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#105 THE MISUSE ISSUE

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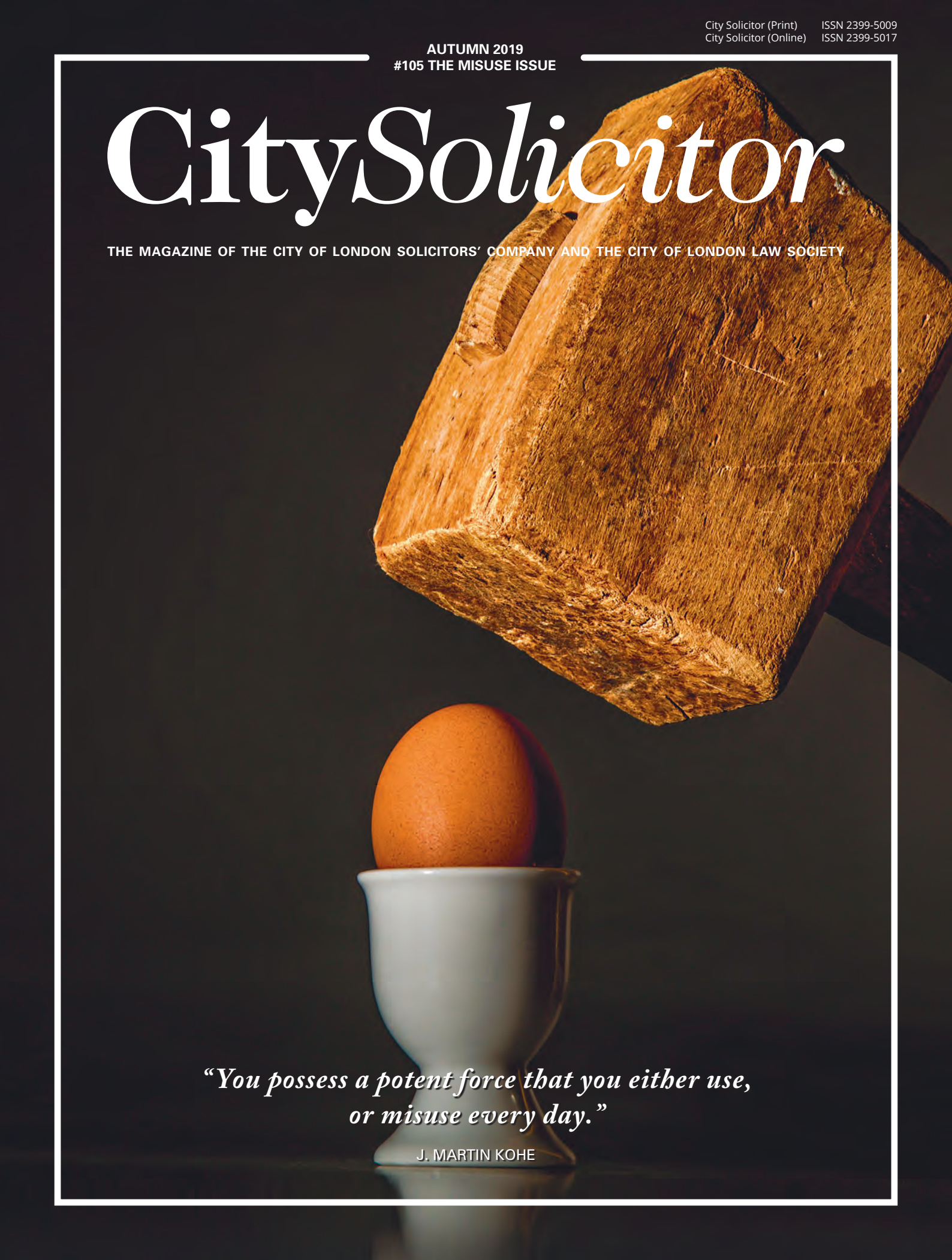

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## WITH THE DAYS GETTING SHORTER AND DARKER WE HAVE CHOSEN TO EXPLORE THE CHALLENGING THEME OF **MISUSE** IN THIS AUTUMN EDITION.

Everyday we are bombarded with news reports of allegations of misuse of power – whether in the business or political context. As Lord Acton famously said: "Power tends to corrupt and absolute power corrupts absolutely". With the rise of populism, the citizens of many countries are seeing first hand (or choosing to ignore) that too much power concentrated in one person's hands, can lead to misuse of power.

Language, the rule of law and the freedom of the press, are increasingly important weapons in this post truth age. A common rebuttal from politicians is to declare that an allegation, or unfavourable comment, is merely "fake news". That response does not assert that an allegation is true or false, or seek to explain the context – or indeed explain anything. It is a distraction designed to end scrutiny. It troubles me that we continue to hear the riposte that something is fake news, and that riposte is not challenged.

The same can be said of attacks on our profession and the administration of justice including cuts to spending on Court infrastructure, and the now almost forgotten legal aid. Have our politicians misused their power by removing access to justice? How do politicians intend to fill the void? Is the intention that insurance cover will be a gateway to justice?

In this edition we consider the controversial topic of deferred prosecutions and we also consider the threat to prorogue Parliament to push through a No-Deal Brexit. Should we not raise our professional voices to scrutinise such controversial issues, and put pen to paper to the press and to our elected representatives to express our concerns rather than retweeting the opinion of someone else?

If we, as a profession, lobby for change then it is an easy retort to say that we are only raising the issue because it is in our financial interests to do so, or for the press to cite the PEP of a magic circle partner, or the highest paid QC in the land. But the issue of access to justice affects everybody, as any casual reader of the Secret Barrister can attest.

It is easy to become distracted by the ongoing chaos in the world, or to retreat to suburbia and be pacified by binge watching a series on Netflix or Amazon Prime. Do we now need to re-dedicate time in our working week to demonstrate how we – solicitors and the Livery – encourage debate, help society and do good?

I am the first to applaud my fellow Liverymen for the inspiring pro-bono and CSR work that you (and we collectively) do, and the excellent work of our own Charity Committee in ensuring continued funding to law centres. But do we need to do more and perhaps more importantly explain why it is so important and also, necessary to promote a united modern Livery and the City of London?

As ever, we welcome your comments/feedback/thoughts/tweets/LinkedIn comments.

**Philip Henson**
Editor
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# DEFERRED PROSECUTION AGREEMENTS –

## a way of getting corporations to admit wrongdoings?

*or a means to buy themselves out of criminal charges?*

***In 2014, the UK followed the American way and, through the Crime and Courts Act, introduced Deferred Prosecution Agreements (DPAs).***

***Five years on, the Serious Fraud Office (SFO) has concluded only five of these and the jury is definitely out as to whether they provide a means for ensuring corporations operate within the remit of the law, or whether, in fact they are providing those who can afford it with a way of paying their way out of potentially highly damaging prosecution charges.***

***Today, there is talk of extending DPAs, again following American precedent, beyond businesses to individuals.***

# WHAT PRECISELY IS A DPA AND HOW DOES IT WORK?

It is a legally binding agreement made, under the supervision of a Judge, between a prosecutor and any organisation that has committed actions such as fraud, bribery or any financial crime for which it may be charged. The Judicial oversight is a major distinguishing feature between US and UK Law as, in America, the Judiciary is not involved.

The DPA (which is available to both the Criminal Prosecution Service and the SFO), in effect, suspends, for a specific time, any prosecution on the condition that certain requirements are fully met.

Obviously, DPAs are of major benefit to corporations in many ways. Avoiding long, expensive trials they, publicly and transparently, give businesses the opportunity to redress any wrongdoing without having to face the enormous and possibly catastrophic damage a prosecution could cause. It is the Judge's decision to make that the DPA is "in the interests of Justice" and to ensure that the conditions it sets out are "fair, reasonable and proportionate".

Head of the SFO, American Lisa Osofsky, is known to take a tough stance on white collar crime. Her CV is impressive, including stints as Assistant US Attorney Special Assistant Fraud Section, US Department of Justice, General Counsel at the FBI, Pupil Barrister at 9–12 Bell Yard Chambers and Money Laundering Reporting Officer at Goldman Sachs before her current office. Despite the hard line Osofsky is known to take on corporate crime, she has gone on the record as being in favour of DPAs and has been quoted as saying that they offer transparency as to what might be expected if companies self-report wrongdoing.

The five DPAs concluded in the UK thus far have been with Standard Bank, Tesco, Rolls Royce, Serco and an, as yet, unnamed company where the trials of individuals involved are still continuing. Four were overseen by the same Judge, Sir Brian Leveson, who was the President of the Queen's Bench Division and Head of Criminal Justice and, after Sir Brian Leveson's retirement, the fifth was before Mr Justice William Davies.

There has been some debate as to whether it is proper that only one Judge, in effect, is responsible for setting the case law on DPAs. Another point to consider is that any supervising Judge only hears from the parties that are in agreement with the DPA so nobody gets to set out the case that perhaps could be made that a particular DPA may not be in the public interest.

Ben Ticehurst is an experienced Litigation and Regulatory lawyer specialising in Business Crime, White Collar Crime and Investigations at Howard Kennedy LLP. He believes that having one Judge oversee all DPAs is actually a good idea as it "develops case law and consistency".

Ticehurst says there are a lot of fascinating aspects to consider in what has happened so far particularly when looking at Rolls Royce and Tesco.

"The issue with Rolls Royce pertained to bribery and corruption. Although they did not actually self-report the misdemeanours initially to the SFO, once an investigation into them began, they then cooperated.

At the time, Sir Brian Leveson said if ever there was a case for a corporate entity to be prosecuted, then this was it. But, contrary to this, he went on to say that because they had cooperated so extensively during the investigation, because they had put in place a completely new Board and Executive Team and made substantial and significant policy changes, he felt a DPA was actually the right course to carry out the interests of justice.

If you look at the public interest test, this begins to make sense. Do you really want to go too hard on one of the UK's biggest corporations? How would the reputational damage impact on the brand of UK plc and the economy?

*"At the time, Sir Brian Leveson said if ever there was a case for a corporate entity to be prosecuted, then this was it."*

The events had happened a long time previously and Rolls Royce were now fully cooperating to make all the required changes and had evolved. Also, the payment they made to the SFO was not insignificant.

The big shock though came a year and a half later when the decision was made that no individuals were to be prosecuted.

The Tesco case was about an accounting scandal where profits were overstated. In this matter, the SFO brought charges against the individuals concerned before entering into the DPA with Tesco. The judgement was not made public so as not to affect the ongoing trials with the individuals. The first

trial was aborted as one defendant suffered a heart attack and at the retrial he was not well enough to attend. The Crown Court Judge then dismissed the case for not having sufficient evidence to go to the Jury for a verdict. The case ended and the defendants were acquitted but then the DPA judgement was released which named those same defendants as wholly culpable. Obviously this led to much criticism, not just of this particular case but of the system in general.

The process should seek to deal with the corporation and individuals at the same time where possible. With Rolls Royce, the individuals involved were left hanging for more than a year after the DPA and with Tesco they were acquitted before the DPA revealed their apparent culpability.

I think it's too early yet to say whether DPAs are a good or bad idea. We need to see how the situation develops in terms of how individuals are treated, particularly in respect to timings.

I also have concerns that lines may be blurred between what is in the interests of Justice and what is in the interests of UK plc, particularly in these uncertain economic times Brexit is causing.

I fear this may cause misuse of power in white collar crime, beyond DPAs. Whilst companies like Serco and G4S were being investigated for fraud, they were still able to win new Government contracts. Another such example is a subsidiary of Airbus which is under investigation for bribery and corruption. Their only client is a Government contract which is on a fixed term and due to come to an end later this year. Whilst the Attorney General is in the process of deciding whether they should be charged, they have announced to the press that they are likely to be wound up at the end of the contract. If they are no longer in existence, they could get away with any wrongdoings they may have committed. It seems political and economic interests may have more sway than evidence. A further twist in this is that when the contract expires it has already been awarded to another company, KBR, who are also under investigation by the SFO.

What is in the interests of justice and what is in the interests of UK plc may well be at right angles to each other at times."

Mukul Chawla QC is partner at Bryan Cave Leighton Paisner LLP. He is a prominent fraud and white collar crime lawyer with vast experience both defending and prosecuting high profile complex cases. He represents

*"The process should seek to deal with the corporation and individuals at the same time where possible."*

both companies and individuals on a wide range of corporate crime matters including fraud, bribery and corruption, money laundering, sanctions and export control, tax and antitrust allegations.

From 2016 to 2018, Chawla acted as lead Counsel to the Serious Fraud Office (SFO) on its largest investigation – a multi-jurisdictional, multi-defendant investigation into suspected bribery by Unaoil and a range of other companies.

On the defence side, Chawla was lead Counsel for the defendant in the first ever contested prosecution of a corporation for the "failure to prevent" offence under the Bribery Act 2010 in early 2018.

"Critics of DPAs call them a form of legalised bribery and corruption whereby larger companies can buy themselves out of prosecution. This is not something the smaller companies can do.

Only last year, I defended Skansen Interiors who unsuccessfully tried to enter into a DPA over some very small bribery charges. This difference in approach leads to a perception that there is one rule for rich, big, successful companies and another for the rest. Skansen satisfied all the requirements of a DPA and made sufficient management changes but the CPS's decision to nonetheless prosecute has led, in my view, to a chilling effect on companies who may otherwise have come forward with any wrongdoing but now feel it may be better to hold back and hope they simply will not be found out.

For some reason, in France, their equivalent of DPAs – Sapin II, which came into force in June 2017 has already heard five cases. Whilst there are not the numbers to evidence why DPAs in the UK have been far slower in happening, this reluctance to come forward is likely to be a significant factor.

In the Tesco case, the fact that the Company avoided prosecution through a DPA and yet the individual Directors were acquitted without having to give evidence hardly sends out the best message.

Should individuals be able to buy themselves out of a prosecution through a DPA? Absolutely not. That would make a complete mockery of the whole system.

The matter of judicial oversight is the big difference between our system and the American one – and I have no doubt Sir Brian Leveson exercised his oversight very rigorously in asking himself with regard to Tesco and Rolls Royce, two of the very largest companies in the whole of the UK, whether not prosecuting them was in the public's interests. He was obviously persuaded that yes, it was.

There needs to be greater clarity about whether a DPA will be on offer so that companies like Skansen can approach the prosecution authorities with greater confidence.

If there is no certainty as to whether a DPA will be applied or not, it makes life difficult. It leads to an attitude of businesses taking the decision that if they are not very likely to be found out, then why should they come forward? It seems preferable to sort out their own systems privately rather than bring attention to them."


*"Corporations are no more than legal structures through which individuals operate."*

It seems still very unclear as to whether DPAs are an effective tool in getting companies to come forward, own their wrongdoing and take the required penalty and changes to put it right – or whether they are simply a way the biggest and richest can legally and successfully avoid prosecution.

Bearing in mind his huge personal involvement in overseeing four of the five DPAs agreed in this country before retiring in June this year, Sir Brian Leveson is probably the most experienced and knowledgeable person to comment on them.

"Corporations are no more than legal structures through which individuals operate. Individual employees who are responsible for unlawful business practices should be pursued through the criminal courts but if the corporation has self reported its wrongdoing, parted company from those responsible for the offending conduct, assisted the authorities in their investigations and put in place appropriate control controls and monitoring, it is generally in the public interest that the corporation pay the appropriate financial penalty, disgorging any profit, but then be allowed to continue to trade. Whilst DPAs are a valuable tool in the armoury of prosecutors, they should not be seen as an answer to all corporate wrongdoing."

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# A LEGAL WAY TO ACHIEVE NO DEAL – or a gross misuse of power?

*Brexit continues to turn our country, our political system and even our constitution upside down. The latest subject to cause further division and controversy is prorogation.*

*It was former Brexit Secretary, now Foreign Secretary, Dominic Raab who first suggested it at a private hustings organised by the moderate Conservative MPs group, One Nation. At the time, Raab was pitching to become leader of the Tory party and Prime Minister, and he stated that he was prepared to temporarily prorogue Parliament to ensure that the UK does actually leave the EU by October 31st.*

*Not only did this cause uproar from his less extreme Tory colleagues, swathes of Parliament and the Speaker of the House, John Bercow, but it also caused a lot of the country to scratch its heads as to what prorogation actually means; Brexit is bringing a whole new vocabulary into use.*


Parliament.UK explain on their website;

"Prorogation (pronounced 'pro-ro-ga-tion') marks the end of a parliamentary session. It is the formal name given to the period between the end of a session of Parliament and the State Opening of Parliament that begins the next session. The parliamentary session may also be prorogued before Parliament is dissolved.

## HOW IS PROROGATION MARKED?

The Queen formally prorogues Parliament on the advice of the Privy Council.

Prorogation usually takes the form of an announcement, on behalf of the Queen, read in the House of Lords. As with the State Opening, it is made to both Houses and the Speaker of the House of Commons and MPs attend the Lords Chamber to listen to the speech.

The same announcement is then read out by the Speaker in the Commons. Following this both the House of Commons and House of Lords are officially prorogued and will not meet again until the State Opening of Parliament.

*"This potential misuse of a power to achieve a No Deal Brexit has been hugely attacked and criticised by many."*

## WHAT IS THE DIFFERENCE BETWEEN PROROGATION AND DISSOLUTION?

While proroguing happens at the end of every parliament session, dissolution only occurs before a general election.

Under the Fixed-term Parliaments Act 2011, Parliament is dissolved 25 days before an election – but prorogation can predate that, and kill all the House's business while Parliament technically still exists."

And there, in those last few words, is precisely the point. If Parliament were to be prorogued at about the time you are reading this article and no agreement has been reached with the EU or passed through Parliament, then, by "killing all the House's business", hard Brexiteers would get their wish of the UK crashing out with No Deal on October 31st.

This potential misuse of a power to achieve a No Deal Brexit has been hugely attacked and criticised by many.

John Bercow dismissed it by saying that it simply won't happen. Matt Hancock said it would undermine parliamentary democracy. And Rory Stewart called it a misuse of power, saying that if Parliament were to be shut down with the express purpose of getting a No Deal Brexit through it would be illegal, unconstitutional and undemocratic.

Those arguing in favour of such a prorogation have said that far from being undemocratic, a move like this

would actually be stopping the undemocratic way Parliament has so far behaved in not delivering on the results of the Referendum and therefore supporting democracy rather than opposing it.

Prime Minister, Boris Johnson, has also refused to rule out the possibility of proroguing Parliament in order not to miss the October 31st deadline of leaving the EU, again arguing that he would be using it in order to rectify what has been thus far an undemocratic response to what was voted for in June 2016.

But, ultimately, the final decision as to whether prorogation can go ahead does not lie with any Prime Minister but with the Queen, a power rubber stamped by Section 6(1) of the Fixed Term Parliaments Act. Again, the prospect of dragging a Monarch into any political decision has triggered huge furore. Whilst a Prime Minister can advise the Monarch on her decisions, they may only do so if they have majority support from Parliament – which would obviously not be the case in this instance.

Vernon Bogdanor is Professor of Government at King's College, London and author of 'Beyond Brexit: Towards a British Constitution', published earlier this year by Tauris.

"Were the Prime Minister to advise the Queen to prorogue Parliament, she would almost certainly be guided by the rule that has served her so well during her long reign, of abiding by the advice of her Ministers. Then, any criticism at the decision would be directed at the Prime Minister, not the Queen. It is in any case not for the Queen to arbitrate in a conflict between her Government and Parliament.

*"The final decision as to whether prorogation can go ahead does not lie with any Prime Minister but with the Queen."*

The more interesting question is whether the Prime Minister's advice to the Queen would be subject to judicial review. While there is no precedent for this, there is a strong argument that, as Lord Browne-Wilkinson declared in R v Secretary of State for the Home Department ex parte Fire Brigades Union, [1995] UKHL 3, the prerogative cannot be used to frustrate the will of Parliament. And there are precedents to the effect that executive decisions which constitute an abuse of power, are in bad faith, or affect legitimate expectations, may be subject to judicial review.

The fundamental point perhaps is that uncertainty about the scope of this prerogative power, and the possibility that a Prime Minister can follow Charles I by suspending Parliament against its wishes, shows how much Britain needs to follow almost every other democracy by enacting a codified constitution. Perhaps indeed Brexit may prove to be our constitutional moment."

Whether prorogation may be subject to judicial review is discussed by Sam Fowles from Cornerstone Barristers in a paper written for the London School of


Economics in which he argues that although it is generally accepted that certain prerogative powers are exempt from such review, including the power to prorogue Parliament, he feels this exemption could be overridden.

"Two avenues may be successful. First, as they did in R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, the Courts may determine the scope of the prerogative power even where that power is one of those excluded from the traditional principles of judicial review. The Courts may determine that to prorogue Parliament so as to prevent Parliament from exercising control over Brexit is outside the scope of the prerogative power (the substantive reasons for this are set out below). Further, it was stated by the majority in Miller that the Court could not accept that 'a major change to UK constitutional arrangements can be achieved by Ministers alone'. Parliament should be consulted on significant constitutional changes. Given that, by effect of Article 50, the UK will automatically leave the EU on 31 October, the Government's failure to stop it will create a substantial constitutional change by default. I do not think this argument is as strong in this case as it was in Miller, however, because it begs the obvious response that Parliament sanctioned the serving of a notice under Article 50 in the European Union (Notification of Withdrawal) Act 2017 in the full knowledge of the effect of Article 50. There has not been any subsequent Act of Parliament suggesting that the position has changed on that point.

Second, there is nothing to indicate that the Queen will exercise her personal prerogative to prorogue Parliament otherwise than on the advice of the Prime Minister. I would argue that the decision to advise the Queen to prorogue Parliament is separate from the Queen's decision to do so. The latter could (constitutionally speaking) be made independently of the former. The Courts may, therefore, entertain a judicial review of the Prime Minister's decision to advise the Queen to prorogue Parliament without trespassing on the personal prerogative of the Monarch herself. Given the analysis below, the Courts will have good reason to find such a constitutional fix."

Former Prime Minister, Sir John Major, was recently interviewed on BBC's Radio 4 on the matter of prorogation, the Queen's role and judicial review and he spoke in no uncertain terms as to his views:

"In order to close down Parliament, the Prime Minister would have to go to Her Majesty, The Queen and ask for her permission to prorogue. If her first Minister asks for that permission it is almost inconceivable that the Queen will do anything other than grant it. Then she is in the midst of a constitutional controversy that no serious politician should put the Queen in the middle of. I think this is completely and utterly against Parliamentary tradition and against the way our Government should work. If that were to happen I think there would be a queue of people who would seek judicial review. The Queen's decision cannot be challenged in law, but the Prime Minister's advice to the Queen can, I believe, be challenged and I, for one, would be prepared to go and seek judicial review to prevent Parliament being bypassed."

Maddy Thimont Jack is a Senior Researcher working for the Institute for Government as part of their Brexit team.

*"The overall view is that using prorogation to frustrate the will of Parliament is wholly undemocratic."*

"The overall view is that using prorogation to frustrate the will of Parliament is wholly undemocratic. Is it similarly undemocratic for Parliament not to have carried out the will of the people? I think not, because whilst people did vote to leave the EU, they were never asked what the form of that should be and so the will of the people is far from confirmed. If any Prime Minister sought to get their will through proroguing Parliament, not only would this be undemocratic but it would have huge constitutional effect by setting a precedent.

It's obvious also the Monarch cannot get involved as this is a political issue. We can only speculate that if the subject of prorogation was ever raised as a serious possibility, there would be some very strong behind the scenes conversations counselling the Prime Minister to ensure that this simply does not happen. But this is a no win situation should it rear its head as even by preventing prorogation happening by stepping away from the issue, the Monarch could be accused of political involvement by doing nothing as this would have consequences.

We also have to bear in mind that if prorogation did happen to push a No Deal through, there are huge practical implications. Budgets that would need to be approved to prepare for No Deal could not be passed if Parliament is not sitting.

There are measures Parliament itself could take to prevent prorogation. They could legislate to prevent Government from taking such a step, they could try and take control of time by cancelling recess and, even if it did happen, they could, as Rory Stewart has suggested, informally sit elsewhere.

Ultimately, prorogation is highly unlikely as it would put huge political pressure on any Prime Minister and it would set a dangerous precedent whereby any future Government, Conservative or Labour, could use it to push their will through."

In July, in an attempt to prevent prorogation, a number of pro-Remain MPs and former Attorney General, Dominic Grieve made an amendment to the Northern Ireland Act to ensure that Parliament comes back to the Northern Ireland issue in October, so meaning it cannot be prorogued.

Grieve said;

"Northern Ireland and Brexit go rather closely together. The chances are, if a no-deal Brexit goes through, it is going to be the end of Northern Ireland's union with the United Kingdom, with serious political consequences flowing from it."

The last time that Parliament was prorogued extraordinarily was in 1948 when a new Parliament Bill to reduce the power of the Lords was being blocked by Peers. In order for the Government to override the Lords, a special short session of 10 days was arranged.

The reasons for the current proposed prorogation are very different. Raab's plan, if anyone should attempt to carry it out, whether it is seen as undemocratic or actually a movement in defence of democracy, could threaten to undermine our whole constitution particularly in the event that the Queen did agree to the prorogation and the Speaker refused it. Whilst this is highly unlikely, it is fair to say that Brexit has taught us that anything is possible.

## STOP PRESS

***28 August 2019. And just as this edition was going to print, Mr Johnson did it. Today, he officially requested that the Queen suspend Parliament just days after MPs return to work in September – and only a few weeks before the Brexit deadline. He has said that this is to provide an opportunity to set up new bills to 'level up' spending on his priorities, including the NHS, education and policing. Whilst he denies it has anything to do with decreasing the amount of time MPs will have to block any prospect of a no deal Brexit, the Speaker of the House, John Bercow, has called it "a constitutional outrage" and the Leader of the Opposition, Jeremy Corbyn, has asked the Queen for an urgent meeting to try and stop the prorogation. By the time you read this in two weeks, who knows what will have happened. What we can be sure of is this is history happening right before our eyes – and our constitution may be changed forever.***

# LIVERY NEWS

A look at what has been happening – and what is coming up.

## The City of London Solicitors' Company Prize

**We are delighted to announce that the Company Prize for 2019 was awarded to Abdur-Razzaq Ahmed, a trainee with Pinsent Masons LLP. This award is made each year to a trainee at a City firm who has gained a distinction on the Legal Practice Course and who, based on an essay competition and interview, shows the most promise as a future City Solicitor. Razzaq's essay (reprinted below) focusses on how technology and other factors will affect City law firms in the near future.**

Rupert Jones and Razzaq Ahmed at the Company's AGM

## How will innovations in technology and/or other areas affect the practice of law in City firms over the next 5 to 10 years?

*One machine can do the work of fifty ordinary men.*
*No machine can do the work of one extraordinary man.*

The mainstream view states legal practice will change beyond recognition and that lawyers must adapt to changes technology will bring, with increased automation being the centrepiece. That is beyond doubt. Yet, this focuses on half of Elbert Hubbard's words; that *"one machine can do the work of fifty ordinary men."*

Another view as to how innovation will affect the next decade of legal practice remains underdeveloped on the City firms circuit. *"No machine can do the work of one extraordinary man"* reflects the malleable skillset of lawyers that enable them to reach the 'best' and not just the 'correct' answer. To that extent, innovations in technology and psychology will enable City firms to focus on strategic partnering with clients and allow legal practice to become truly interwoven with a client's existing commercial decision-making processes.

The current practice of law sees a City firms lawyer typically qualify into a particular subject specialism and later specialise further still into a particular sector. Also, while City firms have embraced agile ways of working on the micro-level, legal practice on the macro-level still operates in distinct silos. Bain & Company have identified that the best firms now orientate themselves around bold and insurgent missions around how they will serve clients. The effect of this will be a movement away from pyramid or "hub-and-spoke" models of practice and management to agile, self-organising and project-based teams built around "mission-critical roles."

These innovations are redefining, not eliminating, the "lawyer" into mission-critical roles. This is the key distinction to the mainstream view. Three mission-critical roles emerge in legal practice, each attracting specific personality-types and skills:

**Efficiency Seekers:** the task-focussed lawyer, who supervises technology solutions designed to streamline processes and whose skill lies in adjusting legal-technology solutions to ensure clients receive rapid advice;

**Strategy Seekers:** the advisory lawyer, who uses technology solutions to expand the scope of legal analysis including the use of (i) smart-searches, (ii) hub solutions allowing lawyers to access historical advice and published content and (iii) solutions that use big-data to improve a lawyer's analytical skills over time in order to ensure clients receive disciplined advice to inform commercial decisions; and

**Creativity Seekers:** the creative lawyer, who uses a combination of legal knowledge and software-engineering skills to create tailored products for private-practice teams or in-house teams to use on an on-going basis and whose role is significantly commercial in nature.

Project teams will exhibit a combination of these mission-critical roles. City firms face one other decision: whether to invest innovation budgets across all three of these approaches (becoming generalists) or narrow the scope of their investment to become specialised City firms. Specialisation has risks but can lead to faster innovation deltas, a strong reputation and subsequently attracting talent.

In the long-term the trade-off may subside but by then clients will have a clear understanding of a City-firm's expertise, reputation and people. It remains that innovation will enable legal practice based on skills and not subject area, allowing lawyers and City firms to truly fulfil the role of a "trusted advisor."

**Razzaq Ahmed**
**Pinsent Masons LLP**

# Livery Dinner 2019 – Fishmongers' Hall

**Liverymen are invited to join the Master and Wardens at Fishmongers' Hall for this year's Livery Dinner which will take place on Wednesday 27th November 2019.**

The Fishmongers' Company is one of the Twelve Great Livery Companies of the City of London and as one of the most ancient of the City Guilds it has enjoyed an unbroken existence of over 700 years, adapting to the challenges of changing times. One of the Company's greatest assets is the Grade I listed Hall on the north bank of the Thames at London Bridge. Fishmongers' Hall was destroyed by the Great Fire, rebuilt twice thereafter and then devastated by bombs during World War II before being restored to its former glory. We are privileged to have the use of the Hall for our Livery Dinner and we encourage all Liverymen to join the Master and Wardens. Tickets and more details are available from the Clerk.

**If you are interested in finding out more about becoming a Liveryman of the Company, please contact the Clerk at mail@citysolicitors.org.uk**

## The Company's 2019 Distinguished Service Award

The 2019 Distinguished Service Award was presented to Simon James of Clifford Chance LLP, in recognition of his outstanding work as Chairman of the City of London Law Society's Litigation Committee. Simon has chaired the Litigation Committee for the last nine years and has served on the Committee for twenty years.

## DATES FOR YOUR DIARY:
## THE CITY OF LONDON SOLICITORS' COMPANY

**Wednesday 2nd October**
Election of Lord Mayor, Guildhall, 11.45 a.m. followed by lunch at the newly refurbished Butchers' Hall.
Liverymen.

**Thursday 31st October**
Wine Tasting Evening, Guildhall.

**Saturday 9th November**
Lord Mayor's Show.

**Tuesday 26th – Wednesday 27th November**
Red Cross Christmas Market, Guildhall.

**Wednesday 27th November**
Livery Dinner, Fishmongers' Hall, London Bridge, EC4R 9EL at 6.45 p.m.
Liverymen and Guests.
Dinner Jacket (black tie).

**Monday 2nd December**
Wellbeing of Women Christmas Fair, Drapers' Hall, EC2.

# WHAT'S IN A NAME?

When James Cochran wowed us all with his ridiculously impossible to resist creations and was proclaimed the overall winner of The Great British Menu in 2018, his name was on every foodie's list of must visit restaurants.

If you googled his name, then, yes the eponymous restaurant immediately popped up. James Cochran EC3. The restaurant's website shared with us Cochran's glittering credentials at the two Michelin starred Ledbury and the Harwood Arms amongst others and the menu included some of his most famous dishes. There was even an option to buy the recipes for some of the most coveted ones.

But – and this is a very, very big "but" indeed, Cochran had actually left the restaurant to set up his own restaurant in Islington before his first appearance on The Great British Menu.

His old employers, Rayuela Limited, had trademarked the name "James Cochran" so they could carry on using it and, rather perversely, he couldn't. Legal? Of course. Moral? Of course not. A misuse of power? Definitely.

So, Cochran called his restaurant 12:51 (more on that later). Rayuela then changed the name of their restaurant to 19 Bevis

*"His old employers, Rayuela Limited, had trademarked the name "James Cochran" so they could carry on using it."*

Marks but their marketing still very strongly used Cochran to sell themselves.

Sarah Wright, Head of IP CMS Cameron McKenna Nabarro Olswang LLP, had this to say on the matter:

"This is a salutary tale for creatives about the danger of allowing third parties to register their personal name as a registered trade mark given how closely their name is associated with their personal brand and reputation. Sadly, this is not the first example of this kind of situation with fashion designer Roland Mouret and Princess Diana's wedding dress designer, Elizabeth Emmanuel also having lost the right to trade under their own names. It is critical

for any business owner to ensure that it has secured the rights in its brand, but even more so when the brand is their own name."

At the end of the day, the proof of the pudding is not a legal issue but in the eating, literally in this instance. 19 Bevis Marks is no longer – call it karma – and 12:51 has been awarded not one, but two, AA rosettes in its first year.

Hardly surprising as it is totally amazing.

You'll find it on Upper Street in Islington – but look carefully, or you could walk straight past it. It has a small, unpretentious exterior and, indeed, that very casual, laid back vibe continues as you go inside. Almost cafe-like in its decor, 12:51 is bursting with stuff from Cochran's life and passions. The pictures on the wall are of Whitstable where he grew up. The music is his favourite playlist. Which brings us back to 12:51 – it's the title of one of his favourite songs by The Strokes. Cochran says for him a good restaurant should be all about "food, service and music" and this place certainly delivers on all three. If you go expecting the sort of restaurant most celebrity chefs tend to own, you'll be disappointed. Cochran himself is not a fan of the typical Michelin starred venue. But if the very best food imaginable served in a relaxed and friendly environment is what you are looking for, you will love this place.

The food takes its influences from Cochran's cocktail of Scottish and St Vincent heritage mixed in with a Whitstable upbringing. It takes fusion to a new level.

Cochran says he knew from the age of seven when he used to bake with his mother that he wanted cooking to be his life. His father saw his son's career path somewhat differently and sent him to a nunnery to study in the hope that James would eventually become a doctor or a lawyer.

But the young Cochran was not to be swayed from his calling. By the age of 12 he was working in Wheelers Oyster Bar in Whitstable. By 16 he had left school and then went to college in Thanet where he was awarded the title of "Young Seafood Chef" of the year.

From there he went to work at the Michelin starred Reads in Faversham and then on to some of the top London restaurants but Cochran says he was well aware he was just "a minnow in a very large fish pond".

He wanted to do his own thing and so he started doing pop ups in pubs all over London on Mondays, a night which would normally be quiet. The popularity of Cochran's food soon changed that.

Next came James Cochran EC3. Cochran always felt the decor, ambiance and even the location of the restaurant did not match his vision. He was open in talking to his employers about setting up on his own and remaining a consultant. His honesty was rewarded with them trademarking his name and firing him.


*"He believes in the saying that any publicity is good publicity and the whole trademark issue got him a lot of coverage."*

Whilst Cochran would obviously dearly have loved to use his own name, he knew he didn't have deep enough pockets to take on the fight. So he moved on. He's a hugely positive individual and when he talks about the experience, there is no bitterness. He says he believes in the saying that any publicity is good publicity and the whole trademark issue got him a lot of coverage. As did winning The Great British Menu which Cochran admits to "still having nightmares about". But he firmly believes that the exposure he got from it has been instrumental in the success of 12:51.

Cochran is a perfectionist. He's at the restaurant every minute he can be, making sure standards are kept high. For that reason, he doesn't see himself owning a portfolio of restaurants. Instead, his latest mission is to broaden the mind and palate of the public. And he's beginning with the meat his name has become synonymous with – goat.

"We are taught to eat certain meats like beef and lamb and close our minds to others. My West Indian background meant I was exposed to goat early on. It's delicious, with a similarity to lamb but more gamey.

*"Whatever Cochran's restaurants are named, his signature runs through the very core of them."*

In this country goats are reared solely for their milk. My vision is to make goat mainstream. At 12:51 we use every bit of the goat. We even use the fat to make mayonnaise."

In his aim to make goat mainstream, Cochran has opened Goat by James Cochran, a street food concept which caters at festivals and now has a permanent spot at Box Park, Croydon.

With this move Cochran has ensured Michelin quality, creative, good food is not an elitist proposition but is available to everyone.

When you arrive at 12:51, doubtless you will be greeted by Dan Henry, Cochran's business partner and the one who is front of house. Henry has the priceless gift of making you feel you have just arrived at a friend's house for dinner.

Whilst studying the menu why not try the House Negroni? This is a twist on the old classic and varies according to the seasons. The latest one is – as you would expect – Gin, Campari and Sweet Vermouth, but with the addition of Elderflower and Aperol. To keep you going while you decide, have a snack. Or two.

The Malt Cracker with Peas, Watermelon, and Feta looks like it should be in an art gallery, it's so beautiful.


Somehow it manages to taste even better than it looks – and that really is saying something.

As good as it is though, simply nothing in this entire world compares to Cochran's signature Buttermilk Jerk Chicken with Scotch Bonnet Jam, Corn Nuts and Coriander. Hyperbole? Just try it. A bit of advice here; you may want to order more than one portion.

Cochran's food is sharing food – which has its up and down sides. The upside being you can sample more of his delicious creations, the downside is you have to watch whoever you are with devouring half of what you would prefer to be going into your own mouth. There are snacks which are smaller and plates which are larger. Eat as much as you possibly can – simply every mouthful is a an explosion of flavours, each as delicious as the other.

The English Asparagus with Hay, Cured Egg Yolk, Berkswell Cheese and (optional) Lardo may not sound like it's the most appetising dish in the world but don't judge the book by the cover. It's sublime.

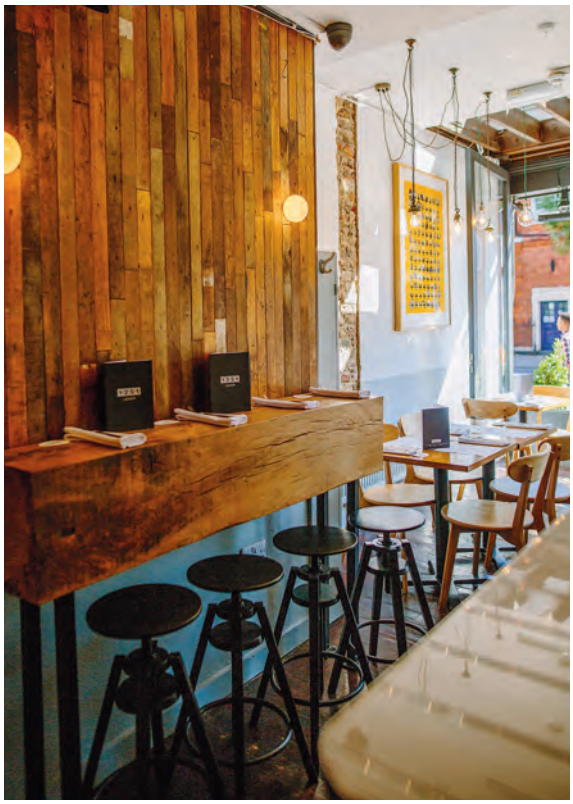
A personal favourite is the picked Devon White Crab, Katsu Curry, Pickled Apple, Buttermilk and Almond. This is definitely one you will resent sharing.

On our last visit, we were lucky enough to see the infamous goat on the menu. This dish was called the 12:51 Signature Goat Sharer (for a minimum of two people) and consisted of Loin, Belly, Kromeski and Shoulder of Kid Goat, Smoked polenta, Roast Jerk Spiced Cauliflower, Yoghurt, Pomegranate, Coriander, Chargrilled Spring Cabbage, Green Sauce, Crispy Cabbage and Curry Sauce. I still dream of it. Cochran brought it to our table himself and explained how it was a dish he created on the tube whilst going home and had scribbled the idea down on a scrap of paper. Think Picasso. Cochran is genius on that level.

However full you are, find room for dessert. Just when you thought Cochran's cooking couldn't get any better, it does. The Meringue, Watermelon, Strawberry and Hibiscus sounds simple enough but there are so many wonderful things going on in your mouth as you are eating it, it's unquestionably a show stopper.

If you are reading this and thinking this review is way too good to be true, get yourself down there. Then tell me this isn't the best place you've visited in years.

What's in a name? James Cochran's name equals exquisite, innovative, creative, delicious food served in a relaxed, fun atmosphere. Yes, some may "borrow" his name – but none can copy his inimitable style. Whatever Cochran's restaurants are named, his signature runs through the very core of them.



***All photography by Jessica Jill Photo***

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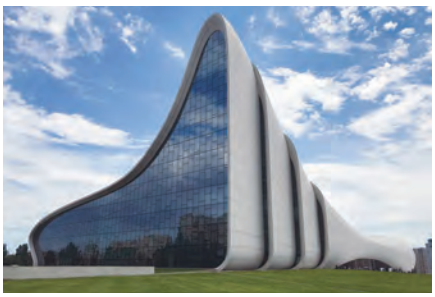
# CARS, CULTURE AND CONTROVERSY IN THE LAND OF FIRE

## Discovering some hidden gems in a far-flung corner of Europe

By Joel Leigh



Contemplating my 5,700-mile round trip to Baku in Azerbaijan to watch the Europa League final between two teams whose grounds are just 6 miles apart as the crow flies, I found myself pondering a number of news stories about the country which left me with a healthy degree of scepticism about the use of money and power in Azerbaijan.

The week before my flight, Amnesty International issued a statement, clearly directed at UEFA, suggesting that Azerbaijan should not be allowed to 'sportswash its appalling human rights record' by staging high profile football matches. The story followed previous allegations that the government had attempted to buy respect using the spectacle of international sport and other cultural happenings including the Eurovision Song Contest, the European Games and since 2017 a street circuit F1 Grand Prix.

Also reported the same week was Arsenal midfielder Henrikh Mkhitaryan's decision not to travel to the final because he feared for his own safety given Azerbaijan's dispute over the Nagorno-Karabakh region, which borders his native Armenia.

The day before I flew, the High Court released the so called 'shopping bill of the century', following the National Crime Agency's first Unexplained Wealth Order case, which laid bare the spending habits of Zamira Hajiyeva, wife of Jahangir Hajiyev, the ex-chairman of the state-owned International Bank of Azerbaijan who was jailed for 15 years for defrauding the Bank of £2.2 billion. Hajiyeva racked up over £16 million of transactions at Harrods alone over a ten-year period and is accused by the Azerbaijani authorities of being one of several family members used by her husband to take money out of the country.

Having arrived in Baku for the game, my experiences pointed to a country culturally very different to the rest of mainland Europe, born mainly of the nation's history as a former Soviet Republic.

Massive apartment complexes and grandiose plazas housing extravagant fountains hinted at this. At face value, these and the cobbled streets of the Old City sat incongruously alongside the Rolls-Royce and Lamborghini dealerships, state of the art building projects and sports stadia of the post-independence regime.

Yet the more you looked the more you realised that President Ihlam Aliyev must have channelled a significant proportion of the nation's newfound and substantial oil wealth into these highly impressive public projects, inadvertently mirroring his Soviet era predecessors.

Chief amongst these is the Heydar Aliyev Centre, whose swooping, wave-like shell shapeshifts as you view it from different angles. Designed by the late Iraqi-British Architect, Zaha Hadid and opened in 2012, it spans 57,500 square metres over eight levels and contains numerous exhibition spaces, a thousand-seater theatre and the Museum of Independence, which recounts the history of Azerbaijan with a fascinating albeit distinctly propagandist approach. The building was named after the current President's father and predecessor, whose huge influence on local politics was rooted in his role as a Major General in the pre-independence secret police.

The real surprise at the Centre was the excellent car museum, secreted three stories below ground level, a joint venture between the Automobile Federation of Azerbaijan and the famous Remise and Schlumpf Motor Museums of Germany and France respectively. Here I found rows of pristine automobiles spanning the late 19th Century to the late 1960's, the obvious connection being the local oil industry.

My favourite exhibit featured the ex-presidential limousines in use between 1972 and the late 1980's, including some

genuine and rarely seen Soviet exotica. The Chaika Gaz-13 and it's imaginatively named successor, the Gaz-14 were only ever available to Soviet Government officials and the elite, and Nikita Khrushchev is known to have presented them to Yuri Gagarin, Valentina Tereshkova and Fidel Castro as well as being an owner himself. Bizarrely and following Mikhail Gorbachev's decision to cease production in 1988, as part of his so called 'war against privileges', the company's technical drawings and specifications were all destroyed, rendering an attempt to resuscitate the brand in the mid-nineties impossible.

Also on display was the stately Zil-41047 limousine used by the former president between 1980 and 1982, with an eight-litre engine and measuring just under 21 feet the longest production car in the world in its time. Famed as the most austere and enduringly sinister limousine in history, it has enjoyed something of resurgence in recent years, particularly after Vladimir Putin turned up in one at 10 Downing Street.

Unless you're a serious Formula 1 fanatic or otherwise work in the oil and gas industry, it seems unlikely you'll find yourself a visitor in Baku, but if you do, consider a visit to the historical Old City, parts of which date back to the 11th century, followed by the Heydar Aliyev Centre to admire the stunning post-modernist design. Wander inside and take the lift into the bowels of the building, where you can check out some of the behemoths of automotive history; you'll be reminded that whilst a good deal has changed for the better post-independence, some things remain eerily the same.

**Joel Leigh is the motoring correspondent of City Solicitor and a Partner at Howard Kennedy LLP.**

## ONE LAST WORD

# DID YOU KNOW?

## *The misuse of a nation*

**Throughout history there have been notorious examples of scam artists abusing people's trust and misusing their money. Charles Ponzi set up his Securities Exchange Company amidst the dizzy rush to speculate that marked the 1920s. His investors were promised huge returns. People flocked to invest, pumping more and more money in until the whole rotten edifice collapsed. In today's money, $225 million was lost. Decades later, Bernie Madoff's scheme took the original idea and ran with it – eventually costing investors $18 billion.**

This was tragic for people who had trusted others to look after their money. There were also wider ripples, with bank failures following the collapse of the Ponzi scheme and Madoff becoming a symbol of greed and excess in the aftermath of the financial crisis.

But has any misuse of the public's money had the enduring social and political impact of Scotland's Darien Scheme to colonise central America?

By the end of the seventeenth century, Scotland was suffering. English competition, the aftermath of ruinous civil wars and Scotland's sclerotic export trade combined to stifle a moribund economy. By the 1690s, crop failures compounded economic woes. Famine stalked an already suffering population.

There seemed to be two options for the nation. Scotland could pursue an economic and political union with England. Or it could forge an independent mercantile and colonial destiny.

Scottish nationalism and pride led the country to try and go it alone.

The time was right for William Paterson. Behind every great scam is a great scam artist. Peterson was born in Scotland but had gone to London to seek his fortune. He proposed the scheme that led to the creation of the Bank of England in 1694. This brought him huge personal riches and enormous political capital. He returned to Scotland brimming with ideas to improve his native land.

Under his guidance, the Bank of Scotland was set up in 1695. The Company of Scotland received its charter in the same year. It would compete with the English East India Company and develop trade with Africa and the Indies.

All of this was sensible economic planning and could have left a positive legacy. But Paterson had bigger ideas to transform Scottish fortunes. The English, Spanish, Portuguese, French and Dutch all had colonies. Even Denmark, Norway and Sweden had expanded abroad. Scotland needed her own overseas outlet.

So, where should the Scots go?

Paterson had heard about 'a wonderful paradise on the Isthmus of Panama'. It boasted a sheltered bay, friendly Indians and rich, fertile land. It was called Darien.

The colony was to straddle the Isthmus of Panama at the Gulf of Darién. It would create an overland route to connect the Atlantic and Pacific Oceans. Vessels from the Old World and the New World, it was hoped, would converge on the colony. Scotland would reap bountiful dividends.

Scotland sank more than a quarter of its national wealth into his audacious scheme to colonise central America. By building its own colonial empire, a still independent Scotland planned to become a more equal partner with England under the Stuart crown.

What could go wrong?

The colonists soon found that their new home was not a wonderful paradise. It was a malarial swamp on land owned by the Spanish. Paterson had backed his idea in person and accompanied the first ships. Even he acknowledged their first choice for settlement was unwise:

'A mere morass, neither fit to be fortified nor planted, nor indeed for men to lie upon. We were clearing and making huts upon this improper


place near two months, in which time experience, the schoolmaster of fools, convinced our masters that the place now called Fort St Andrew was a more proper place for us.'

Colonists died of tropical diseases, the land failed to yield sufficient food and the group suffered attacks from the Spanish and native population. New Caledonia barley lasted a year and Scotland's expensive venture had failed spectacularly.

The Darien scheme's downfall was a major push forcing Scotland to give up her independence and join with England in 1707's Act of Union. People from all levels of society were deeply in debt and union with England offered relief from this financial burden.

This article was provided courtesy of Ian Chapman-Curry, Principal Associate at Gowling WLG and host of the Almost History podcast.

**www.almosthistorypodcast.com**

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