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Philip Gillyon

Call: 1988

Main areas of practice, for both litigation and advisory work, are: company law and corporate insolvency, including related fields such as financial services, and mergers and acquisitions; commercial litigation; and offshore work.

Philip has been a member of the Panels of Counsel authorised to represent the Secretary of State for Trade and Industry/the Official Receiver in proceedings under the Company Directors Disqualification Act 1986.

Philip is also called to the Bar in the BVI.

Philip is a Fellow of the Chartered Institute of Arbitrators.

Litigation & Arbitration

- Shareholder disputes
- Commercial disputes
- Professional negligence
- Warranty claims
- Joint venture disputes
- Fraud and asset recovery
- Fiduciary obligations
- Interim remedies

Significant cases include:

Walkers (Bermuda) Ltd v Bermuda Bar Council [2019] UKPC 25 (10.06.19)

Appeal to the Privy Council from the Court of Appeal of Bermuda. Challenge by Walkers (Bermuda) Ltd to the refusal of the Bermuda Bar Council to grant Walkers (Bermuda) Ltd a Certificate of Recognition under s 16 Bermuda Bar Act 1974. Whether Walkers (Bermuda) Ltd was entitled to the Certificate to enable it to practice law in Bermuda; and meaning of "control" in CA 1981.

PT Satria Tirtatama Energindo v East Asia Company Ltd [2019] UKPC 30 (27.06.19)

Appeal to the Privy Council from the Court of Appeal of Bermuda. Application for the rectification of the register of members of a Bermuda company to substitute the Claimant as the member in place of the Defendant. Issues include whether Heads of Agreement for the transfer of the shares were binding; whether they were executed with the ostensible authority of the Defendant; whether defects in their execution were cured by the "indoor management rule" in Turquand's case; and whether they were avoided by the Defendant.

Re Primefuels Investments Ltd (No BVIHCM 2018/0007) (High Court, Commercial Division (BVI) 08.02.19)

Joint venture dispute between shareholders in a BVI company, controlling a group companies trading in logistics in Africa. Proceedings taken in the BVI and in Mauritius. Whether the conduct of the affairs of the holding company or the group have been conducted in a manner oppressive, discriminatory or unfairly

prejudicial to the interests of the Claimant; whether the action should proceed in the BVI or in Mauritius; whether the proceedings should be stayed on *forum non conveniens* or other grounds.

Comodo Holdings Ltd v Renaissance Ventures Ltd and Katz [2018] (action No BVIIHC (COM) 2013/0045) (High Court, Commercial Division and Court of Appeal (BVI))

Action by the Claimant for declarations that the Defendants are not entitled to be entered on the register of members of the Claimant in respect of shares in the Claimant. Whether the shares claimed by the Defendants were paid for by the Defendants; whether non-payment is a bar to their registration under the applicable legislation or the Claimant's articles of association; whether the Defendants' claim is barred by limitation, delay, acquiescence or laches.

Zavod Ekran Oao v Magneco Metrel UK Ltd [2017] EWHC 2208 (Comm); [2017] Lloyd's Rep. Plus 83

Action by the Claimant to enforce a Russian arbitration award of the International Commercial Arbitration Court. Application by the Defendant to set aside an English judgment enforcing the award. Whether the Defendant was given proper notice of the arbitration proceedings. Meaning of "*proper notice*" in section 103(2)(c) of the Arbitration Act 1996. Whether the notice of the arbitration proceedings had to be in the language used by the party receiving the notice (English) or whether notice in the agreed language of the arbitration (Russian) was sufficient.

Jackson v Dear & Anr [2012] EWHC 2060 (Ch) and [2014] 1 BCLC 186 (CA)

Trial of preliminary issues as to the construction of a commercial agreement and its effect on the constitution of a Guernsey company operating a closed-ended investment fund. Whether terms may be implied in the articles of association of the company. Appropriate test for the implication of terms. Effect of a "further assurance" clause. (Acted for the Claimant, instructed by Fladgate LLP).

Royal Bank of Scotland plc v. Hicks & Ors [2010] EWHC 2579 and [2011] EWHC 287

Disputed takeover of Liverpool Football Club. Whether the Court should grant the bidder (amongst others) an anti-suit injunction preventing proceedings by the then owners of the Club in Texas or elsewhere and requiring the discontinuance of Texas proceedings. Injunction granted. (Acted for the successful bidder, instructed by Shearman & Sterling (London) LLP).

Secretary of State for BERR v. Amway (UK) Ltd [2008] EWHC 1054 (Ch); [2009] EWCA Civ 32 (CA); [2008] BCC 713; [2009] BCC 781; [2011] 2 BCLC 716

A "public interest" petition to wind up a direct marketing company under s.124A IA 1986. Whether the company's business was "inherently objectionable", an unlawful lottery or an unauthorized trading scheme contrary to the Fair Trading Act. Petition dismissed. Dismissal upheld on appeal. (Acted for the Company, instructed by Eversheds LLP).

EIC Services Ltd v Phipps [2004] 2 BCLC 589

Whether a bonus issue of shares was valid, including issues of shareholder approval, common mistake and s.35A of the Companies Act 1985, (Acted for the Claimant, instructed by Jones Day Gouldens).

P&P Design plc v PricewaterhouseCoopers [2002] 2 BCLC 648

Application under s.394(6) CA 1985 to prevent resigning auditors' statement of circumstances connected with their resignation from being circulated to the company's members. Application successfully resisted. (Acted for PwC, instructed by Herbert Smith).

Re Joseph Holt plc [2001] 2 BCLC 604 (CA) Takeovers.

Whether compulsory acquisition of shares of minority shareholder who had not assented to the takeover offer should be permitted. Whether current practice for dealing with shareholders resident in jurisdictions with

exacting securities laws (i.e. the USA, Canada, Australia and Japan) is acceptable under Part XIII CA 1985. (Acted for the successful Offeror, instructed by Addleshaw Booth & Co).

Jarvis plc v. PricewaterhouseCoopers [2000] BCLC 368

Application under s.394(6) CA 1985 to prevent resigning auditors' statement of circumstances connected with their resignation from being circulated to the company's members. Application successfully resisted. (Acted for PwC, instructed by Herbert Smith).

Guinness Peat Group plc v. British Land Company plc [1999] 2 BCLC 243 (CA)

Unfair prejudice petition under s.459 CA 1985. Whether the petition should be struck out without a trial on the grounds that the petitioner's shares were at all times worthless and that the petitioner had therefore suffered no prejudice by the conduct complained of. Strike out application defeated on appeal. (Acted for Guinness Peat Group plc, instructed by CMS Cameron McKenna).

Re BSB Holdings Ltd [1996] 1 BCLC 155

Unfair prejudice petition under s.459 CA 1985. Analysis of the fiduciary duties of company directors in respect of different groups of shareholders in the company having differing interests. Petition dismissed. (Acted for the Respondents Pearson plc, Granada Group plc and Chargeurs, instructed by Stephenson Harwood).

Possfund Custodian Trustee Ltd & Ors v. Diamond & Ors [1996] 1 WLR 1351

Whether those who are responsible for the publication of a prospectus for an issue of shares in a company owe a duty of care not only to the addressees of the prospectus who rely upon it in subscribing to the issue, but also to those who rely upon the information in the prospectus when making subsequent purchases of shares in the "aftermarket". (Acted for Allied Provincial Corporate Services plc, instructed by Richards Butler).

Re Cimex Tissues Ltd [1995] 1 BCLC 409

Consideration of the characteristics of fixed and floating company charges; and in particular, whether a limited right of the chargee to deal with the charged property precludes the charge from taking effect as a fixed charge. (Acted for the chargeholder, instructed by Streathers).

Re NL Electrical Ltd Ghosh and Anr v. 3i plc [1994] 1 BCLC 22

Shares/financial assistance in acquisition of shares/use of incorrect form of statutory declaration. (Acted for 3i plc, instructed by Lawrence Graham).

Wilton Group plc v. Abrams & Ors [1991] BCLC 315

Sale of shares/terms of agreement/whether proper for vendor to be given a service contract in connection with the sale. (Acted for Cowan de Groot plc, instructed by Paisner & Co).

Corporate

- Capital reorganisations
- M&A
- Takeovers
- Schemes of arrangement
- Reductions of capital
- Corporate governance
- Shareholders' rights
- Meetings and resolutions
- Part VII FSMA transfers
- Directors' disqualification

Significant cases include:

Re Trina Solar Ltd (No FSD 92 of 2017) (Grand Court of the Cayman Island Financial Services Division)

Action by a dissenting member for the court's determination of the "fair value" of its minority shareholding in the Company on the compulsory acquisition of its shares, following a merger of the Company. Application by the dissenting member for a freezing order to restrain the compulsory acquisition at an undervalue, alternatively the appointment of a receiver by the court. Whether there was a good arguable case of an undervalue; and whether there was a real risk of dissipation of the Company's assets and of judgment in favour of the Applicant being unsatisfied.

Olive Group Capital Ltd v Mayhew [2017] (BVIHCMAP 2 of 2016) (Court of Appeal, BVI; appeal to JCPC)

Action by the Claimant to challenge an out of court appraisal of the "fair value" of the Defendant's minority interest in the Company, following the compulsory acquisition of his shares by the Company. Whether a minority discount should be applied; and whether the processes adopted by the out of court of appraisers were proper, fair and in accordance with the applicable legislation.

EIC Services Ltd v Phipps [2004] 2 BCLC 589

Whether a bonus issue of shares was valid, including issues of shareholder approval, common mistake and s.35A of the Companies Act 1985, (Acted for the Claimant, instructed by Jones Day Gouldens).

Re Joseph Holt plc [2001] 2 BCLC 604 (CA) Takeovers.

Whether compulsory acquisition of shares of minority shareholder who had not assented to the takeover offer should be permitted. Whether current practice for dealing with shareholders resident in jurisdictions with exacting securities laws (i.e. the USA, Canada, Australia and Japan) is acceptable under Part XIII CA 1985. (Acted for the successful Offeror, instructed by Addleshaw Booth & Co).

Restructuring & Insolvency

- Contentious insolvency
- Winding-up
- Receivership
- Schemes of arrangement
- Cross-border issues
- Administration
- CVAs
- Directors' disqualification

Significant cases include:

Lehman Brothers Australia Ltd (in liquidation) v Lomas & Ors, the Joint Administrators of Lehman Brothers International (Europe) (in administration) [2018] EWHC 2783 (Ch)

Application by Lehman Brothers Australia (LBA) to challenge the decision of the Joint Administrators of Lehman Brothers International (Europe) (LBIE), refusing to vary LBA's erroneous claim in LBIE's administration (acknowledged to be too low, having been calculated in the wrong currency). Whether the Joint Administrators should be directed to accept LBA's full, correct claim under the principle in ex parte James or under paragraph 74, Schedule B1 Insolvency Act 1986; whether the proper test for the application of the principle in ex parte James is "unfair" or "unconscionable" conduct; and whether LBA should be held to its contractual settlement in a Claims Determination Deed.

S&K Group Ltd & Anr v Mortgage Agency Services No 1 Ltd & Ors [2014] EWHC (Ch)

Application to determine the validity of the appointment of administrative receivers of a foreign company under foreign law. Whether a demand for payment had been validly made by the creditor. Whether the English law

debenture permitted the appointment of administrative receivers under a foreign law. (Acted for the Claimants, instructed by Berg).

Sisu Capital Fund Ltd & Anr v Tucker & Ors [2006] BCC 463

Applications in the TXU insolvencies for the revocation or suspension of voluntary arrangements under s.6 IA 1986 on the grounds that they unfairly prejudiced creditors of the Companies, that there were material irregularities in relation to the creditors' meetings and that there were conflicts of interest which were not properly managed by the supervisors; and applications to remove the supervisors of the CVAs. Heard as urgent vacation business. (Acted for the creditor Applicants, instructed by Bingham McCutchen LLP).

Sisu Capital Fund Ltd & Anr v Tucker & Ors (No 2) – [2006] 1 All ER 167; [2006] BCC 577

Whether the costs of time spent by the Respondent accountants/supervisors of company voluntary arrangements where solicitors and counsel had been instructed, were recoverable. (Acted for the creditor Applicants, instructed by Bingham McCutchen LLP).

Re Leyland Daf Ltd [2001] 1 BCLC 419 (Ch) and [2002] 1 BCLC 571 (CA)

Priority as between liquidation expenses and claims of holder of crystallised floating charge. Whether expenses of liquidation occurring after appointment of administrative receivers were to be paid before claims of holder of floating charge which crystallised prior to liquidation. (Acted for the floating chargeholder, instructed by Freshfields Bruckhaus Deringer).

Banca Carige v. Banco Nacional de Cuba [2001] 2 BCLC 407; [2001] 2 Lloyd's Rep 147

Application for permission to serve out of the jurisdiction proceedings under s.423 IA 1986 on the former and present central bank of Cuba. Whether no jurisdiction to hear proceedings owing to sovereign immunity under the State Immunity Act 1978, or the doctrine of judicial self restraint. Whether ground existed for service out of the jurisdiction – meaning of CPR 6.20(10). Exercise of discretion whether to grant permission to serve out of the jurisdiction. (Acted for Banca Carige, instructed by Holman, Fenwick and Willan.)

Re Anglo American Insurance Co. Ltd [2002] BCC 715

Application for request for judicial assistance to overseas court. Reliance on confidential statement of Provisional Liquidator. Whether disclosure of confidential statement to be ordered. Whether permissible in statement to refer to without prejudice communications. (Acted for the Provisional Liquidators, instructed by Linklaters).

Banco Nacional de Cuba v. Cosmos Trading Corp [2000] BCLC 813 (CA)

Petition to wind up overseas former Central Bank as an unregistered company. Whether sufficient connection with this jurisdiction for winding up. Whether Court should wind up an overseas company which has no trading connection with this jurisdiction but continues to trade elsewhere. Whether State Immunity Act 1978 applied. (Acted for Cosmos Trading Corp., instructed by Holman, Fenwick & Willan).

Re Exchange Travel (Holdings) Ltd [1996] 2 BCLC 524

Preference by repayment of directors' loans avoided; balance sheet, rather than cash-flow, insolvency relied upon by the Liquidators. (Acted for the Liquidators, instructed by Addleshaw Booth & Co.).

Re a Company (No. 00687 of 1991) [1992] BCLC 133

Winding up/validation order/meaning of "advertisement" of petition. (Acted for the Company, instructed by Lawrence Graham).

Re FSA Business Software Ltd [1990] BCLC 825

Winding up/disputed debt/effect of counterclaim by company. (Acted for the petitioner, instructed by Miller Paris).

Directors' Disqualification Proceedings:

Re Queens Moat Houses plc (No 2) [2005] 1 BCLC 136

Responsibility of the Chairman of a listed company for misleading financial statements. Whether the Chairman was entitled to rely on delegation to others and the certificate given by the Company's auditors. Disqualification order made. (Acted for the Official Receiver, instructed by the Treasury Solicitor).

Re Queens Moat Houses plc [2003] 1 BCLC 696 (CA)

Admissibility of evidence. Whether findings in earlier proceedings involving the director were admissible in the disqualification proceedings. Whether the director's challenge in the disqualification proceedings to the earlier findings and conclusion was an abuse of process. Acted for the Official Receiver, instructed by the Treasury Solicitor).

Re Homes Assured Corporation plc [1996] BCC 297

Disqualification of director/whether disqualification proceedings may be stayed by consent/when a stay is appropriate. (Acted for the Official Receiver, instructed by the Treasury Solicitor).

Re Hitco 2000 Ltd [1995] 2 BCLC 63

Disqualification of director/role of appellate court. (Acted for the director).

Re Wimbledon Village Restaurant Ltd [1994] BCC 753

Disqualification of director. Disqualification order refused. (Acted for the director).

Re Homes Assured Corporation plc [1993] BCC 573.

Acted for the Secretary of State for Trade and Industry, instructed by the Treasury Solicitor.

Memberships and publications

Philip Gillyon has been a member of the Panels of Counsel authorised to represent the Secretary of State for Trade and Industry/the Official Receiver in proceedings under the Company Directors Disqualification Act 1986

Chancery Bar Association

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Insolvency Lawyers Association

Financial Services Lawyers Association

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