1928] Ch 737). However, such a case may be no more than an application of the principle that a court will not give effect to a sham transaction.

57. Fourthly, especially following the passing of the 1986 Act, the courts should not extend the rule beyond its present limits, save where logic or practicality otherwise require.

Given that the rule is based on the proposition that one cannot contract out of the provisions of the insolvency legislation, it would be hard to justify going beyond the established limits of the rule, save to the extent required by legislation. Further, as Patten LJ said in argument, the 1986 Act, following the recommendations in the Cork Report, has more detailed and wide-ranging provisions with regard to undermining transactions, or the effect of transactions, entered into before winding up than the legislation in force when the English cases so far discussed were decided.

58. Fifthly, it is important that, so far as possible, judicial decisions in the insolvency field ensure that the law is clear and consistent. That has always been true, but the need for consistency and clarity is all the greater now that commercial contracts are becoming increasingly complex both in their underlying nature and in their detailed provisions, as is well demonstrated by the contracts in the instant cases, especially in the *Perpetual* appeal. It is also desirable that, if possible, the courts give effect to contractual terms which parties have agreed. Indeed, there is a particularly strong case for party autonomy in cases of complex financial instruments such as those involved in the *Perpetual* appeal and in arrangements involving large corporate groups, such as those who signed the agreements in the *Butters* appeal; in such cases, the parties are likely to have been commercially sophisticated and expertly advised.

The anti-deprivation rule and the Perpetual appeal

59. As mentioned, the Chancellor had two separate reasons for concluding that the rule did not prevent Perpetual and Belmont relying on Noteholder Priority and Condition 44.2. The first reason was based on the nature of the right triggered by the Insolvency Event, and essentially turned on the extent of the anti-deprivation rule. The second reason was based on the timing of the alleged deprivation, and turned on whether the rule applies to a deprivation effected prior to a winding up (or its equivalent). I shall consider these two arguments in turn.

Was there any "deprivation" which fell within the anti-deprivation rule?

60. There is obvious attraction in the argument, skilfully deployed by Mr Snowden QC on behalf of LBSF, that the "flip" from Swap Counterparty Priority to Noteholder Priority and the "flip" from Condition 44.1 to Condition 44.2 constituted deprivations which were, at least potentially, precluded by the rule. Assuming that the "flips" had applied on or after the Chapter 11 filing of LBSF, they would have had the consequence of (at least potentially) reducing the assets which would otherwise be available for distribution to

the creditors of LBSF, which would appear, at least arguably, to be a "deprivation" of the company's assets, consequent on, and following, the Chapter 11 filing.

61. However, I have reached the conclusion that this argument is not correct. The essence of the arrangements embodied in the extensive documentation appears to me to be as follows: (i) The collateral, over which the rights in question were created, was acquired mainly with money derived from the Noteholders, through their subscription monies. (ii) LBSF provided little by way of subscription monies: it simply agreed to pay the interest and capital due to the Noteholders through the SPV in exchange for the interest and collateral, albeit that it was able to reduce the payments to the Noteholders by reference to failings in the credit standing of the "reference entities". (iii) So long as there was no risk of default, the Noteholders were prepared for the scheme to provide that LBSF would have priority when it came to "unwinding" the transaction. (iv) However, the scheme provided, and was sold on the basis that, if LBSF or LBHI defaulted so that they could not, or did not, pay the interest and the capital on the Notes, then it would be the Noteholders who would have priority both in relation to repayment and in relation to the Unwind Costs. (v) The effect of the "flips" would not be to entitle the Noteholders to more than they had subscribed (with interest), and, if there was no shortfall, LBSF would not have been out of pocket as a result of the "flips".

62. The effect of the "flip" provisions was thus not to divest LBSF of monies, property, or debts, currently vested in it, and to revest them in the Noteholders, nor even to divest LBSF of the benefit of the security rights granted to it. It was merely to change the order of priorities in which the rights were to be exercised in relation to the proceeds of sale of the collateral in the event of a default. Further, as Mr Moss QC, for Perpetual, and Mr Salter QC, for Belmont, pointed out, the right granted to LBSF was a security right over assets purchased with the Noteholders' money, and, from the very inception, the priority, and the extent of the benefits, enjoyed by LBSF in respect of the security were contingent upon there being no Event of Default. Thus, the security rights, as granted to LBSF, included the "flip" provisions, and even at the date the "flips" operated, the priority enjoyed by LBSF was no more than a contingent right. As Patten LJ points out in his judgment, the effect of the "flip" provisions in clause 5.5 and Condition 44.2 is merely to ensure that, as far as possible, the proceeds of sale of the collateral are used to repay the Noteholders their subscription monies in full, before LBSF recovers any sums from those proceeds. There is no question of the "flip" provisions giving the Noteholders more than they subscribed, at least before LBSF is paid the sums which are secured in its favour on the collateral.

63. In other words, the position, when the transaction came to be redeemed early, and "unwound", following an Event of Default, was not that LBSF had agreed, subsequent to the grant of the right, that it would lose the right it had been granted in relation to the proceeds of sale of the collateral as a result of the Default. Notwithstanding the Default, it retained its right, but, as had always been an agreed feature of that right, as a result of the Default, LBSF had to rank behind, rather than ahead of, the Noteholders, no doubt because it was those Noteholders whose money had been used to purchase the collateral.

64. Three principles which can be derived from the cases come into play. The first is that the rule has been held to apply to assets which were vested in the person on whose bankruptcy the deprivation is to occur. By contrast, this is a case where all that is changing is the priorities relating to the right, pursuant to a provision in the very document creating the right. Secondly, there is authority for the principle that the rule may have no application to the extent that the person in whose favour the deprivation of the asset takes effect can show that the asset, or the insolvent person's interest in the asset, was acquired with his money – see *Whitmore* 2 J&H 204, 212 and 214-215. In this case, the collateral was effectively purchased exclusively with the Noteholders' money. The third principle is that the rule cannot apply to invalidate a provision which enables a person to determine a limited interest, such as a lease or a licence, which he has granted over or in respect of his own property, in the event of the lessee's or licensee's bankruptcy - see *Whitmore* 2 J&H 204, 210 and 212-213 and *Barter* 26 Ch D 510. While not identical to a lease or licence, a charge, or provision for priorities for repayment, has features of similarity to a lease or licence, and differs from ownership.

65. In my view, if one applies those principles to the facts of this case, they support the Chancellor's conclusion that the rule does not apply to the operation of the "flips" in clause 5.5 and Condition 44.2. The proper analysis is that, when it came to redemption, in relation to the proceeds of sale of the collateral, whose purchase had been entirely funded with their money, the Noteholders had been prepared to permit LBSF to enjoy priority over them, in terms of Swap Counterparty Priority and under Condition 44.1, so long as there had been no Event of Default; however, in the event of a Default, the Noteholders had provided from the start that they would no longer cede priority, and that Noteholder Priority and Condition 44.2 would apply. In other words, the effect of the documentation was that the Noteholders were granting to LBSF rights over assets derived from their monies, which rights were liable to be modified on the happening of an Event of Default. In my opinion, that was a valid arrangement, enforceable even on or after LBSF's Chapter 11 filing.

66. Patten LJ has reached the same conclusion on the simple basis that the "flip", that is, the reversal of the order of priority against a company as the holder of a charge, in favour of another chargee over the same assets, cannot be caught by the rule, even if it operates after the liquidation of the company, at least if such a reversal was an original feature of the company's charge when it was granted. I have considerable sympathy with that view, which has the merit of simplicity, and seems to be supported by what Lloyd J said in *Re SSSL Realisations (2002) Ltd (in liquidation) [2005] 1 BCLC* 1, paragraph 45. Further, it is fair to say that the principle of party autonomy, referred to above, supports his view.

67. However, while that view may well indeed be right, I prefer to rest my conclusion in this case on the more limited ground that, in addition to the facts relied on by Patten LJ, the assets over which the charge exists were acquired with money provided by the chargee in whose favour the "flip" operates, and that the "flip" was included merely to ensure, as far as possible, that that chargee is repaid out of those assets all that he provided (together with interest), before the company receives any money from those assets pursuant to its charge. It seems to me that there may be room for argument that, in the absence of these additional facts, the arrangement in this case would have fallen foul of the analysis in *Mackay* 8 Ch App 643 (which was arguably approved in *British Eagle* [1975] 1 WLR 758), on the basis that the right in that case to retain the second half of the royalties in the event of bankruptcy was, like the "flip" provisions here, an original feature of the contractual arrangement, and the right to recoup money under a change in priority to another chargee is every bit as much of an asset as the right to monies (in the form of royalties) arising in the future. There is also a danger that the simple analysis adopted by Patten LJ could, in the light of the very limited circumstances in which the court will hold a transaction to be a sham, make it very easy to dress up sale transactions in such a way as to enable the rule to be circumvented.

68. Accordingly, while I am far from saying that I disagree with the simple and compelling basis upon which Patten LJ would dispose of LBSF's argument on this part of the case, I have reached the same conclusion on the rather more limited ground that I have indicated.

If there was a deprivation, does the rule apply in the light of the timing of the deprivation?

69. Even if the "flips" from Swap Counterparty Priority to Noteholder Priority and/or from Condition 44.1 to Condition 44.2 had constituted a deprivation within the rule, I do not consider that the rule would have been engaged in the present case, because the

triggering event was LBHI filing for Chapter 11 which occurred on 15 September 2008, some 18 days before LBSF filed for Chapter 11. As it is common ground that filing for Chapter 11 is for the purposes of the rule equivalent to the making of a winding up order, the deprivation occurred before, not on or after, the liquidation or its equivalent.

70. In the light of an argument raised on behalf of the administrators in the *Butters* appeal, it is right to consider an argument that, if LBSF was clearly insolvent on 15 September 2008, when Noteholder Priority and Condition 44.2 appear to have been triggered, this would have been sufficient to engage the rule even though LBSF did not file for Chapter 11 until 3 October. I do not consider that a deprivation that takes effect before a winding up order (or its equivalent, Chapter 11 filing or an administration order) is caught by the rule, (unless the deprivation is effected pursuant to a sham transaction). It is true that, at least on one view, Page Wood V-C appears to have taken the opposite view in *Whitmore* 2 J&H 204, 215. However, all that he was dealing with was the point that the deprivation provision applied on "bankruptcy or insolvency", and it may well have been that he was saying that, on its true construction, the clause only applied on bankruptcy. Further, it may be that the deprivation in that case was not actually effected until after bankruptcy. If the observations of Page Wood V-C do support LBSF's case, then it is worth mentioning that another of the first instance 19th century cases, *Detmold* 40 Ch D 585, appears to support the converse proposition.

71. More importantly, in my judgment, the basis of the rule as explained in *British Eagle* [1975] 1 WLR 758, 780F-H, and considered in *Carreras Rothman* [1985] 1 Ch 207, 226E-F, makes such an argument difficult to sustain. There is nothing inconsistent with the provisions of the 1986 Act about a contractual agreement which effects a deprivation of an asset of a company before it goes into liquidation, save to the extent that the deprivation falls within the reach of a provision such as sections 238 and 239, which do not apply in this case. This is supported by the fact that Lord Cross made it clear at [1975] 1 WLR 758, 778C, that any deprivations effected prior to the winding up of British Eagle were not caught by the rule, even though it seems very likely that British Eagle had been insolvent some time before it was wound up. Further, it is also clear from what Lord Cross said at [1975] 1 WLR 758, 780F-G that the fact that the triggering event for the deprivation in the present case is based on insolvency or failure to pay makes no difference.

72. In addition, it seems to me that it would, or at least could, lead to uncertainty if we did not adhere to the simple proposition that, if the deprivation occurs before winding up, it does not fall within the scope of the rule, whereas if it occurs after the winding up, it does so – at least potentially. It would often be difficult for the parties involved,

particularly the party with the right to effect the deprivation, to know whether the company concerned was insolvent at a particular time prior to liquidation: in some cases, it may be difficult to ascertain even after the event. No such difficulty arises in determining when a company went into liquidation. And what would happen in a case where, at the time the deprivation was to take effect, the company concerned was insolvent, but it subsequently recovered? It is hard to see how the rule, dependent as it is on the operation of the 1986 Act, could apply in such a case, but that means that, in some cases, the parties could not know whether the deprivation fell foul of the rule for some time after it had purportedly taken effect. Further, many deprivation rights may be triggered by breach or even by notice, and it is hard to see why, or by reference to precisely what standards, it should be decided that a right to deprive for breach or by notice should be defeated simply because the company to be deprived was insolvent, but not subject to the liquidation process (or other procedures) in the 1986 Act.

73. Quite apart from this, in the *Perpetual* case, unlike in *Whitmore* 2 J&H 204, it is the liquidation (or its equivalent) of a party other than the company which would suffer the deprivation which gives rise to the deprivation. Even if the reasoning in *Whitmore* 2 J&H 204 that the rule applies to any deprivation effected after the onset of insolvency were correct, I would find it hard to see how the rule could apply because of the insolvency of a party other than the company which would suffer the deprivation. Subject to any other arguments, to which I will turn, it is equally hard to see how the insolvency of a third party (even if closely connected with the company in question) can engage the rule. First, as the rule is based on the principle that one cannot contract out of the statutory insolvency regime, there appears to be no room for it to be invoked simply because the deprivation results from the insolvency of a third party. Secondly, such an extension of the rule would not be in line with the authorities. Thirdly, if the rule were so extended, it really would lead to confusion, as its limits would be hard to predict.

74. In the present case, it appears to me that the way in which clause 5.5 of the STD operated, and the terms in which Condition 44 of the T&C was expressed, mean that, when, on 15 September 2008, an Event of Default, namely LBHI's filing for Chapter 11, occurred, Noteholder Priority automatically replaced Swap Counterparty Priority and Condition 44.2 automatically replaced Condition 44.1 on that date, which, crucially, was before LBSF filed for Chapter 11. It is true that the consequences of these two replacements were only enjoyed, in terms of their financial effect, after LBSF had filed for Chapter 11. However, the essential point seems to me to be that the replacement rights were vested on 15 September. Mr Snowden's argument that either or both replacement rights should be treated as occurring after 3 October (when LBSF filed for

Chapter 11) presents him with a logical difficulty. If the replacement rights (i.e. Noteholder Priority and Condition 44.2) were not vested before 3 October, then *ex hypothesi* the original rights (ie. Swap Counterparty Priority and Condition 44.1) were never vested, and, if that is right, it is hard to see how LBSF could say that they had been deprived of those rights. This conclusion is inconsistent with some of the views expressed in *Fraser v Oystertech plc* [2004] BPIR 486, by Mr Peter Prescott QC, sitting as a Deputy Judge of the Chancery Division, which must therefore be treated as, to that extent, overruled.

75. It was also suggested that the argument that LBHI's filing for Chapter 11 operated to effect a deprivation of an asset owned by one of its subsidiaries, LBSF, and so fell foul of the rule. This was advanced on two grounds. The first ground, which appealed to Peter Smith J in the *Butters* case at first instance, was that, particularly in these days of group company cross-guarantees, it was unrealistic to treat members of the same group of companies as separate entities. That has some commercial attraction, but, as Robert Walker J concluded in *Re Polly Peck International plc* [1996] BCC 486, 498B-G, it is not open to the court to treat "a closely-integrated group of companies as a single economic unit" as a matter of law (save if the rather limited grounds for piercing the veil of incorporation exist). As he explained, the need to treat such companies as separate entities is "particularly important when creditors become involved", namely on an insolvency. The second ground was that the rule should not permit LBHI, as a company in liquidation (or Chapter 11), to have the value of one of its assets, namely its shareholding in LBSF, diminished as a result of a deprivation of property owned by LBSF, following its, LBHI's, Chapter 11 filing. That cannot be right; it is unsupported by any case, and cannot be said to be consistent with the principle on which the rule is based as explained in *British Eagle* [1975] 1 WLR 758. In any event, LBHI is not a party to the *Perpetual* proceedings.

Differences relating to some of the other eleven issues of Notes

76. I have mentioned that the provisions and facts relating to Saphir I, which I have been considering, were not in all respects repeated in relation to all the other eleven issues being considered in the *Perpetual* appeal. In relation to Saphir 2006-5, Condition 38 of the T & C was slightly more prescriptive in relation to the application of Condition 44. I do not consider that this makes any difference. Similarly, Condition 44 in the case of another of the Notes issues, Beryl 2008-4, was in slightly different terms to that in the case of the other Notes issues, but, again, nothing hangs on that difference in this appeal.

77. Further, in the case of three of the Belmont issues, LBSF did contribute towards the subscription for the issue of the Notes. However, as Mr Salter said, in one of these cases, the contribution represented a very small proportion of the total amount subscribed: while not *de minimis*, it was certainly far less than the amount subscribed by the Noteholders. In two of the three cases, the LBSF payments were more substantial, but that was because it was settling claims made by the Noteholders. I do not think that this point gets near justifying a different outcome in relation to any of those three Notes Issuers.

78. What happened on and after 15 September 2008 in relation to the ten Notes issues where Belmont represents the Noteholders was rather different from the events relating to the two Notes issues where Perpetual represents the Noteholders. I do not propose to describe those different events, as it has not been contended that they affect the outcome of the appeal. The facts are usefully summarised in the Chancellor's judgment at [2009] EWHC 1912 (Ch), paragraph 24.

The anti-deprivation rule and the Butters appeal

79. As in the *Perpetual* appeal, there are two main issues. The first is whether clause 26.7 of the JVA and clause 16.2.5 of the MLA could in any way give rise to an infringement of the rule. The second main issue is whether, if they could do so, the fact that they were operated before Media went into administration means that the rule nonetheless does not apply. I shall deal with these two issues in turn.

Do clause 26.7 of the JVA and clause 16.2.5 of the MLA give rise to a deprivation?

80. In my judgment, there is nothing in the terms or the operation of clause 26.7 of the JVA and clause 16.2.5 of the MLA, whether taken separately or together, which could engage the anti-deprivation rule. Even assuming, in favour of the administrators, that those two clauses had been triggered after the making of the administration order in respect of Media, there could have been no complaint that they offended against the rule.

81. So far as clause 16.2.5 of the MLA is concerned, Mr Sheldon QC, for the administrators of Group and Media, rightly conceded that a provision in a licence in relation to intellectual property rights (or, indeed, any other type of licence) entitling the licensor to determine the licence in the event of the licensee's insolvency is in principle unobjectionable, even bearing in mind that it may only take effect after the bankruptcy or liquidation of the licensee. As Mr Howard QC said on behalf of BBCW, at least in the absence of special circumstances, a licence can be granted on any terms as to

determination which the licensor wishes to agree with the licensee. As long ago as 1787, it was held that a provision for determination of a lease in the event of the tenant's bankruptcy did not contravene the law (see *Roe d. Hunter v Galliers* (1787) 2 TR 133), and such a provision is common form in most leases, and has been effectively approved by statute (see now section 146(9) of the Law of Property Act 1925). The same principle must apply to licences – see *Whitmore* 2 J&H 204 and *Barter* 26 Ch D 510. In relation to intellectual property licences, such a provision is also very common: *Laddie et al, The Modern Law of Copyright and Designs* 3rd edition, para 24.7, footnote 3, refers to such a provision being included in "[a]ny well drawn licence", and in *Fraser v Oystertech* [2004] BPIR 486, para 97, Mr Prescott referred to such a provision as a "standard term" in a licence of intellectual property rights. Most landlords and licensors do not want to have a tenant or licensee enjoying their land or exploiting their intellectual property, especially when (as is almost always the case) the tenancy or licence is granted on terms which include significant obligations, once the tenant or licensee is insolvent.

82. In this case, of course, the basis for the right to determine the licence is a little more complex. The licensee, Video, is wholly owned by 2e, which in turn is 60% owned by the licensor, BBCW, and 40% owned by Media. The licence is determinable in the event of the insolvency of Media (or its parent, direct or indirect). In practice, therefore, the licence is determinable by the licensor, not on the insolvency of the licensee, but on the insolvency of the licensor's co-owner (through 2e) of the licensee. The provision for determination is thus a variant of the "standard term", but the variation arises from the fact that the licensor has retained a substantial interest in the licensee, and it in no way represents a departure of significance from the norm, for present purposes.

83. As I have sought to explain, the fundamental reason why the clause does not infringe the rule is that its invocation does not involve what has been the property of the insolvent party becoming vested in a third party. It merely involves a limited interest being brought to an end, in accordance with its terms, by the third party who had granted it to the party who has become insolvent. In that connection, it can be contrasted with the other provision which falls for consideration in the *Butters* appeal, namely clause 26.7 of the JVA. This plainly does involve property which had been owned by a party who is now insolvent, namely the shares in 2e owned by Media, becoming vested in a third party, namely BBCW. But for one important feature, this clause would fall foul of the rule, at least if operated on the administration of Media. That important feature is similar to, indeed stronger than, the feature which prevented the rule applying in *Borland* [1901] 1 Ch 279. In that case, an obligation contained in the company's articles of association on a shareholder, who became bankrupt, to sell his

shares to other shareholders was held to be enforceable because the sale was to be at market value. As Farwell J made clear at [1901] 1 Ch 279, 291, he would have held otherwise if the sale was required to have been effected other than on "fair" terms, which meant, it would seem, if the terms had been different from those which applied in the other circumstances in the articles of association which gave rise to an obligation on a shareholder to sell his shares. In the present case, the price payable under clause 26.7 is market value, which cannot be objectionable: indeed, it is arguably better than market value because no discount can be made for the fact that Media has a minority shareholding in 2e.

84. If a licence termination provision such as clause 16.2.5 of the MLA and a right of pre-emption such as clause 26.7 of the JVA is each unexceptionable on its own, it is difficult to see how they could be objectionable because they exist together. Nonetheless, Mr Sheldon advanced a most attractive case for suggesting that the combination of the two clauses did fall foul of the rule. His argument had a number of strands. First, he relied on the point that the two clauses were linked, and that, given that the MLA could not be determined by BBCW under clause 16.2.5 unless BBCW was exercising its right to purchase Media's shares in 2e under clause 26.7 of the JVA, this showed that the purpose of the two clauses was to enable BBCW to acquire those shares at a discount, as the major value in those shares was 2e's ownership of Video, so long as Video remained licensee under the MLA. The trouble with that argument is that it overlooks the fact that the practical effect of the linkage is simply this, that BBCW's ability to determine the MLA in an Insolvency Event is fettered in that it can only be operated if BBCW exercises its right under clause 26.7 of the JVA. Accordingly, BBCW (as licensor under the MLA) is worse off, and Media (as owner of 40% of the shares in 2e), better off, by the linking of the two provisions than they would be if the two provisions had not been so linked, and if they were not so linked, they would, as independent provisions, be valid, as I have discussed. Given that the rationale for the rule is to protect insolvent estates, it cannot be right that it requires the two clauses to be invalidated in any way simply because they contain a term of some potential benefit, and no potential harm, to the estate, given that, without the term, the clauses would not infringe the rule.

85. Mr Sheldon also argued that the clauses, when read together, demonstrated that the intention of the parties was to reduce the amount of money available to be distributed to Media's creditors, by enabling BBCW to acquire Media's shares in 2e at a lower price than if Media (or its parent) had not become insolvent. I do not agree. The point is very similar to Mr Sheldon's first point, and the answer is that, viewed objectively (as supported by the witness statement evidence, whose admissibility on this point it is

unnecessary to determine), the proper commercial analysis of the purpose of the two clauses appears to be as follows. BBCW, like almost any licensor of intellectual property rights, wanted to be able to determine the licence in the event of the insolvency of its effective joint venturer, Media, as co-owner through 2e, of the licensee, Video (or indeed in the event of the insolvency of any parent company of Media). In those circumstances, Media would not have wanted to have been "landed" with a minority holding in 2e, and it is for that reason, i.e. for Media's benefit, that BBCW's right to determine the MLA is dependent on it agreeing to buy out Media's shares in 2e at market value.

86. Mr Sheldon also contrasted the valuation under clause 26.7 of the JVA with the valuation basis which applied in cases other than insolvency which give rise, under clause 26, to a right in BBCW to purchase Media's shares in 2e. In such other cases, the value of the shares would take into account the fact that 2e owned Video, which had the benefit of the MLA. Accordingly, ran the argument, reflecting the approach of Farwell J in *Borland* [1901] 1 Ch 279, 291, the two clauses did fall foul of the rule, as the price payable for Media's shares in 2e in the event of insolvency would be lower than if the shares were being acquired in other circumstances covered by clause 26. I do not accept that analysis for two reasons. First, as BBCW must pay market value (indeed, at least market value) for the shares, the rule cannot be engaged. Secondly, in every case, in which clause 26 of the JVA provides for BBCW to acquire Media's shares in 2e, including the occurrence of an insolvency event under clause 26.7, BBCW has to pay market value for those shares (subject to the exclusion of any discount attributable to Media having a minority interest). Accordingly, there is no such difference. There will be a difference in the actual price, but that is because, under clause 26.7, the MLA will have been determined, but as that determination is, as discussed, unobjectionable, no attack can be mounted against clause 26.7 on that ground.

87. It follows from this that the Judge was, in my view, incorrect to hold that the rule was engaged on the facts of the present case. With respect to him, that conclusion is reinforced by the effect of the "blue pencil" exercise which he carried out: it resulted in the two clauses having the same commercial effect as they would have had without the excision of the parts which he, in effect, deleted. In that connection, it would not be helpful to consider the question whether, if as the Judge thought, the rule was engaged, it was appropriate to indulge in a blue pencilling exercise, and, if so, what that exercise should have involved. The extent to which the two clauses in issue would have to have been disregarded would have depended on the reason why, and extent to which, they infringed the rule. As the clauses do not infringe the rule, this question is not one which can be usefully considered.

Would the rule have applied as the deprivation was prior to Media's administration?

88. I consider that, even if the rule had been engaged if the notice operating clause 26.7 of the JVA and clause 16.2.5 of the MLA had been served after the administration order made in relation to Media, it would not have been engaged in the present case, given that the relevant Insolvency Event which triggered the service of the notice related purely to Group, and the service of the notice which operated clause 26.7 of the JVA and clause 16.2.5 of the JVA was served on Media before the making of the administration order against Media. As already explained in relation to the *Perpetual* appeal, it appears to me that both principle and practicality support the view that the rule has no application where the deprivation has been effected by the time the winding up (or administration) order is made against the company which is deprived.

89. As Mr Howard argued on behalf of BBCW, once a valid notice was served under clause 26.7 of the JVA on 2 February 2009, the equitable ownership in Media's shares in 2e passed to BBCW. Accordingly, if Media had gone into liquidation (rather than administration) on 11 February 2009, the liquidator could only have treated the bare legal title to the shares (subject to the right to be paid the "Fair Value" for those shares) as the property of Media. If the notice had not been served until after 11 February, the position would have been different, as there would have been no specifically enforceable agreement for the sale of Media's shares in 2e prior to Media going into administration, and (as administration is treated for present purposes like liquidation) it is hard to see how the reasoning of the majority in *British Eagle* [1975] 1 WLR 758 could be distinguished.

Concluding remarks on the rule

90. The decision of the House of Lords in *British Eagle* [1975] 1 WLR 758 is not without its critics, which is scarcely surprising given that six of the nine Judges who expressed views on the point were effectively out-voted by the other three. However, it remains the leading case on the rule in this jurisdiction, and the basis and reach of the rule is reasonably clear from the leading speech of Lord Cross, and, as Patten LJ says, there is little between Lord Cross and Lord Morris so far as principle is concerned (although, as mentioned above, they seem to have differed on the question of whether it was relevant to the application of the rule that the deprivation provision is provided to take effect on liquidation or on the happening of some other event).

91. In this judgment, I have tried to adhere to the logic of that reasoning, while also bearing in mind the need for clarity and consistency in this area of the law, the undesirability of

interfering with party autonomy in business transactions, the inappropriateness of the courts extending the law in areas where Parliament has enacted an extensive code, and the assistance which can be gleaned from a significant body of jurisprudence.

92. It is true that the conclusion on the second issue in each appeal, namely that a deprivation will not (at least normally) be caught by the rule if it is completed before liquidation or bankruptcy (or its equivalent), means that it may be reasonably easy in many cases to devise schemes to avoid the rule. However, as Mr Moss said, the decision in *Ansett Australia* [2008] BPIR 57 shows that the effect of the rule can often be avoided by careful drafting. It is ultimately up to Parliament to legislate against anti-avoidance devices in the insolvency field, as it has done in sections 238 and 239 of the 1986 Act. Especially in an area where Parliament has intervened so substantially and so significantly, it can only be very rarely, if ever, that it would be right for the court to invent its own anti-avoidance policies and frustrate the terms of commercial contracts freely entered into by sophisticated parties.

93. It can also be said that it is difficult to define precisely what sort of deprivation provisions are caught by the rule. That point is particularly acutely raised by the question whether there is a deprivation capable of falling within the rule in the "flip" provisions in the documentation in the *Perpetual* appeal. The difficulty is reinforced by the view expressed by Patten LJ (which I share) that the decision in *Newitt* 16 Ch D 522 cannot survive the analysis and reasoning in the speech of Lord Cross in *British Eagle* [1975] 1 WLR 758. The effect of my reasoning on the first point in the *Butters* appeal leaves, I hope, the law in a relatively clear state, but, as indicated, I am not sure that that is so true of my reasoning on the first point in the *Perpetual* appeal. However, because of the multifarious, sophisticated and increasingly complex arrangements contained in modern financial instruments, such as the synthetic collateralised debt obligations in these proceedings, it is probably inevitable that the courts must develop the law in this area, at least for the moment, on a relatively cautious, case-by-case basis.

94. It is strictly unnecessary to decide what would happen if a third party had a right to acquire an interest owned by a company (either on notice or on the happening of a breach or other event) which was only exercised after the company went into liquidation. However, in agreement with Patten LJ, it seems to me that the logic of the decision in *British Eagle* [1975] 1 WLR 758 must mean that the right could not be enforced, as it would deprive the company of an asset which should be available to the liquidator for distribution, unless it was a right to acquire the asset at or above market

value. However, the loss of the ability to exercise the right might well be something for which the third party could prove in the liquidation.

95. I should also add that we were referred to *Peregrine Investments Holdings Ltd v Asia Infrastructure Fund Management Co Ltd* [2004] 1 HKLRD 598, a decision of the Hong Kong Court of Appeal; for the reasons given by Patten LJ, I agree with the minority judgment and disagree with the majority. Finally, on this aspect, it is right to acknowledge that the above analysis is not quite the same as, and is (I hope) rather more focussed than, the analysis which I proffered in *Money Markets International Stockbrokers Ltd (in liquidation) v London Stock Exchange Ltd* [2002] 1 WLR 1150. It would not be profitable to analyse the rather detailed discussion at [2002] 1 WLR 1150, paras 87 to 118, but, while there is not much to challenge in the "rather limited propositions" summarised at [2002] 1 WLR 1150, para 118, proposition (iii) may be rather misleading.

The effect of the grant of the temporary licence in the Butters case

96. Longmore LJ has dealt with the arguments on this issue, which, as he says, need not be determined in the light of our conclusion that the rule does not inhibit the operation of clause 26.7 of the JVA or clause 16.2.5 of the MLA. I agree, however, with his view that Peter Smith J was right to conclude on the findings which he made that, if the MLA could not have been determined as a result of the Notice, it was determined by the grant and acceptance of the temporary licence.

Conclusion

97. Accordingly, the appeal brought by LBSF against the decision of the Chancellor is dismissed, the appeals by the administrators of Media and Group against the decision of Peter Smith J are dismissed, the appeal brought by BBC Video against the decision of Peter Smith J is dismissed and the cross-appeal of BBCW against the decision of Peter Smith J is allowed.

98. I would invite counsel in each case to agree a form of order recording the effect of our decision.

Lord Justice Longmore :

99. I agree with the Master of the Rolls that the appeals should be dismissed and the cross-appeal in the *Butters* case should be allowed for the reasons which he gives.

Did the MLA come to an end in any event?

100. The Judge held that as a result of the conduct of the parties, the licence given by BBC Worldwide ("BBCW") to BBC Video ("BBCV") in the MLA came to an end in any event because, in February 2009 after BBCW had purported to terminate the licence, they offered to grant a temporary licence (terminable on a month's notice) to BBCV/Media and BBCV/Media agreed. Even if therefore the Administrators of Media or Group are right that the termination of the original licence offended the anti-deprivation principle, that would not avail them if the Judge is correct, because the original licence no longer exists. Both the Administrators and BBCV appeal against the Judge's conclusion. The burden of this argument was assumed by Mr Cullen for BBCV.

101. The exchange of letters, leading to the new licence was initiated by a letter from BBCW to BBCV of 30 January 2009 in the following terms:-

> "We are writing to inform you that we have today served notice on [Media] in accordance with clause [26.7.1.] ... The MLA has therefore terminated pursuant to clause 16.2.5 of the MLA, and all rights granted under or pursuant to the MLA have automatically reverted to us...
>
> In the light of the termination of the MLA and the reversion of rights that has occurred in consequence, we hereby offer you a new licence containing the same terms as are contained in the MLA save that the "Term" of such licence shall also be terminable by either party on one month's written notice...this new licence will apply to all rights under licence under or pursuant to the MLA as at the date of its termination...
>
> We will take the continued exploitation by 2e after today's date of rights previously granted as your acceptance of these offers of new licences...unless we hear from you to the contrary."

BBCV and 2e responded on 5 February 2009 by saying:-

> "BBCW has further informed us that it has served notice on [Media] pursuant to clause 26.7.1. of the JVA, with the result that the MLA has terminated pursuant to clause 16.2.5.
>
> We have also seen the offer of a new licence containing the same terms as the MLA, save that the Term shall be terminable by either party on one month's written notice with a sell-off provision...

> In the light of the serious consequences of the termination of the MLA for the 2 entertain group of companies, the Directors of [BBC Video] and [2e] have concluded that it is appropriate to accept the BBCW Offer".

The Judge considered the correspondence and what he described as the "coy" evidence given on both sides in relation to the question whether the parties were aware that there were possible grounds for challenging the termination of the old licence. He concluded that both parties were aware there were possible grounds for challenge on the basis of "unfairness" (para 48) but (para 52) that Media and BBCV had no confidence in any such grounds when they were negotiating the new (temporary) licence. The Judge concluded that the MLA could not stand alongside the new licence but was supplanted by it and had governed the parties' relationship since February 2009 (para 54).

102. Mr Cullen for BBCV (with support from Mr Sheldon QC for the Administrators) submitted (1) that the parties never intended to replace the MLA with the temporary licence, (2) that the temporary licence was subject to an express or implied condition precedent that the MLA was terminated so that, if it was not in fact terminated, the temporary licence never took effect (3) that the temporary licence was void for mistake.

103. Since the court has concluded that the anti-deprivation principle does not apply and that the MLA did in fact validly come to an end, anything the court says on this point is irrelevant to the decision; it can, therefore, be dealt with relatively briefly. In my view the Judge came to the correct conclusion.

104. In the first place the Judge's finding of fact, that BBCV (and Media) were aware that there were arguments for asserting that the MLA had not been validly terminated but decided to make the temporary licence agreement, was open to him on the "coy" evidence which the parties chose to put before him. It must, therefore, follow that BBCV made the agreement in that knowledge and thus agreed to give up any point they might have had in relation to the purported termination of the old licence, for the sake of having a seamless continuation of the rights which they were enjoying. On this analysis, arguments about implied conditions precedent and mistake cannot arise.

105. Secondly, even if it were correct that both parties were labouring under a misapprehension that the MLA had been validly terminated, I cannot read the correspondence as subjecting the new agreement to any express condition that the old MLA had been validly terminated. Although it proceeds on the basis that the MLA had in fact been terminated, no statement was made about the validity of the termination.

That was just not a matter which the parties discussed (or even, on this view of the case, wished to discuss).

106. Thirdly the Judge's finding of fact is fatal to the idea of an implied condition precedent. If the parties were aware that questions of validity could arise but do not mention them, one just cannot say that business efficacy requires a term that the agreement they have just made (and have for sometime continued to act on) is to disappear if it turns out at a later stage that, for whatever reason, the termination of the old agreement was ineffective or invalid.

107. Mr Cullen relied on the decision of Steyn J in *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255. The claimants had made an agreement to buy from (but to lease back to) the seller four industrial machines. The defendants guaranteed the obligations under the lease. The seller/lessee paid one instalment of rent but then defaulted. It was then discovered that the whole arrangement was a scam and that no machines had ever existed. In these circumstances the Judge, having emphasised the importance of the sanctity of contract and the need to give effect to the reasonable expectations of honest men, construed the reference to machines in the guarantee as a reference to existing machines and said that the contract was subject to an express condition precedent (and, if necessary, an implied condition precedent) that the machines did, in fact, exist. That seems to me to be a very different case. Machines are visible and tangible entities. It is easy to discover if they exist or not and their existence or non-existence can hardly be a matter of controversy. The question whether a licence agreement has been validly terminated and no longer exists is a different matter. A licence is not visible or tangible in the sense that a machine is. It is a legal concept. Although it may be possible to contract expressly on the basis that a licence has validly come to an end, it would be unusual because everyone knows that questions of validity of termination are (or may well be) essentially controversial. In the absence of an express term about validity of termination, it is in my judgment impossible to imply one.

108. Fourthly the same considerations militate against the existence of mistake. Where the parties are mistaken about the physical existence of the subject-matter of the contract there may be room for a doctrine of mistake. But again that is not this case. Still less is it the case where, on a true appreciation of the facts, both parties were aware that points could be made about the validity of the termination. Once a party appreciates that an assumption underlying a contract may be legally questionable, that party will usually bear the risk that that assumption will turn out to be false. There is then no room for mistake. As Steyn J said at page 268B:-

> "... before one can turn to the rules as to mistake, whether at common law or equity, one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will fail or prove to be unnecessary."

If there had been a condition precedent, argument about mistake is unnecessary. As it is, on the facts as found, the plea of mistake must fail.

109. If, moreover, one applies the requirements which are necessary before a mistake can be operative as they are set out in the *The Great Peace* [2003] QB 679, this case does not meet either requirement (i) or requirement (iv). There was no common assumption that the MLA had been validly determined nor was performance of the new licence contract rendered impossible by the fact (if it had been a fact) that the MLA had not been validly terminated.

110. I therefore reject Mr Cullen's argument which, in any event, makes no difference to the outcome of the appeal.

Lord Justice Patten :

111. I agree with the order proposed by the Master of the Rolls but, because of the general interest of these appeals and the importance of the issues which they raise, I add some observations of my own.

112. In both these appeals we are concerned with claims that significant parts of the contractual arrangements between the parties have been invalidated by the application of what has been termed the anti-deprivation rule. In the *Woolworths* appeal the agreements were made in England between English companies. In the *Lehman* appeals the companies are not English but the agreements are governed by English law and it is common ground that, for the purposes of applying the anti-deprivation rule, the court should treat the US Chapter 11 filings as if they were insolvency proceedings in England.

113. Expressed in its simplest and most general form, the anti-deprivation rule is said to be a common law rule of public policy that the property of an insolvent person must be administered for the benefit of his creditors in accordance with the provisions of what is now the Insolvency Act 1986. Consistently with and as part of this rule, the individual bankrupt or insolvent company may not contract at any time, either before or after the making of the bankruptcy or winding-up order, for its property subsisting at that date to

be disposed of or dealt with otherwise than in accordance with the statute. Put another way, it is not possible to contract out of the Act.

114. So in *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 the majority in the House of Lords held that, under the IATA clearing house arrangements, debts due from Air France to British Eagle in respect of services rendered between October 1st and November 6th, 1968 which had not yet been closed off under the clearing house procedures fell to be dealt with in the liquidation of British Eagle following its winding-up on 8th November and could therefore be recovered by its liquidator in full. Had it been permissible to deal with these liabilities under the IATA rules, the existence of set-offs would, on closure, have produced a nil balance in favour of British Eagle.

115. The House of Lords were split as to whether the liquidator could claim the benefit of the sums due from Air France without giving credit for the reductions which the application of the IATA rules required to be made. Lord Morris (giving the speech for the minority) accepted that the company's receivables had to be dealt with by the liquidator for the benefit of its creditors generally. But his view was that the receivable in this case was no more than the net balance (if any) due after the operation of the clearing house arrangements. This appears from two passages in his speech at p. 761E and 769H:

> "When a liquidator takes over the property of a company in order to apply it according to law he may disregard an arrangement pursuant to which there would be application of the property contrary to law: but he cannot disregard or ignore or alter the features of and the nature of the property itself by describing it as something that genuinely it is not.
>
> So in the present case if the defendant company had owed money to the plaintiff company but if there was a direction to the defendant company which required them in the event of a liquidation to pay the money to some particular persons rather than for the benefit of all the creditors the liquidator could prevent what would be an evasion of the law (see *Ex parte Mackay* (1873) 8 Ch. App. 643). But if an airline company makes a contract with a number of other airline companies (the contract being in no way colourable but made for commercially beneficial reasons) for the mutual rendering of services on the terms that no money is to become payable between the various parties inter se, I do not think that a liquidator while seeking to rely on and to extract a benefit

from the contract can do so on the basis of ignoring or transforming some of its terms or on the basis of requiring a breach of its terms.

.....

I see no reason to think that the contracts which were entered into by the members of the clearing house offended against the principles of our insolvency laws. Services rendered before the end of September 1968 were as I have stated the subject of "clearances" within the scheme before the date of the liquidation. "Clearance" differs from "settlement" (see regulations B.12, 14 and 15) and "clearance" in regard to the September items was complete before November 8. Services rendered during October and the first few days of November were in my view rendered under perfectly lawful contracts which were made in the same way as contracts had been made for years past. Because of the terms of the contracts which were made the appellants had no claims against and no rights to sue other individual members of the clearing house. It is a general rule that a trustee or liquidator takes no better title to property than that which was possessed by a bankrupt or a company. In my view the liquidator in the present case cannot remould contracts which were validly made. He cannot assert or assume or surmise that different contracts could or might have been made and then advance claims on the basis that such different contracts had in fact been made."

116. The majority view is set out in the speech of Lord Cross at p. 780C to 781B:

"It is true that if the respondents are right the "clearing house" creditors will be treated as though they were creditors with valid charges on some of the book debts of British Eagle. But the parties to the "clearing house" arrangements did not intend to give one another charges on some of each other's future book debts. The documents were not drawn so as to create charges but simply so as to set up by simple contract a method of settling each other's mutual indebtedness at monthly intervals. Moreover, if the documents had purported to create such charges, the charges - as the judge saw (see [1973] 1 Lloyd's Rep. 433) - would have been unenforceable against the liquidator for want of registration under section 95 of the Companies Act 1948. The "clearing house" creditors are clearly not secured creditors. They are claiming nevertheless that they ought not to be treated in the liquidation as ordinary unsecured creditors but that they have achieved by the medium of the "clearing house" agreement a position analogous to that of secured creditors without the need for the

creation and registration of charges on the book debts in question. The respondents argue that the position which, according to them, the clearing house creditors have achieved, though it may be anomalous and unfair to the general body of unsecured creditors, is not forbidden by any provision in the Companies Act, and that the power of the court to go behind agreements, the results of which are repugnant to our insolvency legislation, is confined to cases in which the parties' dominant purpose was to evade its operation. I cannot accept this argument. In *Ex parte Mackay,* 8 Ch.App. 643, the charge on this second half of the royalties was - so to say - an animal known to the law which on its face put the charge in the position of a secured creditor. The court could only go behind it if it was satisfied - as was indeed obvious in that case - that it had been created deliberately in order to provide for a different distribution of the insolvent's property on his bankruptcy from that prescribed by the law. But what the respondents are saying here is that the parties to the "clearing house" arrangements by agreeing that simple contract debts are to be satisfied in a particular way have succeeded in "contracting out" of the provisions contained in section 302 for the payment of unsecured debts "pari passu." In such a context it is to my mind irrelevant that the parties to the "clearing house" arrangements had good business reasons for entering into them and did not direct their minds to the question how the arrangements might be affected by the insolvency of one or more of the parties. Such a "contracting out" must, to my mind, be contrary to public policy. The question is, in essence, whether what was called in argument the "mini liquidation" flowing from the clearing house arrangements is to yield to or to prevail over the general liquidation. I cannot doubt, that on principle the rules of the general liquidation should prevail. I would therefore hold that notwithstanding the clearing house arrangements. British Eagle on its liquidation became entitled to recover payment of the sums payable to it by other airlines for services rendered by it during that period and that airlines which had rendered services to it during that period became on the liquidation entitled to prove for the sums payable to them. So, while dismissing the appeal so far as concerns the September clearance, I would allow it so far as concerns the period from October 1 to November 6."

117. What is clear from this passage is that the IATA clearing house arrangements did not survive the liquidation of British Eagle because they amounted to an attempt to administer debts due to the company otherwise than in accordance with what was then s.302 of the Companies Act 1948: i.e. a pari passu distribution amongst all of the company's general creditors. Although the rules of the scheme prohibited member

airlines from suing each other to recover the money due and instead required them to obtain payment through the clearing house system, Lord Cross considered that the sum due from Air France was nonetheless a chose in action having some but not all of the characteristics of a debt: see p. 778H. It was this chose in action which constituted the property of the company on liquidation and therefore fell to be dealt with under the Companies Act rather than in accordance with the IATA scheme.

118. Once one moves beyond the particular issue in that case of whether the Air France debt or the end balance represents the property of British Eagle on liquidation there is no real difference between the majority and minority views. Both Lord Cross and Lord Morris accepted that s.302 and the pari passu rule apply to the administration of the company's property in liquidation and that it is impossible to contract out of that. The common law rule of public policy applied in that case was therefore no more than the application of s.302 to the property of the company at the date of liquidation with the necessary corollary that a contract to administer the debts in some other way was unenforceable. The IATA scheme (which of course operates generally and has no special provisions dealing with insolvency) simply ceased to apply to the debts due to British Eagle once the liquidation took effect.

119. This view of the limited scope of the decision in *British Eagle* is confirmed by the recent decision of the High Court of Australia in *IATA v Ansett Australia Holdings Ltd* [2008] HCA 3. The rules of the clearing house scheme were modified following *British Eagle* so as to exclude any liability or right of action for payment between member airlines. The only liabilities of the airlines in respect of services rendered to each other are now to the clearing house for the balances due on closure. The administrators of Ansett sought a declaration that the clearing house scheme was unenforceable against the company post administration and that the only debtor-creditor relationship was between it and the other airlines.

120. The High Court decided by a majority that the rule changes were effective to make IATA the sole creditor of Ansett and that the revised system did not therefore have the effect of administering debts due to an insolvent company otherwise than in accordance with the mandatory pari passu rule imposed on the company by a deed of arrangement made under the powers contained in the Australian Corporations Act. After quoting the passage from Lord Cross referred to above, Gummow J (at paragraphs 76-79) said this:

> "[76] .....

... There appear to be two strands of thought in this passage. One is that the Clearing House arrangements, as they then stood, so operated as to give British Eagle an asset, the money claim against Air France, and that in the face of the mandatory operation of s 302 of the Companies Act 1948 (UK), this asset could not be captured for the netting-off system. This conclusion would flow from the operation of s 302 and would be analogous to the situation in *Re Jeavons, ex parte Mackay* discussed above. No recourse to 'public policy' would be called for. The second strand of thought is apparent in the references to 'mini liquidation', 'contracting out' and 'public policy'. But the critical point is that there was 'property' of British Eagle to which s 302 applied and a contractual provision negating that outcome could not prevail against the terms of the statute. Hence it perhaps is not surprising that Lord Cross did not spell out the content of any relevant public policy.

[77] Subsequently, however, in *Horne v Chester & Fein Property Developments Pty Ltd* [1987] VR 913, at 919, the rule was expressed as being that, 'in insolvency law, the *whole* of the debtor's estate should be available for distribution to *all* creditors, and that no one creditor or group of creditors can lawfully contract in such a manner as to defeat other creditors not parties to the contract' (emphasis added). And Ansett submitted that this formulation of the rule captures the essence of a public policy said to have been recognised and applied as a 'fundamental tenet of insolvency law generally' in various common law jurisdictions.

[78] It is not necessary to examine in any detail the several cases in which the rule is said to have been recognised and applied. Many can be understood as depending upon the proper application of a generally expressed provision in the relevant statute requiring that all debts proved in an insolvency rank equally and, if the property of the insolvent is insufficient to meet them in full, they are to be paid proportionately, See, for example, Corporations Act 2001 (Cth) (the Corporations Act), s 555. Others, including *British Eagle*, turned upon what was the 'property' of the company that was to be applied in satisfaction of its liabilities (Companies Act 1948 (UK), s 302; cf the Corporations Act, s 478). Instead, it is essential to begin from the elementary proposition that insolvency law is statutory and primacy must be given to the relevant statutory text.

[79] Whether the *whole* of the debtor's estate is available for distribution to *all* creditors, and whether *all* creditors are to participate *equally* in the

> distribution of that estate, are questions that depend entirely upon what the relevant statute provides. What is advanced as a rule of public policy assumes that there can be both an affirmative and a negative answer to each of those questions. To the extent that the rule of public policy depends upon there being universal and invariable rules that the *whole* estate is available to *all* creditors and *all* creditors are entitled to participate *equally*, the rule of public policy depends upon an affirmative answer to both of the identified questions. Yet by asserting that the public policy achieves what the statute otherwise does not achieve, the rule assumes that the questions identified have been answered in the negative. This contradiction suggests that the rule that is asserted is unsound."

121. A similar view of what was decided in *British Eagle* was expressed by Peter Gibson J in *Carreras Ltd v Freeman Matthews Ltd* [1985] 1 Ch 207 at p. 226F:

> "Thus the principle that I would extract from that case is that where the effect of a contract is that an asset which is actually owned by a company at the commencement of its liquidation would be dealt with in a way other than in accordance with section 302 of the Companies Act 1948, then to that extent the contract as a matter of public policy is avoided, whether or not the contract was entered into for consideration and for bona fide commercial reasons and whether or not the contractual provision affecting that asset is expressed to take effect only on insolvency."

122. Before the law can strike down a commercial contract on grounds of public policy it needs, in my judgment, to be certain of two things. The first is what the rule of public policy which is sought to be enforced actually is. The second is whether the invalidity or unenforceability of the contract is necessary in order to give effect to the policy objective enshrined in the rule.

123. On the authority of the decision in *British Eagle* the anti-deprivation principle is little more than the direct application of the provisions of the Insolvency Act to the transaction under consideration. Compliance with the statute is both the foundation for the rule prohibiting the enforcement of contracts which are in conflict with the application of the statutory provisions and is its only rationale. Consistently with this, it is difficult to see how a contract can offend against the principle unless there is both property of the bankrupt or the company in liquidation to which it relates and its treatment of that property produces a result which is inconsistent with the provisions of the Act.

124. For this reason alone the suggestion made by the Deputy Judge (Mr Peter Prescott QC) in *Fraser v Oystertec PLC* [2004] BPIR 486 that the anti-deprivation rule can apply to invalidate contracts even when no bankruptcy or winding-up order is ever made seems to me to be wrong in principle and should not be followed.

125. Rule 4.181 of the Insolvency Rules 1986 provides for a pari passu distribution of the assets of a company to the unsecured creditors who are not preferential creditors. A similar rule is contained in s.107 of the Act for voluntary liquidations and in s.328(3) for bankruptcy. The functions of the liquidator are "to secure that the assets of the company are got in, realised and distributed to the company's creditors, and if there is a surplus, to the persons entitled to it": see s.143(1). In bankruptcy the estate of the bankrupt vests in the trustee on appointment (s.306) and includes all property belonging to the bankrupt at the commencement of the bankruptcy together with any property treated as falling within the estate under the provisions of the Act: see s.283(1). The second limb of this formula is a reference to the provisions of ss.339-342F which enable the court to set aside certain specified types of prior transactions including transactions at an undervalue and preferences. Similar provisions relating to companies in liquidation can be found in ss.238-246 of the Act.

126. Where a winding-up or bankruptcy order is made the operation of the pari passu rule relates to property of the company or the bankrupt from the commencement of the relevant insolvency process. In the case of companies, winding-up commences from the date of the presentation of the petition or, in a voluntary liquidation, from the date of the resolution to wind-up: see IA s.129. Consistently with this, s.127(1) of the Act invalidates any disposition of the company's property or any alteration in the status of the company's members made after the commencement of the winding-up unless the court orders otherwise.

127. On an application for a validation order in the period between the presentation of the petition and its hearing, the court will need to be satisfied that it is in the interests of the creditors generally that the transaction should be allowed to proceed: see *Re Gray's Inn Construction Co Ltd* [1980] 1 WLR 711 at p. 717. In *Denney v John Hudson & Co* [1992] BCLC 901 Fox LJ (at p. 904) set out the following principles derived from that earlier decision of the Court of Appeal:

> "(1) The discretion vested in the court by s 522 is entirely at large, subject to the general principles which apply to any kind of discretion, and subject also to limitation that the discretion must be exercised in 'the context of the liquidation provisions of the statute.

(2) The basic principle of law governing the liquidation of insolvent estates, whether in bankruptcy or under the companies' legislation, is that the assets of the insolvent at the time of the commencement of the liquidation will be distributed pari passu among the insolvent's unsecured creditors as at the date of the bankruptcy.

In a company's compulsory liquidation this is achieved by s 227 of the 1948 Act (now s.127 of the Insolvency Act 1986 of the current legislation).

(3) There are occasions, however, when it may be beneficial not only for the company but also for the unsecured creditors, that the company should be able to dispose of some of its property during the period after the petition has been presented, but before the winding-up order has been made. Thus, it may sometimes be beneficial to the company and its creditors that the company should be able to continue the business in its ordinary course.

(4) In considering whether to make a validating order, the court must always do its best to ensure that the interests of the unsecured creditors will not be prejudiced.

(5) The desirability of the company being enabled to carry on its business was often speculative. In each case the court must carry out a balancing exercise.

(6) The court should not validate any transaction or series of transactions which might result in one or more pre-liquidation creditors being paid in full at the expense of other creditors, who will only receive a dividend, in the absence of special circumstances making such a course desirable in the interest of the creditors generally. If, for example, it were in the interests of the creditors generally that the company's business should be carried on, and this could only be achieved by paying for goods already supplied to the company when the petition is presented (but not yet paid for) the court might exercise its discretion to validate payments for those goods.

(7) A disposition carried out in good faith in the ordinary course of business at a time when the parties were unaware that a petition had been presented would usually be validated by the court unless there is ground for thinking that the transaction may involve an attempt to prefer the disponee – in which case the transaction would not be validated.

(8) Despite the strength of the principle of securing pari passu distribution, the principle has no application to post-liquidation creditors; for example, the sale of an asset at full market value after the presentation of the petition. That is because such a transaction involves no dissipation of the company's assets for it does not reduce the value of its assets."

128. As I shall explain later, propositions (6) and (8) are particularly relevant to the issues canvassed on these appeals.

129. If validation is sought after a winding-up order is made it is likely to be even more difficult to justify any disposition which is in conflict with the operation of the pari passu principle. The party in whose favour the disposition was made may seek to plead that he received the property or payment without notice of the petition but, where in a contract the event which triggers the disposition is expressly the bankruptcy or liquidation of the counterparty, it is difficult to see how the transaction could ever be regarded as anything but an agreement to prefer one creditor to the detriment of the general creditors as a whole. The strongest evidence will be the terms of the agreement itself.

130. Bankruptcy commences from the date of the making of the bankruptcy order (see IA s.278) but again any payments or dispositions by the bankrupt of his property made between the presentation of the petition and the bankruptcy order are rendered void by s.284 unless the property was received in good faith before the making of the bankruptcy order and without notice of the presentation of the petition: see s.284(4).

131. "Property" includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property: see IA s.436.

132. A straightforward application of these provisions to the contracts under consideration on these appeals would not bring them within the anti-deprivation rule. In the two Lehman cases the charge over the collateral provided by clause 5.3 of the Supplemental Trust Deed was granted to the trustee on behalf of both the Noteholders and the swap counterparty to secure payment of the sums due from the issuers to the Noteholders under the Notes and the payment to the swap counterparty of the sums due to it from the issuers under the swap agreement. The Noteholders were not parties to the swap agreement and their only contractual rights were to payment under the Notes.

133. Clause 5.5 of the Supplemental Trust Deed gave the swap counterparty priority in every distribution of the proceeds obtained from the realisation of the security unless it was the Defaulting Party under the swap agreement in respect of an Event of Default. During the continuance of the swap agreement it therefore enjoyed priority over the collateral purchased with the Noteholders' money so long as it continued to perform its obligations by paying to the issuers the sums due from them to the Noteholders. If those payments ceased and an Event of Default occurred which would leave the issuers to pay the sums due under the Notes without the financial assistance of the swap counterparty then the Noteholders became entitled to priority over the proceeds from the collateral to meet any shortfall.

134. The definition of an Event of Default in the ISDA Master Agreement to include the bankruptcy of either the swap counterparty (LBSF) or a Credit Support Provider (Lehman Brothers Holdings Inc) ("LBHI") as well as a failure to pay meant that by the time that the first swap termination notices came to be served in late November 2008 there were at lease two (and possibly three) events which could be relied upon by the Noteholders as constituting events of default for the purposes of clauses 5.5 and 9.3 of the Supplemental Trust Deed. The first was the Chapter 11 filing by LBHI which occurred on 15th September 2008. The second was any non-payment under the swaps that constituted an Event of Default thereunder. The dates on which payments fell due and were missed under the swaps varied among the series but were in some cases before and some cases after 3rd October 2008. The third was the Chapter 11 filing by LBSF which occurred on 3rd October 2008.

135. Even if one accepts that the date for determining the order of priority under clause 5.5 is that of the realisation or distribution of the proceeds of the collateral (rather than 15th September as held by the Chancellor) and that it therefore post-dates the bankruptcy of LBSF, the consequence of the operation of clause 5.5 is not to deprive LBSF or its creditors of any property or asset which they would have been entitled to but for its bankruptcy. The only interest or property which the company ever enjoyed in the collateral was a charge granted by the issuers of the Notes on the terms of the Supplemental Trust Deed. That security interest remains part of the property of the company unchanged by the event of its bankruptcy. The reversal of the order of priority under clause 5.5 was always a facet of the security designed to regulate the competing interests over the collateral of LBSF and the Noteholders. To say that its operation in the event of the company's bankruptcy constitutes the removal of an asset from the liquidation is to confuse the security itself with the operation of its terms in the events prescribed by the charge. LBSF retains the same asset as it had before its bankruptcy and is free to deal with any recoveries for the benefit of its general creditors in

accordance with the applicable statutory regime. Likewise the Noteholders do not obtain any security over the collateral which they did not have before. This was essentially the reasoning of the Chancellor and I agree with it.

136. The same point can be made about Mr Snowden's reliance on condition 44 of the terms and conditions attached to the prospectus which establishes the amounts due under the swap agreements if terminated on an Event of Default. Condition 44 is said to have the effect of increasing the amount payable to Noteholders in the event of LBSF being the defaulting party under the swap agreement by diverting to the Noteholders monies which would otherwise have been payable to it in order to discharge the issuers' liability for Unwind Costs. But the operation of condition 44 does not give to the Noteholders more than the right to recover the whole of the sums due under the Notes in priority to any claim over the collateral by LBSF for the Unwind Costs. It simply adjusts the balances on early termination to ensure that the Noteholders are paid the whole of what is due to them in priority to the sums payable to LBSF. If there is no shortfall in the security LBSF will recover the sums due to it in full. Condition 44 does not therefore remove an asset from LBSF. Nor does it give to the Noteholders security over an asset in which they previously had no interest. It merely regulates the order in which the company and the Noteholders are entitled to be recouped out of the security. Although the amount of the security available to meet LBSF's claims is obviously reduced in the event of a shortfall in the value of the security over what it would have been had no Event of Default occurred, that is simply a function of the change in priority which was always a feature of the security which the company enjoyed.

137. A change in priority consequent upon the insolvency or liquidation of a company is not prohibited by any express term of the Insolvency Act and, for the reasons I have given, does not amount to the disposition of any property of the company. If the anti-deprivation rule is to be effective to invalidate the provisions of clause 5.5 and condition 44 then it has to be based on a wider principle than that applied by the House of Lords in *British Eagle*.

138. Is the position any different in respect of the termination of the Master Licence Agreement ("MLA") and the operation of clause 26.7 of the Joint Venture Agreement ("JVA") in the *Woolworths* appeal? Under the MLA BBC Worldwide Ltd ("BBCW") granted to BBC Video Ltd ("Video") an exclusive but non-assignable licence to manufacture, distribute and sell video cassettes and DVDs of existing and future BBC titles. The MLA did not include an assignment of any copyright, trade mark or other intellectual property rights in respect of those titles. In common with most such agreements, it was terminable by notice under clause 16 on various grounds including

the insolvency of Woolworths Group plc ("Group"), the ultimate parent of WW Realisation 8 Ltd ("Media") which is the counterparty under the JVA and the 40% shareholder in 2 Entertain Ltd ("2e").

139. Clause 16.2.5 makes the effective termination of the MLA on the grounds of the insolvency of Group dependent on the service of a notice under clause 26.7.1 of the JVA. BBCW must, as part of that condition, become unconditionally bound to buy Media's shares in 2e which will be the effect of the service of the clause 26.7.1 notice.

140. Under clause 26.7.1 BBCW is required to pay Fair Value for the shares. This is expressed to be the market value of the shares at the date of the notice disregarding any premium for majority control or any discount for a minority holding: see clause 27.2.1. The Investment Bank which is to carry out the valuation must have regard to recent comparables but:

> "26.7.2 In determining Fair Value for the purpose of this clause 26.7, the Investment Bank shall be directed to take into account the continuation (on the same or on different terms) or the termination in accordance with their terms as a consequence of the Insolvency Event in question of the agreements referred to in this clause 26.7 and the consequences of any such continuation or termination.
>
> 26.7.3 The provisions of clause 16.2.5 of the Master Licence shall apply."

141. These latter provisions mean that there is no significant departure from reality in assessing 2e's worth at the relevant date but no discount is to be allowed against market value on account of the shareholding being a minority interest. Although this is obviously favourable to Media, the administrators' case is that the combination of the power of termination contained in clause 16.2.5 and the basis of valuation to be applied under clause 26.7.1 operates to deprive Media of its shares at an undervalue. Mr Sheldon submitted in terms that the purpose and effect of these provisions was to allow BBCW to get the shares cheap.

142. Before the Judge it seems to have been accepted by the administrators that, looked at in isolation, neither the provisions of clause 26.7.1 of the JVA nor those of clause 16.2.5 of the MLA could be said to be within the anti-deprivation rule. But the express linkage in these provisions to each other was said to be sufficient to transform them into an unenforceable contract. Like the Master of the Rolls, I consider that neither this submission nor the Judge's acceptance of it were correct. The provisions of clause

26.7.3 which expressly apply to the valuation exercise the provisions of clause 16.2.5 of the MLA do no more than to require the valuation of the shares to take into account the status of the licence granted to BBC Video under the MLA according to its actual terms. To value the company on any other basis would be counter-factual. The valuation exercise therefore requires the Investment Bank to take into account the termination of the licence which has occurred. If there is nothing objectionable in a provision which entitles one shareholder in a company to acquire the shares of another in the event of its or its parent's insolvency then the basis of valuation prescribed by clause 26.7.3 is also unobjectionable. Therefore Mr Sheldon's submission that the effect of these provisions was to enable BBCW to purchase the shares at an undervalue can only be correct if the termination of the licence in the event of the insolvency of Group is in some way precluded by the operation of the anti-deprivation rule. Otherwise the Fair Value formula operates to give Media the market value of its 2e shares with no discount for a minority stake.

143. A licence can terminate either by effluxion of time or on the happening of a specified event. Alternatively it may be terminable on notice in certain circumstances. If a licence for a specified period terminates by effluxion of time after bankruptcy or the liquidation of a company no-one contends that it infringes the anti-deprivation rule. The liquidator or trustee in bankruptcy never inherits more than a finite interest. Similarly if a licence were expressed to determine automatically upon the insolvency of the licensee or its parent no complaint could be made. There would be no property to fall into the insolvent estate.

144. In the cases of a lease or licence which are terminable by notice on the insolvency of the licensee the interest will continue into the period of insolvency and therefore form part of the estate. But again the trustee or liquidator will take the interest subject to the licensor's power of termination and cannot therefore complain if it is exercised. The cases draw no distinction between a lease or licence terminable post-insolvency for a breach of its terms and cases where the agreement is expressly terminable on bankruptcy or liquidation. It seems to have been established since at least the eighteenth century that a proviso in a lease for re-entry on an act of bankruptcy was not void on grounds of public policy: see *Roe d. Hunter v Galliers* (1787) 2 TR 132.

145. In the case of bankruptcy or winding-up there is no statutory inhibition under the Insolvency Act on the exercise of these powers. Administration bars the exercise of a landlord's right of forfeiture by peaceful re-entry or by legal process without the consent of the administrators or the court (see Insolvency Act, Schedule B1, paragraph 43(1))

but this merely demonstrates that the inclusion in a lease of a proviso for re-entry in the event of bankruptcy is not per se unenforceable.

146. In principle a licence terminable on the liquidation or bankruptcy of the licensee can be no different. The power of termination does not infringe the anti-deprivation rule because it does not remove from the estate property in which prior to its insolvency the bankrupt or insolvent company ever had an unfettered interest. The trustee or liquidator is bound to take the licence on the terms on which it was granted. If the event of insolvency which triggers the right to terminate is that of a parent or group company rather than the licensee then the position is a fortiori.

147. Like the Master of the Rolls I find it difficult to see how provisions in a licence which enable it to be terminated on the bankruptcy of a parent company and which are otherwise legally unobjectionable can be transformed into an unenforceable contract by the insertion of provisions designed to ensure that the right of termination is only exercised in conjunction with the acquisition of Media's shares. Even without that provision BBCW would be entitled, upon terminating the licence, to acquire the shares on terms which took account of the termination of the licence.

148. If the termination of the MLA was valid one needs to return to clause 26.7 of the JVA. An option to acquire shares in the event of bankruptcy is not objectionable on grounds of public policy unless the price paid for the shares would constitute an undervalue. The trustee or liquidator is bound by the contract which was made as an incident of the property which falls into the insolvent estate. If the event of bankruptcy is that of the shareholder itself then IA s.127(1) will render the transfer void unless validated by the Court. But, as Fox LJ indicated as his proposition (8) in *Denney v John Hudson & Co* (supra), the sale of an asset at full value will not infringe the pari passu principle. The option therefore remains contractually exercisable unless the price fixed by the option agreement is less than the shares could otherwise be sold for: see *Borland's Trustee v Steel Brothers & Co Ltd* [1901] 1 Ch 279. A contract to acquire the shares at an undervalue on bankruptcy was treated as a fraud on the bankruptcy laws in the older cases because it was tantamount to the gratuitous transfer to the option holder of part of the bankrupt's uncharged estate which would otherwise have been available for distribution between his general creditors.

149. In the *Woolworths* appeal the clause 26.7 notice was served on 2nd February 2009 before Media was placed into administration on 11th February. But even had the notice been served after that date the outcome would be no different. Given the enforceability of the termination provisions contained in clause 16.2.5 of the MLA, the Fair Value

formula when operated in the context of clause 26.7 of the JVA cannot be said to produce a price which is less than the market value for the shares. The administrators (like their counterparts in the Lehman appeals) can therefore only succeed in their claim to invalidate the option provisions if they can establish and rely upon a wider rule of public policy which invalidates contractual provisions merely because they have the economic effect of reducing the value of the insolvent estate.

150. Peter Smith J accepted an argument to that effect. He said:

> "114. In my view clause 26.7.3 of the JVA and its linkage to clause 16.2.5 of the MLA inevitably means that upon insolvency of any of the companies in the Woolworths Group that provision enables BBCW to acquire the shares at less than the Fair Value price that would have appertained but for the Insolvency Event. That in my view is a classic situation where the deprivation principle would apply. It does not matter in my view that it was a negotiated provision nor does it matter that it was not intended to be the effect nor does it matter that the Insolvency Event relied upon is not connected (as BBCW would argue) with the insolvency of Media.
>
> 115. It would have been otherwise in my view if the two agreements had not been linked. Thus for example if clause 16.2.5 had removed from it the linkage to the Notice so it became a general insolvency clause this would not pose a difficulty to BBCW. In that eventuality in my view the deprivation principle would have no application. The reason for that is that the MLA would have a standard provision for termination on insolvency. It has long been the case that such a provision is not subject to the deprivation principle see Neuberger J above. Mr Sheldon QC initially accepted that was the case even if the Insolvency Event was a different company within the group. He later resiled from that proposition and said it would only be a normal provision if the insolvency was the party to the MLA. I do not accept that. There are compelling reasons why the Insolvency Event would be triggered for any company within the group. That too in my view is not an unusual provision it merely reflects refinement of the clause over the years to deal with the possibility of the contracting company being kept alive artificially while all the other companies in the group collapse around it to avoid the determination provision. Thus if the clause read:-
>
> > "If a holder of [Media's shares] or any parent undertaking of a holder of [Media's shares] or if the holder of [Media's shares] is

> a member of the Woolworths Group as defined in the Joint Venture Agreement Woolworths suffers an Insolvency Event .....this Agreement should immediately terminate....."

116. That of course is not the agreement that was negotiated between the parties. I have no power to renegotiate the agreement. Thus it is of no assistance to BBCW to argue that the clause reflects the ordinary provision that on insolvency BBCW will have the right to terminate the MLA (per BBCW's supplemental note paragraph 7). I fully accept the gestation of the clause and why BBCW would consider it unfair in effect to have to "buy back" its own rights. However one is concerned as Neuberger J sets out above with the consequences of the operation of the clause in the facts of the case. The consequence is inevitable namely that as a determination only takes effect on the insolvency ***and*** the giving of the Notice its sole purpose is to produce a termination of the MLA for the purposes of calculating the Fair Value in the light of the Notice given by the BBCW. Nobody could expect that clause operating that way to achieve anything other than a reduced price in my view. It is self evident that 2e does not have much of a business if the MLA is terminated.

117. As I said in argument (and this is relevant to a further part of my judgment) the reality is that the situation has come about by a drafting problem. There would have been no reason why the agreed terms of the parties could not have been achieved by redrawing clause 16.2.5 of the MLA as set out above. Thus the application of the deprivation principle has an unintended consequence. I cannot believe that either BBCW or Media ever contemplated that there would be some principle that would prevent their freely negotiated agreement coming into effect.

118. I therefore nevertheless conclude that clause 16.2.5 and the linkage to the JVA by clause 26.7.3 is also void. They both together infringe the deprivation principle.

119. Finally, the fact that the event which causes the problem (clause 16.2.5 of the MLA) is in a document to which Media is not a party is in my view irrelevant. One looks at the facts, one looks at the events and if the consequence is that an asset is removed from the availability for the creditors at a lesser value than otherwise it would have been then the deprivation principle is infringed. Support for this is to be found in the Hong Kong Court of Appeal decision provided by Mr Sheldon QC in *Peregrine Investments Holdings Ltd (In*

liquidation) & Ors v Asian Infrastructure Fund Management Company Ltd LDC & Ors CACV 32/203 at paragraph 87."

151. I have already explained why the linkage between the two clauses is not sufficient in itself to convert what the Judge rightly regarded as two valid provisions (if independent of each other) into an invalid one. His view, however, that the application of the anti-deprivation rule depends upon the economic outcome of the transaction for the insolvent estate is troubling as a definition of the scope of the rule. On one view, it would catch almost any contractual provision affecting the property of an insolvent company which, when operated, reduced the value of the estate. This would include provisions (e.g) for the forfeiture of a lease or licence on insolvency which the Judge accepted were otherwise unobjectionable. It is necessary therefore to look at the decision of the Hong Kong Court of Appeal in *Peregrine Investment Holdings* and at the earlier English cases on which the majority's decision purports to be based.

152. As the Master of the Rolls has pointed out, there is a well-settled line of nineteenth century authorities that a contract under which a person's property is transferred to a third party on his bankruptcy is void at common law as what the cases describe as a fraud on the bankruptcy laws. Fraud for this purpose does not imply deception or dishonesty or even a conscious determination to avoid the effect of the Bankruptcy Act on insolvency. The contract is void because it has the effect of removing from the bankrupt's estate property which would otherwise remain and vest in the trustee for the benefit of the general creditors.

153. So in *Wilson v Greenwood* (1818) 1 Sw 471 Lord Eldon LC held that articles in a partnership deed which dissolved the partnership on bankruptcy but gave an option to the bankrupt's partners to acquire his share in the partnership at a valuation and to pay for it by yearly instalments over seven years were void because they removed from his assignees in bankruptcy their entitlement to a distribution of the bankrupt's share of the partnership property on dissolution. Lord Eldon's reasoning is set out in the following passage at p. 482:

> "I have no doubt, therefore, whether, on general principle, or on the construction of the deeds, that the law of this case is, that the partnership was dissolved by bankruptcy; and the property must be divided as in the ordinary event of dissolution without special provision. The consequence is, that the assignees of the bankrupt partner are become, *quoad* his interest, tenants in common with the solvent partner; and the Court must then apply the principle on which it proceeds in all cases, where some members of a partnership seek

> to exclude others from that share to which they are entitled, either in carrying on the concern, or in winding it up, when it becomes necessary to sell the property, with all the advantages relative to good will, &c."

154. This was applied by Page Wood V-C in *Whitmore v Mason* (1861) 2 J. & H. 204. In that case the partnership deed provided for the bankrupt partner's share in the partnership assets to be valued and for the value to be paid to his assignees in bankruptcy. But it excluded from this process his share in a mining lease, the benefit of which was simply to pass to his partners without payment. At p. 212 the Vice-Chancellor said that:

> "...the law is too clearly settled to admit of a shadow of doubt that no person possessed of property can reserve that property to himself until he shall become bankrupt, and then provide that, in the event of his becoming bankrupt, it shall pass to another and not to his creditors."

155. Both these cases were therefore concerned with contracts which removed the bankrupt's share in the partnership assets out of his estate on bankruptcy and transferred it to his partners on terms which departed from the provisions of the bankruptcy laws and deprived the estate and its creditors of its ordinary entitlement to a distribution of the assets or their value on dissolution. But the principle set out in *Whitmore v Mason* has been applied more widely. In *Ex p. Mackay* (1873) LR 8 Ch App. 643 the assignee of a patent who contracted as a term of the assignment to pay the royalties to the assignor agreed with him that in return for advancing £12,500 by way of loan, he should be entitled to retain one half of the royalties to be applied towards the satisfaction of the debt. It was also agreed that if the assignor should become bankrupt then the assignee should be entitled to retain the whole of the royalties until the debt was discharged. The Court of Appeal held that the provision for additional security over the royalties in the event of the assignor's bankruptcy was void because it provided on bankruptcy for a disposition of the bankrupt's assets which was not in accordance with the Bankruptcy Act. At p. 647 James LJ said that:

> "I entertain no doubt that there is a good charge upon one moiety of the royalties, because they are part of the property and effects of the bankrupt. But, on the other hand, it is equally clear to me that the charge cannot extend to the other moiety. If it were to be permitted that one creditor should obtain a preference in this way by some particular security, I confess I do not see why it might not be done in every case - why, in fact, every article sold to a bankrupt

should not be sold under the stipulation that the price should be doubled in the event of his becoming bankrupt.

It is contended that a creditor has a right to sell on these terms; but in my opinion a man is not allowed, by stipulation with a creditor, to provide for a different distribution of his effects in the event of bankruptcy from that which the law provides. It appears to me that this is a clear attempt to evade the operation of the bankruptcy laws. The result is that the order will be varied so as to declare that there is a security on one moiety only."

156. Although the assignor was a creditor of the bankrupt, the principle is not confined to circumstances amounting to a preference. The provision for additional security is void because it removes property from the estate over which the creditor had no prior entitlement or interest and which, but for the provision, would fall to be administered as part of the bankrupt's estate. The only purpose and effect of the further charge was therefore to encumber the remaining half of the royalties on bankruptcy in favour of the assignee in priority to the rights of the general creditors. This was by contrast to the original charge over the first half of the royalties which took effect prior to and without reference to any act of bankruptcy by the assignor and was therefore binding on his trustee.

157. It is not difficult to see why *Ex p. Mackay* was referred to by both Lord Morris and Lord Cross in *British Eagle* as an example of a case in which the charge had (to use Lord Cross's words) "been created deliberately in order to provide for a different distribution of the insolvent's property on his bankruptcy from that prescribed by the law": see *British Eagle* at p. 780G. As mentioned earlier, this is implicit in the nomination of the debtor's bankruptcy as the occasion for the creation of the charge. The deed was designed to apply a different treatment of an otherwise unencumbered asset specifically in the event of bankruptcy. There is nothing in *Ex p. Mackay* to support any wider principle.

158. *Ex p. Jay* (1880) 14 Ch.D 19 is to the same effect. There the landowner was entitled under the building agreement to forfeit on bankruptcy the builder's interest under the agreement in any houses which had not yet been completed and demised to him under a lease. The agreement also gave the landowner the right to take possession of and resell any unused building materials on the site. The Court of Appeal held that this latter right was unenforceable. James LJ at p. 25 said that:

> "... it appears to me that it is governed by the decisions of this Court in *Ex parte Mackay* and *Ex parte Williams* , which only followed much older decisions. The principle of those decisions is this, that a simple stipulation that, upon a man's becoming bankrupt, that which was his property up to the date of the bankruptcy should go over to some one else and be taken away from his creditors, is void as being a violation of the policy of the bankrupt law. Now that we have all the facts before us, I think we cannot escape from applying that principle to the present case. According to the debtor's own evidence everything that he was bound to do under the agreement had been performed by him up to the date of the bankruptcy, and therefore no right was vested in the lessor except by virtue of the bankruptcy. Her title is founded only on the stipulation that in the event of the builder's bankruptcy the materials which had been placed on the land should become her property. It seems to me impossible to distinguish the case from those authorities to which I have referred."

159. This is simply an application of the rule explained in *Ex p. Mackay* but the case is important because the right of forfeiture over the building materials could, under the agreement, have been exercised either on bankruptcy or for a failure by the builder to complete the houses in accordance with the agreement. In his judgment, Cotton LJ (at p. 26) said that:

> "I am of the same opinion. This case is governed by the decision of Lord *Eldon* in *Higinbotham v. Holme* , that there cannot be a valid contract that a man's property shall remain his until his bankruptcy, and on the happening of that event shall go over to some one else, and be taken away from his creditors. Here the forfeiture is to take place on the happening of either of two events. There is no stipulation as to the mode in which the lessor shall use the materials when they become forfeited to her. One of the two events is not hit by the decided cases. But, as to the other, though the contract is good as between the parties to it, it is on principle void in the event of the builder's bankruptcy."

160. The exercise of a landowner's right to forfeiture on grounds other than bankruptcy was considered further by the Court of Appeal in *Ex p. Newitt* (1881) 16 Ch.D 522. There the landowner's right to forfeit the unused building materials was exercisable in the event of the builder's failure to complete the agreement but was not a right to forfeit on bankruptcy. The builder filed a bankruptcy petition in the county court and on the same day the landowner gave him notice of forfeiture. The Court of Appeal held that

the landowner's right was not affected by the intervening bankruptcy of the builder. James LJ (at page 531) said that:

> "... it is immaterial at what particular moment the seizure was made. The broad general principle is that the trustee in a bankruptcy takes all the bankrupt's property, but takes it subject to all the liabilities which affected it in the bankrupt's hands, unless the property which he takes as the legal personal representative of the bankrupt is added to by some express provision of the bankrupt law. There is no such provision applicable to the present case. The building agreement provides, in effect, that in a certain event certain property of the builder may be taken by the landowner in full satisfaction of the agreement. It appears to me analogous to a sale of property with a power of repurchase in a certain event. I am of opinion that this point fails like the others. I think that the Judge of the County Court has miscarried, and that the *Bills of Sale Act* does not apply, and I am of opinion that the landowner is entitled at Law and in Equity, as he certainly is morally, to the benefit of the stipulation in the agreement."

161. This decision and Cotton LJ's judgment in *Ex p. Jay* were relied on by the Chancellor in the *Lehman* appeals as support for the view that a right of forfeiture which is exercisable on an event other than the insolvency of the counterparty may lawfully be exercised on those alternative grounds even if the bankruptcy of the counterparty has occurred.

162. I agree with the Master of the Rolls that, if the provisions in question can be and are operated on other grounds prior to the commencement of any bankruptcy proceedings, it is difficult to see why the anti-deprivation rule should apply. The property has been removed pursuant to a valid contractual provision on grounds other than the insolvency of the counterparty and cannot, on any view, form part of the insolvent estate. If the transaction is to be reversed it can only be by the operation of the provisions of the Insolvency Act mentioned earlier which apply to prior transactions such as transfers at an undervalue and preferences. Where Parliament has expressly considered the kind of transactions which fall within these anti-avoidance provisions it is not appropriate in my view for the Court to seek to widen the scope of those provisions by the extension of a common law rule. This is a point of principle to which I shall have to return. Therefore the only real area of dispute is in relation to the enforceability of provisions which might infringe the anti-deprivation rule when operated post-bankruptcy on grounds of insolvency but which are in fact operated at that time on some alternative grounds.

163. The determination of this issue is not necessary for the resolution of these appeals and does not arise on the facts. But, in the light of the decision of the House of Lords in *British Eagle*, I have some difficulty in accepting the correctness of the proposition that, following the making of a bankruptcy or winding-up order, provisions of the kind described in *Ex p. Jay* and *Ex p. Newitt* could remain exercisable on grounds other than insolvency. As mentioned earlier, the IATA clearing house rules made no specific provision for the bankruptcy of one of the airline members but were still held to contravene the anti-deprivation rule because they had the effect of excluding the property of British Eagle from the operation of s.302 of the Companies Act. The forfeiture of the building materials would obviously constitute a disposition of the bankrupt's property vested in his trustee otherwise than in accordance with the pari passu rule. On that basis, it seems to me that a provision in an agreement which removes an asset of the kind under consideration in cases like *Ex p. Mackay* and *Ex p. Jay* out of the bankrupt's estate following his bankruptcy is also caught by the rule. Once the bankruptcy or winding-up order is made the priorities between creditors is to be determined by the provisions of the Insolvency Act. The validity of the operation of a forfeiture provision of the kind considered in these cases cannot depend on whether the event relied on to trigger the provision was insolvency or a breach of the building agreement. Once the Insolvency Act regime has come into effect a contractual provision which seeks to remove property out of the estate and to vest it in a third party cannot override the provisions of the Act. The creditor must prove for his loss in the bankruptcy or liquidation. I would therefore decline to follow *Ex p. Newitt* on this point.

164. I return then to the central question of what types of transaction are rendered unenforceable by the bankruptcy or liquidation of the counterparty. All the decided cases such as *Ex p. Mackay* are instances of where the bankrupt has agreed to his property being transferred in the event of his bankruptcy to a particular creditor or other third party who has no prior security or other interest in that asset. They are therefore fundamentally different from cases where a lease or licence terminates on insolvency or where security is granted over the bankrupt's property to secure his obligations prior to any act of insolvency. But they have been relied on by Mr Sheldon (and, to a lesser extent, by Mr Snowden) as providing a foundation for a wider principle that the anti-deprivation rule should apply to transactions which reduce or limit the economic value of the estate.

165. Some support for this is said to be contained in the decision of the Court of Appeal of Hong Kong in *Peregrine Investment Holdings*. The issue in that case was whether the terms of a shareholders' agreement under which the shares of one of the parties in a management company could be acquired by the others at par value in the event of the

insolvency of an affiliate as defined breached the anti-deprivation rule in relation to the insolvency of the ultimate parent company of the party whose shares were the subject of the compulsory acquisition provisions. The view of the majority of the Court of Appeal was that the rule did apply to render the provisions unenforceable because the subsidiary company (PII) was an asset of the holding company in liquidation (PIH) and the removal of its only asset (the shares in the management company) at an undervalue reduced indirectly the value of PIH.

166. The idea that the asset of a subsidiary can be regarded as the property of its parent seems to me both novel and unprincipled. The majority in the Court of Appeal, I think, recognised the difficulties presented by the doctrine of separate legal personality and the fact that PII (the owner of the shares) was not itself subject to any process of insolvency. Therefore to link the provisions of the shareholders' agreement to PIH (which was not itself even a party to the agreement) the anti-deprivation rule was held to apply not merely to an agreement for the removal of the property of an insolvent company, but also to any contractual arrangement which had the effect of reducing its value even if it did not affect the ownership of its property.

167. Rogers V-P at paragraph 33 described the operation of the rule in this way:

> "33. In the first place, the anti-deprivation policy looks to whether a person can insist on retaining an unfair advantage to himself at the expense of creditors in a bankruptcy. In any event, whether it is the insolvent himself, or itself, who disposes of his property or its value to the detriment of the creditors or whether it is a trustee of the insolvent's property or whether it is whoever is in charge of the insolvent's asset or the maintenance of the value of an asset for the ultimate benefit of the insolvent (in this case the directors of PII whose duty it was to maintain the value of PII for the ultimate benefit of PIH), matters not. It is the dealing with property the benefit of which the insolvent is ultimately entitled to and the diminution of the value therein that is important."

168. Woo V-P's analysis was as follows:

> "86. Mr Thomas' argument is that if the property deprived is not the property of the insolvent company the anti-deprivation principle does not normally apply, because there is no deprivation. This is tantamount to saying that since the property that is disposed of is not within the reach of section 182 of the Companies Ordinance because it is not legally vested in the insolvent company, the common law anti-deprivation principle similarly has no

> application. In my view, however, if the subject matter is an asset of the company, although not strictly property of the company within the ambit of section 182, if the effect of a contractual provision is to deprive the company of it or reduce its value to the detriment of the company's general creditors in insolvent liquidation, that must equally be contrary to the public policy of equitable and fair distribution amongst unsecured creditors in insolvency.
>
> ....
>
> 106. It was, indeed, based on the separate legal personality of companies that the judge rejected the plaintiffs' case that PII was the nominee or bare trustee of PIH in PII's holding of the Shares. However, Mr Tong stresses that he is not asking this Court to pierce the corporate veil. He is relying on the fact that the Shares held by PII were an asset of PVC and in turn an asset of PIH, which would but for clause 14 be available for pari passu distribution to PIH's general creditors. Clause 14 had the effect of diminishing the value of the asset to the detriment of the creditors. The court does not pierce the corporate veil to give effect to the anti-deprivation principle in striking down clause 14. I agree."

169. This wide view of the scope of the anti-deprivation rule was rejected by Cheung JA. He considered that the rule of public policy established in the earlier authorities I have referred to does not extend to a case where the insolvent person did not personally agree to dispose of his own property in the event of insolvency. In the *Peregrine* case neither of these two conditions was satisfied. PIH was not a party to the shareholders' agreement nor did it own the shares in the management company. At paragraphs 148 to 150 the Judge said:

> "148. It is clear that the rationale of principle is to ensure that the assets of an insolvent is made available for distribution to its creditors who will share it on an equal footing. I am happy to accept that this is a matter of public policy in light of the insolvency law. But what is equally clear is that this public policy is developed from a situation of an insolvent making provisions prior to his insolvency in respect his own property. In such a situation the public policy will interfere and set aside the transaction made pursuant to the arrangement of the insolvent and another party. This is no doubt a drastic measure but is nonetheless an acceptable one because the court is only interfering with an arrangement that had been made personally by the insolvent who had put his assets out of the reach of the creditors.

149. However, there has never been a case, like the present case, where the insolvent had not made an arrangement in respect of his own property and yet the principle was nonetheless applied. Although in both *Higinbotham* and *MacKay* there were statements which seemed to refer to a wider principle that no one can have the benefit from a contract that is a fraud on the bankruptcy law, the courts there were really concerned with an arrangement made by the bankrupt himself. These statements were made in respect of the corollary of the situation, namely, how the other party to the transaction would be affected when there was a fraud of the bankruptcy laws. The courts held that they could not take the benefit of the arrangement. They were not propounding a free standing principle which would apply whenever the property of a bankrupt is affected as a result of his bankruptcy irrespective of whether the bankrupt has made the arrangement himself or not.

150. Likewise the cases on the disposal of the insolvent's assets at an undervalue were merely illustrations of the original principle. They did not articulate a free standing wide principle which is to be applied as soon as the value of the insolvent's property is affected by an arrangement not entered into by him personally."

170. I prefer this view of the law. In appropriate cases the court has always reserved to itself the power to look through a transaction and to pierce the corporate veil when the property in question is in substance that of the company in liquidation. But when that cannot be done the anti-deprivation rule has, in my judgment, to be confined to cases where property of the insolvent company or bankrupt within the meaning of the Insolvency Act is removed from the insolvent estate either for less than its market value or for no value at all.

171. There is, I think, a basic point of principle which needs to be addressed. Some of the arguments advanced on behalf of LBSF have treated the anti-deprivation rule as if it had or should have an existence and operation of its own entirely divorced from the terms of the provisions of the Insolvency Act which it is supposed to protect. Many of the contracts which feature in such cases as *Ex p. Mackay* are nowadays likely to fall foul of the express provisions of the Insolvency Act. As mentioned earlier, dispositions of the property of a company are invalidated when they occur at any time following the presentation of the petition unless validated by the court. That power will, in practice, never be exercised unless the terms of the disposition offer full value to the creditors of the company. If the dispositions are made prior to the commencement of the winding-up but at a time when the company is insolvent then the court has power to set

them aside if they constitute transactions at an undervalue or a preference. Similar provisions apply in bankruptcy.

172. Although not essential for the determination of these appeals, it seems to me to be extremely questionable whether what is said to be a common law rule of public policy can have any existence or purpose at all as a legal rule separate from the Insolvency Act. Whatever may have been the position in the nineteenth century, the Insolvency Act now contains a detailed code for determining and regulating the property of a bankrupt or insolvent company for the benefit of its general creditors. The Act itself really says and does all that is necessary. By the same token, if the rule continues to exist it can have no wider scope than the statutory provisions it is designed to enforce. When Parliament has expressly considered the categories of transaction which should not be allowed to survive bankruptcy or liquidation I can see no proper basis on which the court can arrogate to itself the right to widen the sanction of invalidity so as to encompass transactions which the application of the Insolvency Act would leave untouched. That should be something for the legislature alone to decide. This has, I think, the consequence of placing the anti-deprivation principle within relatively narrow bounds the key to which, as I have explained, is the ability to identify in the transaction under consideration a disposition of property on insolvency otherwise than in accordance with the Act. But, as explained at the outset of this judgment, that is all that the authority of *British Eagle* permits. The rule is therefore restricted to protecting the creditors of the bankrupt or company in liquidation by, in effect, enforcing the provisions of the Insolvency Act in respect of their property. It does not entitle the court to set aside contracts between subsidiaries not in liquidation or administration and third parties merely because they may have some economic effect on the value of the holding company.

173. In the *Woolworths* appeal that particular difficulty does not exist in relation to the JVA. Mr Sheldon, I think, accepts that the application of the anti-deprivation rule depends upon the administration of Media rather than that of its parent and it is Media's shares in 2e which are in issue in relation to clause 26.7. But Peter Smith J accepted that, in relation to the MLA (to which Media was not, of course, a party), the rule had an application because the termination of the licence impacted on the value of Media's shares in 2e. That is not in my view sufficient to invoke the rule in relation to the MLA. As explained earlier in this judgment, the termination of a licence for an event of insolvency does not of itself contravene the anti-deprivation rule even when the insolvency is that of the licensee. But, in the present case, the administrators of Media are seeking to impugn the validity of clause 16.2.5 which operates under a contract to

which they are not parties and which has only an economic effect on the value of the shares in 2e.

174. Likewise in the *Lehman* appeals, it is not possible to strike down the provisions of clause 5.5 and condition 44 merely because their operation may affect the value of the security available to LBSF in the event of a shortfall. There is nothing in the English authorities which supports the extension of the anti-deprivation principle to encompass transactions which do not alter the property of the insolvent company in the asset in question and it would require, I think, a significant amendment to the provisions of the Insolvency Act before such transactions could be struck down. Although such provisions exist in other jurisdictions, they are not yet part of the English statutory regime.

175. That leaves the subsidiary issue in the *Woolworths* appeal about the effect of the temporary licence. I agree that Peter Smith J reached the correct conclusion on this point for the reasons given by Longmore LJ.

UK Treasury questioned over Lehman structured products response

Author: Sophia Morrell

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Categories: Banking, Fund Management

The UK Treasury was grilled by a shadow minister today over its inaction for investors who have lost money from Lehman Brothers backed structured products at a Private Members Debate held in parliament about the marketing of the investments.

During the debate it emerged that the Treasury has said that the products backed by the failed bank will not be covered by the Financial Services Compensation Scheme (FSCS) as the losses were due to "poor investment performance."

The motion was tabled by Ed Vaizey, the shadow minister for culture, media and sport and Conservative member of parliament (MP) for Wantage on May 7. The MP initially wrote to the Treasury in November 2008 to alert it to the plight of investors who had lost money after buying Lehman backed structured products, said Vaizey.

A response arrived from Lord Myners, the financial services secretary, on April 15 2009, five months later, in which the Treasury said that investors would not be covered by the FSCS because it was an issue of poor investment performance, and that investors should complain to the firm which sold them the products and the Financial Ombudsman as a second recourse. The Treasury also specified in a separate letter that investors were not eligible for FSCS compensation because their contract was with the financial adviser and not with Lehman, said Vaizey.

"How can [the Treasury] argue that this is an issue of investment performance and not one of negligence?" said Vaizey, labelling the prodecures of the Treasury and the Financial Services Authority (FSA) inadequate and demanding a response on why the products fell outside the scope of the FSCS. Investors were told that investments would be covered by the FSCS by the firms that sold them the products, said Vaizey. One of his constituents lost £200,000 after buying a Lehman backed product, and was told not to worry about credit risk when he questioned his adviser about bank insolvency.

The Treasury responded by highlighting the FSA's investigation into marketing practice, which has been underway since the Lehman collapse. "The initial review has now been completed... the FSA is now assessing the most appropriate course of action to take in the light of the findings, which will probably involve visiting intermediaries and investigating the advice that was given," said Sarah McCarthy-Fry, the Labour and Co-operative MP for Portsmouth and Exchequer Secretary to the Treasury.

The FSA is investigating ways of reducing consumer detriment under a wider implications referral from the Financial Ombudsman, which means it has temporarily suspended its involvement while the FSA

considers wider options. The next update on the wider implications procedure will be on August 10 2009, said McCarthy-Fry. Ongoing legal processes have prohibited it from making public statements in the interim, although McCarthy-Fry said the FSA understood the frustration of complainants.

According to FSA statistics, around 5,620 investors in the UK bought Lehman backed structured products, and £107 million was invested in 23 products, with an average investment size of £14,000. Approximately 95% were sold by 800 intermediaries, and the majority were sold in Q2 and Q3 2008, with a maturity of either 2013 or 2014, said McCarthy-Fry.

The FSA expects to resolve the issue long before products were due to mature in 2013 and 2014 when investors would have been anticipating to receive money back, she added. It was also specified that although the FSCS had been used to compensate depositors with Icelandic banks, parallels should not be drawn between depositors and investors in products backed by a third party. Equally, civil liability does not exist between Lehman and the consumer, but rather the plan manager, which also made them ineligible for the FSCS, she said, although the FSCS may be able to help if this could be established.

One interjection, from Steven Crabb, Conservative MP for Preseli Pembrokeshire, argued that the small group of investors who had been sold products by one provider in a misleading way were not interested in the generic sector wide approach McCarthy-Fry described. Examples of investor compensation by distribution firms in Asia were also highlighted by Vaizey throughout the course of the debate.

NDFA, the UK distributor, has been the target of several investor complaints. It has described allegations over misleading marketing as "an attack on the financial services industry at large (which) should give us all cause for concern" (See News, Structured Products April).

Vaizey confirmed that it was an attack on NDFA, and what he described as other "cavalier" advisers who could not just walk away. He highlighted the plan manager's failure to communicate the downgrading of Lehman's credit rating to investors last year. It was also noted that while terms such as capital secure and capital guarantee were mentioned 17 times in one of its brochures, whereas a "confusing and misleading" risk disclosure appeared only once.

Related stories:

FRIDAY, DECEMBER 11, 2009

FSCS begins payments over Lehman-backed products

The Financial Services Compensation Scheme (FSCS) has said it is ready to start processing claims from investors who lost money on structured products hit by the collapse of Lehman Brothers.

However, it is currently only willing to pay compensation to those who brought structured products offering the promise of capital security, and not those who were sold capital at risk products.

Those products managed by NDF Administration, Defined Returns Limited and Arc Capital and Income were affected by the collapse of Lehman Brothers.

FSCS has concluded that those products offered under the 'Capital Secure' banner by the firms may have been mis-sold. It raises the possibility of structured products firms shying away from the term 'secure' just as they effectively were forced to abandon the term 'guaranteed' following the precipice bond scandal.

The compensation body estimates that 1,700 investors were sold these capital secure products. Those who invested in capital at risk products will not yet receive any application forms allowing them to receive compensation. It has promised that after further investigations it will make a decision on those investors.

The chief executive of FSCS, Loretta Minghella (pictured) said: 'We have been working closely with the FSA and the administrators of all three firms to establish where we may be able to help. We are pleased to say that we are now able to send application forms to investors with Capital Secure products and will start making payments to eligible claimants as soon as the application forms are returned to us. Meanwhile, we are doing everything we can to complete our investigations into the Capital At Risk products as quickly as possible.'

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Lehman Principal Protected Note Arbitrations On The Rise

Firms and Brokers Facing Increase in Customer Claims

By Mark J. Astarita, Esq.

Spurred by an enforcement proceeding by the State of New Hampshire and a class action complaint filed against Lehman Brothers executives, retail investors are retaining attorneys to attempt to recover their investment losses in Lehman Brothers. This article examines the potential for these cases, and the defense of same.

The Securities At Issue – Principal Protected Notes

These arbitrations involve Principal Protected Notes, a form of structured investments. Structured Investments link fixed income notes and CDs to the performance of equities, commodities, currencies or other assets. These are not new products and have been in existence for years.

There are many types of structured investments, and the main distinctions are full or partial principal protection, payment of a variable amount at maturity, or payments by a coupon linked to a specific security or index with principal at risk. The customized risk and return profiles of structured investments can be suitable for many portfolios, with a wide range of available options.

These arbitrations involve a form of structure investments known as Principal Protected Notes (PPNs). PPNs are a hybrid-style security that includes elements of fixed income notes with derivatives. PPNs are usually linked to an equities index, group of indices or other assets. As the name suggests, PPNs aim to protect principal for investors who also seek potential gains in the equities linked or other indices. Most PPNs have a term of three to eight years, and are generally tied to the S&P 500, NASDAQ 100 and the Dow Jones Industrial Average.

At its most basic form, PPNs are unsecured promissory notes that are linked to a referenced security. Unfortunately, they were not always marketed in such a manner, and in recent years, these PPNs were presented to investors as being relatively safe investments.

Marketing of Principal Protected Notes to Retail Investors

Structured investments in general, and principal protected notes in particular, became popular in the last 5 years or so, and were presented by firms to retail investors as conservative investments, where the investor could receive a return based on a standard index, and be guaranteed the return of his principal if he held the investment to maturity.

FINRA recognized the popularity of these products in 2005, and noted that sales of these products were no longer being marketed only to institutional customers. FINRA issued a Notice to Members to provide guidance concerning the sale of structured products to retail customers.

In the NTM, FINRA expressed its concern that firms "may not be fulfilling their sales practice obligations when selling these instruments, especially to retail customers." In fact, FINRA cautioned its members that they should not "portray structured products as 'conservative' or a source of 'predictable current income' unless such statements are accurate, fair and balanced."

Lehman Brothers PPNs and Bankruptcy

As an investment, there is nothing inappropriate in structured products in general, nor is there anything wrong with Principal Protected Notes. They are an accepted and recognized investment vehicle.These notes are principal protected, and no one disputes that. At maturity, the investor gets a return of its principal, from the borrower – in the instant case... Lehman Brothers.

And therein lies the problem – Lehman filed for bankruptcy, and suddenly the principal protector is no longer able to protect that principal – it is bankrupt. Making the situation worse, in the bankruptcy, these notes are unsecured, and lower in the creditor line than a secured note, although ahead of the common stock investor.

The Arbitration Filings

And that brings us to the present day. Brokers and brokerage firms sold the notes, investors purchased the notes, the markets continued to slide, Lehman got in trouble. Investors suffered significant losses, and are now looking to recover their losses. Estimates as to the dollar value of investments in structured products to $70 billion in 2006 and ballooned in 2007 to $120 billion, almost half of which was sold to individual investors, according to the Structured Products Association

Cases are being filed at an alarming rate. While the allegations are varied, the cases have a common theme – the marketing of the notes and the failure to make necessary disclosures to

investors. Investor claims received some support in June of this year, when the State of New Hampshire instituted proceedings against UBS Financial Services, alleging that investors in New Hampshire lost $2.5 million in various structured products backed by Lehman Brothers, and that UBS engaged in "dishonest and unethical business practices," by not adequately disclosing the risks involved in the investment.

"UBS presented these notes as simple, safe investments when in fact they are highly volatile and are subject to shifting market conditions," said Jeff Spill, the bureau's deputy director for enforcement. "The safety of these products was exaggerated. We believe UBS engaged in unfair and unlawful sales practices when presenting these investments."

These claims have a common theme, and focus on the disclosures, or lack of disclosures, that were made by the broker or the firm. While these cases are fact specific, they generally make the same types of allegations, including allegations that the firm, or the individual broker:

- represented the 100% Principal Protection Notes investment as being 100% principal-protected if held to maturity.
- represented that all of the other Principal Protection Notes were principal protected, as long as the underlying indices or basket did not decline in value.
- did not properly inform clients of the risks of each of the Principal Protection Notes, which included risk of Lehman's default.
- did not inform its clients that Lehman's financial position was declining and that the Principal Protection Notes could potentially decrease substantially, if not become worthless, as a result of Lehman's financial position.
- promoted the Principal Protection Notes to investors who were seeking preservation of capital without fully disclosing the true nature of the risks involved.
- Did not disclose to investors that there was a risk of loss of the entire investment.

There are also allegations that some firms continued to recommend the sale of Principal Protection Notes in the spring of 2008, after the failure of the Bear Stearns. The legal theory is that the Bear Stearns failure should have highlighted the risk investing in financial institutions that held large positions in subprime mortgages, and that the banks were themselves decreasing their own Principal Protection Notes holdings, or risk exposure to Lehman generally, while still recommending investors to invest in or maintain their positions.

Naturally, these are only allegations, and need to be proven in a court or arbitration. However, if these firms were reducing their own positions in these types of securities while recommending the same or similar investments to their customers, the case becomes much more about securities fraud than the failure to disclose risks.

These cases are being filed, apparently at an alarming rate. According to FINRA's arbitration statistics, as of June 2009 nearly 400 arbitration claims have been filed with FINRA for investment products categorized as "Derivative Securities" and suitability claims for the first half of 2009 were more than double the number of claims for all of 2006, and misrepresentation claims have more than tripled the number filed in 2006.

FINRA does not identify the firms or brokers who are being named in these cases, but UBS Financial Services is undoubtedly seeing its share of cases, as it was one of the firms who were actually creating these securities and selling them to its retail customers. Customers are also going to be filing claims against their individual brokers, as the broker, not the firm, made the actual representation regarding the securities. For brokers, this presents a significant problem as it is undoubtedly going to be the case that the brokers were not lying to their customers, they were conveying information from their firms; information that the broker undoubtedly believed, and that the broker had no reason to doubt.

We are continuing to review and investigate these claims, and will file updates as these cases progress. For more information, feel free to contact me at 212-509-6544 or 973-559-5566, or by email at astarita@beamlaw.com

Source : http://www.seclaw.com/docs/LehmanPrincipalProtectedNoteLitigation.htm