3~4 Digest

A Monthly Review of Relevant News, Cases and Articles

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This month the Court of Appeal the confirmed the test for the winding up a foreign company under section 221(5) of the Insolvency Act. In Latreefers the Court of Appeal held that it was unnecessary for a foreign company to have assets within the jurisdiction to satisfy the requirement of benefit to creditors. That requirement could be satisfied by the existence of claims for misfeasance/ wrongful trading. Gabriel Moss QC appeared for the Petitioner and Martin Pascoe for Latreefers.

This edition of the Digest was compiled by David Allison and digest material up to 31 January 2000.

Lucy Frazer

GENERAL NEWS

Provisional Insolvency Statistics for the Third Quarter of 1999

There were 1240 compulsory liquidations, this representing a 2.7% decrease on the same period in 1998. There were 2136 creditors' voluntary liquidations, this representing a 4.3% increase on the same period of 1998.
The number of administrator appointments, at 64, is 38 less than the same period in 1998.
The number of CVAs decreased from 136 to 120.
The number of bankruptcies and IVAs for the third quarter of 1999 is the highest quarterly total for 6 years, and represents a 19% increase on the figures for the same period in 1998. There were 5365 bankruptcy order and 2227 IVAs.

Disqualification Figures

A recent DTI Press Notice revealed that there were 870 disqualifications on the grounds of unfitness between March 1999 and September 1999. This represents a 35% increase on the comparable figures for 1998.

Share buy-backs: legislation to be introduced

On 22 December 1999 the Minister for Competition and Consumer Affairs at the DTI announced the intention to deregulate company law in respect of the holding by a company of its own shares "in treasury". This will facilitate share buy-backs by companies.

FSA reports on progress of handbook of rules and guidance

In December 1999, the FSA issued the first of a series of newsletters dealing with the construction of its single Handbook of rules and guidance.

FSA consults on role as Listing Authority for UK

On 20 December 1999 the FSA issued a consultation paper, the Transfer of UK Listing Authority to the FSA, setting out its proposed approach to its role as the UK Listing Authority. The FSA is due to succeed the London Stock Exchange as the Listing Authority for the UK this Spring.

ADMINISTRATION

Commissioners of the Inland Revenue v Lawrence
Unreported, 10 February 2000. Ch Div. (Jules Sher QC)
Statutory liabilities in respect of PAYE and primary Class 1 National Insurance contributions enjoy priority as liabilities incurred under contracts under sub-sections 19(5) and 19(6) IA 1986, but secondary Class 1 National Insurance contributions do not enjoy such priority. Permission to appeal was granted.
[Gabriel Moss QC, Glen Davis]

ARBITRATION

Harbour and General Works Ltd v Environmental Agency CA
Digested at Vol.6, No.1. Now further reported at [2000] 1 All ER 50.

Laker Airways Inc v FLS Aerospace Ltd QBD
Digested at Vol.5, No.4. Now further reported at [2000] 1 WLR 113.

Walker v Rome *The Independent*, 24 January 2000. QB (Com Ct) (Aikens J)
Under the Arbitration Act 1950, when arbitrators made an award it automatically attracted post-award interest. Section 49(6) of the Arbitration Act 1996, however, had effected an important change, leaving it solely to the discretion of the arbitrators to decide whether post-award interest should be granted. The court, therefore, had no power to grant interest under section 35A of the Supreme Court Act 1981 on a sum which had been awarded by arbitrators but which remained unpaid after the award.

Spenser Underhill and Valentin: "Restraining foreign proceedings in breach of an agreement to arbitrate in England", [1999] Int ALR 151
[Ben Valentin]

BANKING

Price Meats Ltd v Barclays Bank plc *The Times*, 19 January 2000. Ch Div. (Arden J)
A customer owed a duty to his bank to inform it of any forged payment. The duty did not arise, however, where the customer had only constructive notice of the forgery.

Three Rivers District Council v The Bank of England CA
Digested at Vol.4, No.10. Now further reported at [2000] 2 WLR 15.
[Richard Sheldon QC, Mark Phillips QC, Robin Dicker, Ben Valentin]

Fisher and Bewsey: "Laundering the proceeds of fiscal crime", [2000] JIBL 11.

Johnson and Aharoni: "Fraud and discounted deferred payment documentary credits: The Banco Santander Case", [2000] JIBL 22.

BANKRUPTCY

Mulkerrins v Price Waterhouse Coopers
unreported, 15 February 2000. Ch Div. (Jules Sher QC)
Following the Court of Appeal's decision in *Ord v Upton* (see below) a claim which the bankrupt had in contract and tort for financial loss and personal damages which arose prior to the bankruptcy order, was property within section 436 IA 1986 and vested in the trustee in bankruptcy subject to him holding any recovery in relation to the personal loss on constructive trust for the bankrupt.
There was, however, a binding County Court judgment between the bankrupt and her trustee holding that the trustee in bankruptcy had no interest in the claim. The trustee had not appealed such judgment, with the consequence that the bankrupt had, as against her trustee, beneficial entitlement to both the financial loss and the personal damages in the claim. Although the legal title to the claim vested in the trustee upon his appointment, the trustee held the claim on a bare trust for the bankrupt. In these circumstances, the defendant's application to strike out the claim would be dismissed as the bankrupt was entitled to pursue the claims in her own name, subject to the defendant's right to insist that the trustee be joined as a party to the action.
[John Briggs]

Ord v Upton *The Times*, 11 January 2000; [2000] 1 All ER 193. CA (Kennedy, Aldous and Mantell LJJ).
Where a bankrupt brought an action in negligence for personal injuries, the claim was a single cause of action for a hybrid claim, in part personal and in part relating to property. As such, the action fell within the definition of property in section 436 IA 1986 and vested in the trustee in bankruptcy under section 306 IA 1986. The damages awarded for past and future earnings formed part of the bankrupt's estate for the benefit of the creditors, but the trustee held the damages for pain and suffering on a constructive trust for the bankrupt.

Re a debtor (No 87 of 1999) *New Law Online*, 18 January 2000. Ch Div. (Rimer J)
On an application to set aside a statutory demand a cross-claim which the applicant had against the respondent in some other personal capacity, here as the executrix of her husband's will, could form the

basis of an application to set the demand aside. The fact that the applicant had delayed in commencing the cross-claim was not fatal to the application.

Rothschild and Others v Bell (a Bankrupt) CA
Digested at Vol.5, No.3. Now further reported at [2000] QB 33.

Bell: "Give your Trustee co-opertation (and your Pension)", Insolvency Intelligence, Vol.13, No.1, 5.

COMPANY

Allied Carpets Group plc v Nethercott *New Law Online*, 28 January 2000. QBD (Colman J)
Where a company sought to recover unlawful dividend payments (section 270(5) CA 1985) made to a director as a result of improperly prepared accounts signed by the director when he knew the accounts to be improperly prepared (section 271 CA 1985), the company only had to show that the receipt of the dividend was the consequence of the ultra vires distribution and not that it was the direct consequence of the director's breach of duty in permitting the improper preparation of the accounts.

Scotto v Petch *New Law Online*, 21 January 2000. Ch Div. (Lord Hoffman)
The articles of a company contained pre-emption rights which obliged members who intended to transfer shares to give notice in writing to the board which would offer the shares to pre-existing members at an agreed price. It was held that an intention to transfer shares to an outsider conditional upon the pre-emption rights in the articles having been deleted by special resolution could not be an intention which created an immediate obligation to give notice. The obligation to give notice only arose when the shareholder entered into an agreement which placed him under a contractual obligation to execute and deliver a transfer in violation of the pre-emption rights.

Maugham and Copp: "Company law reform and economic methodology revisited", The Company Lawyer, Vol.21, No.1, 14.

Morse: "Company-Securities Regulation", [2000] JBL 58.

CONFLICT OF LAWS

Credit Agricole Indosuez v Chailease Finance Corp *New Law Online*, 28 January 2000. CA (Potter LJ, Ferris J)
Where a letter of credit was issued and was to be paid as per the beneficiary's instructions, the English courts had jurisdiction under Article 5(1) of the Brussels Convention where the beneficiary nominated London as the place of performance of the obligation. The fact that the place of performance would be uncertain until nominated by the beneficiary did not render Article 5(1) inapplicable.

Glencore International AG v Shell International Trading & Shipping Co Ltd QB (Com Ct)
Digested at Vol.5, No.5. Now further reported at [2000] CLC 104.

Glencore International AG v Metro Trading International Inc & Others, Banque Trad-Credit Lyonnais (France) SA Third Party; Metro v Itochu, Bank Trad, Third Party QB (Com Ct)
Digested at Vol.5, No.5. Now further reported at [2000] CLC 83.

Lubbe v Cape plc CA
Digested at Vol.5, No.5. Now further reported at [1999] CLC 45

National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer" (No. 2)) [2000] 1 All ER 37; [2000] CLC 22. CA (Simon Brown, Waller and Tuckey LJJ)
The court had jurisdiction under section 51 of the Supreme Court Act 1981 to determine whether a non-party should be liable to pay the costs of proceedings, even though such person was outside the court's territorial jurisdiction or was domiciled in another contracting state of the Brussels Convention. A claim for a non-party to pay costs under section 51 was not a claim within the Brussels Convention, which was only concerned with substantive causes of action. Even if that was incorrect, the English court had jurisdiction under the Brussels Convention, since such an application would constitute third party proceedings within Article 6(2) of the Convention.

CONTRACT

Director General of Fair Trading v First National Bank plc Ch Div.
Digested at Vol.6, No.5. Now further reported at [2000] 1 WLR 98; [2000] 1 All ER 240.

Mace v Rutland House Textiles Ltd (in administrative receivership) *The Times*, 11 January 2000. Ch Div. (Peter Leaver QC)
Where an agent retained by both parties was left to draft a document, the absence of any outward expression of accord inter partes was not a barrier to rectification being granted provided there was some other convincing proof of the agreement or common intention of the parties.

Pappadakis v Pappadakis Ch Div. (Park J)

Where the terms of a document omitted something which rendered the document invalid, it could only be rectified by the court if there was clear and convincing evidence of what that something was.

CORPORATE INSOLVENCY

Coutt & Co v Stock Ch Div.
Digested at Vol.6, No.1. Now further reported at [2000] Lloyd's Rep Bank 14.

Hollicourt (Contracts Ltd) v Bank of Ireland Ch Div.
Digested at Vol.6, No.1. Now further reported at [2000] Lloyd's Rep Bank 21.
[David Marks]

Mond v Hammond Suddards [2000] Ch 40. CA (Chadwick and Clarke LJJ, Sir Iain Glidewell)
(1) The court' s power to review in r 7.47(1) IR 1986 was to be exercised judicially. It was not to be exercised to hear an appeal against a judge of co-ordinate jurisdiction, but should be confined to those cases where there had been some change of circumstances since the original order was made.
(2) Where no order had been drawn up by the first judge prior to his retirement, the second judge had an inherent jurisdiction to determine what order should be made.
(3) Section 156 IA 1986 did not entitle a liquidator to recoup the costs of unsuccessful litigation out of assets subject to a charge in priority to the claims of the chargee, since such costs were not "expenses incurred in the winding up". The court retained the power to disallow such costs if it thought fit.

Re Latreefers *unreported*, 9 February 2000. CA (Morritt and May LJJ, Wall J)
The Court of Appeal upheld the three part test applied at first instance by Lloyd J to determine whether the court had jurisdiction to wind up a foreign company under section 221(5). The court specifically rejected the submission that there had to be assets within the jurisdiction. In order to determine jurisdiction the court will look to:
(a) is there a sufficient connection with England and Wales?
(b) is there a reasonable possibility, if a winding up order is made, of benefit to creditors? and
(c) whether the court has jurisdiction over one or more persons interested in the distribution of assets of the company?
The Court further held that the existence of claims for wrongful trading or misfeasance is capable of satisfying the need for a reasonable possibility of benefit to creditors.

[Gabriel Moss QC, Martin Pascoe]

Abbot, Case Note: *Re Celtic Extraction Ltd and Bluestone Chemicals*, Palmer's In Company, Issue 1, 2000, 1.

Case Note: *Re Celtic Extraction Ltd and Bluestone Chemicals*, Insolvency Intelligence, Vol.13, No.1, 7.

Alexander: "A bridge too far", an article dealing with the DTI working party review of Company Rescue Mechanisms, [2000] JIBL 1.

COSTS

TSS Management Services Ltd v Charisma Records *New Law Online*, 19 January 2000. Ch Div. (Jacob J)
Where an order for security for costs did not provide the sanction that failure to pay by the prescribed date would warrant the dismissal of the claim, the court should be careful not to treat the failure to pay in time as warranting automatic dismissal of the action. The court should look to the reasons for the failure to make the payment.

Turner & Co v O Palomo SA CA
Digested at Vol.6, No.1. Now further reported at [2000] 1 WLR 37.

DAMAGES

Total Liban SA v Vitol Energy SA QB (Com Ct)
Digested at Vol.5, No.5. Now further reported at [2000] 1 All ER 267.

DIRECTORS AND DISQUALIFICATION

Re Bull Roofing & Cladding Ltd [1999] (5) Butterworths Disqualification Newsletter 6. Ch Div. (Jacob J)
Under the CPR regime the court will be more willing than before to strike out disqualification proceedings if they have not been prosecuted with reasonable dispatch.

Re Westminster Property Management Ltd *The Times*, 19 January 2000. Ch Div. (Scott V-C)
Directors disqualification proceedings were regulatory, not criminal proceedings although being capable of being described as penal proceedings, they were nevertheless, civil proceedings. European law had not recognised as a fundamental right, that evidence of facts or documents obtained by compulsion from an individual could not be used against an individual in

regulatory civil proceedings. Article 6(1) of the European Convention on Human Rights did not, therefore, preclude the making of a disqualification order, nor did it prevent the use in proceedings brought by the Official Receiver of evidence provided to him in interviews under section 235 IA 1986.

Re TLL Realisations Ltd *unreported*, CCH Company Law Newsletter Issue 46. CA
Where the Secretary of State appeals a decision by a court to give permission for a disqualified director to act, the appellate court will only interfere with the judge's exercise of discretion if the decision was plainly wrong or the judge took into account irrelevant considerations.
The Secretary of State was normally entitled to his costs of the section 17 application and his unsuccessful appeal, since he was placed in a special position under section 17(2). His costs were incurred as a consequence of the applicant's misconduct leading to the disqualification order.

Secretary of State for Trade and Industry v Collins *The Times*, 25 January 2000. CA (Peter Gibson and Judge LJJ, Ferris J)
A judge could grant permission under section 1(1) CDDA 1986 to a disqualified director who wished merely to be concerned in or to take part in the management of a company. The permission application should be supported by clear evidence of the precise role to be played and the present state of the company.
It was open for The Secretary of State to appeal the decision to give permission.

Secretary of State for Trade and Industry v Deverell *The Times*, 21 January 2000. CA (Morritt and Potter LJJ, Morison J)
The definition of "shadow director" in section 22(5) CDDA 1986 included anyone, other than professional advisers, with real influence in the corporate affairs of the company.

FINANCIAL SERVICES

Lomnicka: "Making the Financial Services Authority accountable", [2000] JBL 65.

INTERNATIONAL INSOLVENCY

Watson: "Liability of auditors to third parties in New Zealand, clarification at last", [2000] JBL 51.

PENSIONS

Westminster City Council v Haywood (No. 2) *The Times*, 26 January 2000. Ch Div. (Lightman J)
Regulation 9 of the Personal and Occupational Pension Schemes (Miscellaneous Amendments) (No 2) Regulations (SI 1997/786) had retrospective effect in that it entitled a member added by those regulations to the class of members of a pension scheme to complain of maladministration occurring prior to the date on which the 1997 Regulations came into force.

PROCEDURE

Axa Insurance Co Ltd v Swire Fraser Ltd *The Times*, 19 January 2000. CA (Auld and Tuckey LJJ)
An order striking out a claim for want of prosecution made on an application issued after the CPR 1998 came into force, but decided by the judge under the old rules could not stand.

Field v Leeds City Council *The Times*, 18 January 2000. CA (Lord Woolf MR, Waller and May LJJ)
A properly qualified expert witness who understood that his primary duty was to the court, was not disqualified from giving evidence by the fact that he was employed by one of the parties to the litigation.

International Distillers and Vinters Ltd v F J Hillebrand (UK) Ltd *The Times*, 25 January 2000. QBD (David Foskett QC)
In allowing a claimant to substitute one person for another as defendant when a mistake had been made as to the person's identity, CPR 19.4, unlike CPR 17.4(3), contained no requirement for the mistake to have been genuine or for the new defendant to have been prejudicially misled; however, it could not be imagined that an application to substitute would succeed in the absence of a genuine mistake and without taking into account whether the defendant had been prejudicially misled.

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 1 All ER 65. CA (Lord Bingham CJ, Lord Woolf MR, Scott V-C)
The Court of Appeal analysed the principles and gave guidelines on the issue of bias on the part of a judicial decision maker:
(1) Where the judge is unaware of the matter which is alleged to undermine his impartiality, the danger is eliminated. To that end a reviewing court may receive a written statement from the judge dealing with what he knew, and the reviewing court will determine whether there was a risk of bias.
(2) Where the judge is a solicitor, the discovery of a conflict of interest which would disqualify a

solicitor from acting for one or other parties under the Law Society rules does not necessarily bar him from hearing the case, or require the setting aside of the judgment given in the case.

(3) Disclosure of an interest by the judge should be made at the earliest possible opportunity. If the interest is such that it gives rise to automatic disqualification or would embarrass the judge, he must cease to hear the case before any objection is made.
(4) A judge's religion, gender, ethnic or national origin, age, class, sexual orientation or means cannot form a sound basis of objection. The employment history of the judge or his family, his previous political associations, membership of social clubs or charitable bodies, his judicial decisions and extra-judicial pronouncements, previous instructions to act for or against any of the parties or legal representatives, and his membership of the same chambers will not normally form the basis for a sound objection.
(5) No sustainable objection can arise merely because, in the same or a previous case, the judge has commented adversely on a party or a witness, or found their evidence to be unreliable.
(6) In circumstances where the judge has disclosed a possible source of bias to the parties, and no objection was raised, a party cannot subsequently complain that the matter gives rise to a real danger of bias.
(7) In general, it is undesirable to abort hearings unless there is a real danger of bias or it is necessary for justice to be seen to be done.

Memory Corp plc v Sidhu *New Law Online*, 24 January 2000. CA (Mummery and Robert Walker LJJ, Alliott J)
The court held that Hart J was in error in drawing a distinction between the litigant's duty of full and frank disclosure as regards facts on without notice applications and counsel's duty to the court in relation to law and practice. Hart J had held that an advocate's failure to bring a relevant decision to the attention of the court on an application for a freezing injunction did not necessarily require the discharge of the freezing order, whereas an order would be discharged where it had been obtained following a non-disclosure of fact.
A court, when considering the consequences of any breach, should look to all the circumstances of the case. Professional failure may amount to sufficient reason to discharge a freezing injunction.
Further, when considering an application for a freezing injunction, although the court should not condone any illegal conduct, it could admit evidence obtained by questionable means, giving it the appropriate weight it saw fit.

Morris v Bank of America National Trust CA
Digested at Vol.6, No.2. Now further reported at *The Times*, 25 January 2000.
[Richard Sheldon QC, Robin Dicker, Fidelis Oditah]

Reichhold Norway ASA v Goldman Sachs International CA
Digested at Vol.5, No.5. Now further reported at [2000] CLC 11.

Practice Statement (Companies Court) *The Times*, 19 January 2000. (Scott V-C)

From 11 January 2000 all company matters traditionally listed for hearing by the companies judge on a Monday, could be issued for hearing on any day during term time.

Malleson: "Judicial Bias and Disqualification after *Pinochet (No.2)*", MLR Vol.63, January 2000, 119

PROPERTY

Ashworth Frazer Ltd v Gloucester City Council *The Independent*, 20 January 2000. CA (Waller and Chadwick LJJ)
The belief of a landlord that the proposed assignee of a lease intended to use the demised premises for a purpose which would give rise to a breach of a user covenant was not, without more, a grounds for withholding consent to an assignment.

Barrett v Morgan *The Times*, 28 January 2000. HL (Slynn, Woolf MR, Nicholls, Hope and Millett)
A notice to quit an agricultural holding served by the landlords on the head tenants with their agreement not to serve a counter notice under the Agricultural Holdings Act 1986 had taken effect as a notice to quit, not as a surrender, and had been effective to terminate the defendant's subtenancy.

Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd [2000] Ch 12. CA (Stuart Smith, Robert Walker and Laws LJJ)
A landlord's entitlement to double rent under section 18 of the Distress for Rent Act 1737 arose only where the tenant held over as a trespasser after serving a valid notice to quit and the landlord treated him as a trespasser.

Starling v Lloyds TSB Bank plc CA
Digested at Vol.5, No.5. Now further reported at [2000] Lloyd's Rep Bank 8.
[Mark Phillips QC]

VCS Car Park Management v Regional Railways North East Ltd *The Times*, 11 January 2000. CA (Scott V-C, Swinton Thomas and Robert Walker LJJ)
Where a landlord opposed an application for a new tenancy because he wanted to use the property himself,

his opposition was not defeated where he could show that his interest in the holding from the time when it originally arose by purchase or creation covered the five year period required by section 30(2) of the Landlord and Tenant Act 1954 under one lease, or under a series of leases, or under a series of leases preceded by a freehold interest.

Auburn: "Overriding interests: Occupation of Part of the Land", MLR Vol.63, January 2000, 113.

Day: "Rates and Insolvency", Insolvency Intelligence, Vol.13, No.1, 3.

TRUSTS

James v Williams CA
Digested at Vol.5, No.3. Now further reported at [2000] Ch 1.

McCormack: "OECICs and trusts: the changing face of English investment law", The Company Lawyer, Vol.21, No.1, 2.

VOLUNTARY ARRANGEMENTS

Rustein: "Voluntary Arrangement: Contracts or Not?- Part 1", Insolvency Intelligence Vol.13, No.1, 1

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For further information please contact Lucy Frazer or one of the Clerks at 3~4 South Square on (tel) 0171 696 9900 or (fax) 0171 696 9911. E-mail may be sent to *clerks@southsquare.com*