

3/4 Digest

Volume 7 Number 3, June 2001

In **Brumark Investments Limited** the Privy Council has decided that the case of **Re New Bullas Trading :Ltd**, which held that it was possible for a debenture to provide for a fixed charge over book debts but a floating charge over the proceeds, was wrongly decided. The Privy Council held that it was not possible to separate a debt from its proceeds since in deciding whether a charge was fixed for floating it was necessary to consider whether the company was free to deal with both the debts and the proceeds for its own benefit.

This edition of the Digest was compiled by Daniel Bayfield and Tom Smith and contains decisions up to 31 May 2001.

David Allison

GENERAL NEWS

Insolvent Partnerships (Amendment) Order 2001 (SI 2001/767)

This Order came into force on 2 April 2001 amending the Insolvent Partnerships Order 1994 to provide that additional sections of the Company Directors Disqualification Act 1986 are applied to insolvent partnerships where appropriate.

Proposal to Remove 20 Member Limit on Partnerships

On 4 April 2001 the DTI published a consultation paper in relation to a proposal to abolish the restriction on the maximum number of members of a partnerships.

The maximum is currently 20 partners though there are exceptions for regulated professions. It is thought that the abolition of this restriction, together with the introduction of limited liability partnerships, might perhaps lead to partnerships eventually taking over from companies as the normal means of conducting business.

ADMINISTRATION

Re Dianoor Jewels Ltd Ch Div (Blackburne J). [2001] 1 BCLC 450.

An application to set aside an administration order on the ground that the purpose of the order was to thwart the claims of the applicant was refused. An

administration order was a class remedy for the benefit of all creditors and the fact that the making of an order might thwart the genuine claims of a third party was not a reason for not making the order.

[Lloyd Tamlyn]

Holdenhurst Securities Plc v Cohen Ch Div (Laddie J). [2001] 1 BCLC 460.

Where the administrators of a company were also supervisors of a CVA in relation to the company, then an application could be made in relation to the administrators/supervisors pursuant to section 7 of the Insolvency Act 1986 without the need to seek the leave of the court under section 11(3)(d).

[Lloyd Tamlyn]

Re UCT (UK) Ltd Ch Div (Arden J).

Digested at Vol.6, No.7. Now further reported at [2001] 2 All ER 186 and [2001] 1 BCLC 443.

[Felicity Toube]

Isaacs: "The hazards of contested administration petitions", *Insolvency Intelligence*, Vol.14, No.3, page 22.

[Barry Isaacs]

BANKING

Bank of Scotland v A Ltd CA (Lord Woolf CJ, Judge and Robert Walker LJJ).

Digested at Vol.7, No.2. Now further reported at [2001] 1 WLR 751; [2001] Lloyd's Rep Bank 73.

HSBC Bank Plc v Liberty Mutual Insurance Co. (UK) Ltd Ch Div (Patten J). *Unreported*, 4 May 2001.

Several preliminary issues arose in proceedings between Liberty Mutual Insurance Company UK Limited ("Liberty") and HSBC Bank Plc ("HSBC") in relation to the construction of a bond ("the Liberty Bond") in standard form approved by HSBC. The Liberty Bond was part of the arrangements made between Ocean Marine Mutual Insurance Association Ltd ("OMMIA"), a P&I Club, and HSBC Bank plc for the provision of bank guarantees to assist the members of OMMIA. On the trial of three of the four preliminary issues (judgment on the fourth is awaited), the judge held in favour of Liberty. The proviso in the operative part of the bond limited the indemnity given by Liberty under the Liberty Bond to cases where HSBC's loss "arises from a claim that has been paid by the Bank strictly in accordance with the express terms of the Guarantee". There was nothing in the transactional background or other admissible evidence which justified the court in departing from the relatively clear language of the Liberty bond itself. "Guarantee" meant the Admiralty Bond (a bail or court bond issued on behalf of the shipowner by the club or

the bank). Where the Admiralty Bond had been issued by the correspondent bank, HSBC had to show that the conditions for liability under the Admiralty Bond had been satisfied. HSBC must therefore prove the judgment, arbitral award or agreement that triggered payment under the Admiralty Bond.

Permission to appeal was refused.

[Gabriel Moss QC, Richard Adkins QC, Mark Arnold, Felicity Toube]

HSBC Bank Plc v Liberty Mutual Insurance Co (UK) Ltd; Liberty Mutual Insurance Co (UK) Ltd v HSBC Bank Plc Ch Div (Patten J). *Unreported*, 17 May 2001.

The court considered the fourth preliminary issue. The judge held in favour of Liberty. In cases where the Bond liability was in respect of a bond requested by OMMIA and OMMIA requested HSBC to give or procure a Guarantee for one year, Liberty had no potential liability under its bond if HSBC's correspondent bank gave a bond not limited to one year. This was so even if OMMIA stipulated in its request to HSBC that the Guarantee should adopt wording to be supplied by a named third party, which wording contradicted the one year request. Nor was Liberty estopped from claiming that the Liberty Bond was limited to one year, merely because it had mistakenly demanded and received a premium from OMMIA in respect of a further year. There was no course of dealing between Liberty and HSBC which resulted in a common understanding from which it would have been inequitable for Liberty to resile. Permission to appeal was refused.

[Gabriel Moss QC, Richard Adkins QC, Mark Arnold, Felicity Toube]

National Westminster Bank v Utrecht-America Finance Company CA (Aldous, Clarke and Laws LJJ). *The Independent*, 17 May 2001.

Utrecht had entered into an agreement containing a clause that it would bring no action against Nat West alleging non-disclosure of material non-public information relating to the Transfer Assets. The agreement was governed by English law and contained a non-exclusive jurisdiction clause in favour of England. Utrecht brought proceedings in California alleging fraudulent and negligent breaches of a duty to disclose under Californian law and sought rescission of the agreement. Nat West brought proceedings in England claiming that Utrecht was in breach of the agreement, claiming summary judgment and an injunction to Utrecht from pursuing the Californian proceedings.

(1) The agreement was governed by English law and could only be rescinded in accordance with English law. The fact that Utrecht had an arguable claim for rescission under Californian law was irrelevant.

(2) The relevant provisions of the agreement did not constitute exclusion or exemption clauses. In any event the clauses were reasonable. Nat West was entitled to summary judgment on its claim.

(3) Nat West was entitled to an injunction restraining Utrecht from pursuing the Californian proceedings. If the English court gives judgment for the claimant on the merits and the judgment includes a declaration that the defendant has brought proceedings in breach of contract and is asked to exercise its equitable jurisdiction to grant a permanent injunction restrain continued breach of contract, different considerations apply from those which arise at an interlocutory stage.
[Robin Dicker QC]

OBG Ltd v Allan Ch Div (HHJ Maddocks QC). *Unreported*, 27 April 2001.

2 debtor companies, OBG and Plant, granted debentures and legal charges in favour of their bank to secure an overdraft facility. These security documents and the underlying security were purportedly transferred by the bank to a trade creditor. At the time of the transfer there was in fact no money due from the companies to the bank. The trade creditor purported to appoint receivers over OBG and Plant, on the basis that on taking the transfer it was able to tack on to the bank's securities the previously unsecured liabilities of OBG to its trade creditor under earlier contracts.

In construing the debentures and legal charges, it was held that their terms did not enable the bank alone by a transfer to create a relationship between the debtor companies and the trade creditor, under which the trade creditor could use the debenture as a continuing charge for liabilities as between the debtor companies and the trade creditor. Such a tripartite arrangement could be entered into only with the concurrence of the customer. The money due to the trade creditor was accordingly held not to be within the scope of the charges conferred by the debentures and legal charges.

It was held that the debtor companies had an immediate right of redemption, which could not be defeated by the transfer and was enforceable against the trade creditor which, as an assignee, took subject to the equities.

The learned judge commented that even if the transferee were itself a bank, it would still need to make its own banking arrangements with the customer before it could use transferred security as a continuing charge for liabilities as between the transferee bank and the customer.

Further, there was no power under the debentures or legal charges to appoint a receiver without money being due, without a demand being made or to protect the security for a contingent debt. The only reason and justification for the appointment of a receiver by a mortgagee is to collect money from the security to pay off a secured debt. However a validly appointed receiver is entitled to remain in place so long as there remains a contingent liability secured by the debentures.

The judge commented obiter that a charge which was expressed in terms apt to include the unsecured liabilities past, present and future of the holder of the charge for the time being by transfer without the concurrence of the mortgagor, the effect of which was to defeat a *pari passu* distribution between unsecured

creditors, might be held to be invalid as a matter of public policy.

[Marion Simmons QC, Sandra Bristol]

Three Rivers District Council v Bank of England (No 3) HL.

Digested at Vol.7, No.2. Now further reported at [2001] 2 All ER 513.

[Richard Sheldon QC, Mark Phillips QC, Robin Dicker QC, Barry Isaacs, Ben Valentin]

Bompas QC and Griffiths: "Civil liability of banks to office holders arising from money laundering transactions", *Insolvency Intelligence*, Vol.14, No.4, page 25.

Lenon: "Early termination payments under the 1992 ISDA Master Agreement" [2001] JIBL 84.

BANKRUPTCY

A-G's Reference (No. 7 of 2000) CA (Rose LJ, Rougier and McCombe JJ). *The Times*, 12 April 2001.

In criminal proceedings against a bankrupt for an offence under the Insolvency Act 1986, the use by the Crown of documents which were delivered to the Official Receiver under compulsion but which did not contain statements made by the bankrupt under compulsion, did not violate the bankrupt's right to a fair trial.

Gordon v Omgate Ltd Ch Div (Anthony Mann QC). *New Law Online*, 9 April 2001.

The court had a broad general discretion with regard to the grant of leave under rule 6.26 of the Insolvency Rules 1986 where the petitioner had failed to attend on the hearing of an earlier petition against the same debtor based on the same debt. The burden was on the petitioner to show that leave should be granted and any application was required to be made to the court in which the first petition had proceeded. It was first necessary to decide whether there was anything in the circumstances of the prior dismissal which of itself meant that a new petition should not be presented. Moreover, the court had a discretion as to whether to take into account factors arising between the date of an application for leave and the hearing of the application. There was no requirement for such facts to be of an exceptional nature and the registrar was entitled to take into account the matters that he had.

ANDREAS?

Re Cadwell Ch Div (Neuberger J). *Unreported*, 24 Nov 2000

The bankrupt's appeal pursuant to rule 6.105 of the Insolvency Rules 1986 against the trustee in bankruptcy's admission of a creditor's proof of debt

was dismissed. A money judgment obtained in relation to non-marital assets within matrimonial proceedings in Dade County, Florida was not an obligation arising under an order made in “family proceedings” for the purposes of rule 12.3(2)(a) of the 1986 Rules.

[Andreas Gledhill, Roxanne Ismail]

Patel v Jones CA (Aldous, Mummery and Kay LJJ). *New Law Online*, 24 May 2001.

Rights to future payments under a pension subsisting at the time of bankruptcy vested in the trustee in bankruptcy. On the facts the rights to future payments were subsisting at the time of bankruptcy notwithstanding that they only became payable on the bankrupt’s subsequent redundancy. However, the trustee was not entitled to the amount of the pension attributable to the bankrupt’s post bankruptcy contributions since these were made in the mistaken belief that the pension rights remained vested in bankrupt. In those circumstances the court was entitled to apply the principle in **Ex p James** (1874) LR 9 Ch App 609 on the basis that it was inequitable for the trustee to take the benefit of those contributions.

Solomons v Williams Ch Div (Pumfrey J). *Unreported*, 23 May 2001.

A claim by a trustee in bankruptcy to after-acquired property against a bankrupt may be barred if the bankrupt would have acted differently if the appropriate notice had been served within the 42 day statutory period. A claim to the product of the proceeds of a pre-bankruptcy cause of action by a trustee in bankruptcy against a bankrupt may be recoverable by way of an action for moneys had and received if the proceeds are no longer traceable at law.

[David Marks]

Briggs: “A wife’s equity of exoneration: the doctrine revisited”, *Insolvency Intelligence*, Vol.14, No.5, page 33.

[John Briggs]

Bayfield: “Disputed debts – only one bite of the cherry”, *Insolvency Intelligence*, Vol.14, No.5, page 36.

[Daniel Bayfield]

COMPANY

Bairstow v Queen’s Moat Houses plc CA (Sir Andrew Morritt V-C, Robert Walker and Sedley LJJ). *New Law Online*, 17 May 2001.

Where a company declared dividends without having sufficient distributable reserves the dividends were not rendered lawful by the fact that subsidiaries of the company had distributable reserves which could have been paid up to parent. The directors were therefore liable to make good the unlawfully paid dividends even though company remained solvent. Furthermore,

directors who dishonestly prepared false accounts could not act honestly and reasonably in declaring dividends based on those accounts.

Re Benfield Greig Group plc Ch Div.

Digested at Vol.6, No.3. Now further reported at [2001] BCC 92.

Re Big Apple Clothing Co Ltd Ch Div (Neuberger J). [2001] All ER (D) 77.

The company entered into four agreements with the first and second respondents including a factoring agreement and a trade finance agreement. The third agreement was a tripartite deed which allowed each of the respondents to share any security given by the Company and held by the other respondent. The fourth agreement was a debenture by the Company in favour of the first respondent, granting a charge over specified debts to secure payment of all liabilities. The security charge was registered in the charges register as a charge against the company. It was held that the debenture agreement was valid and enforceable and that under the terms of the tripartite deed, the second respondent was allowed to rely on the security, provided by the first respondent, contained in the debenture agreement.

[Samantha Knights]

Johnson v Gore Wood & Co (a firm) HL.

Digested at Vol.7, No.1. Now further reported at [2001] 1 BCLC 313.

Peskin v Anderson CA (Simon Brown, Mummery and Latham LJJ). [2001] 1 BCLC 372.

Fiduciary duties owed by directors to shareholders only arise if there is a special factual relationship between the directors and the shareholders capable of generating fiduciary obligations, such as a duty to disclose material facts or to use confidential information and valuable commercial opportunities for the benefit of shareholders. In this case there were no such special circumstances.

Cabrelli: “*BDG Roof Ltd v Douglas*: further observations on the application of *Re Duomatic* relief”, *The Company Lawyer*, Vol.22, No.5, page 130.

Clark: “Unfairly prejudicial conduct: a pathway through the maze”, *The Company Lawyer*, Vol.22, No.6, page 170.

CONFLICT OF LAWS

Ace Insurance SA-NV v Zurich Insurance Co CA (Kennedy and Rix LJJ, Jacob J). [2001] Lloyd’s Rep 618; [2001] 1 All ER (Comm) 802.

As the Brussels and Lugano Conventions were designed to regulate jurisdiction between contracting states, if a competing jurisdiction was not a contracting state, the doctrine of *forum non conveniens* was not excluded by the Conventions and remained available to the English courts. There was binding authority to the effect that jurisdiction to stay on the ground of *forum non conveniens* could be exercised in favour of a non-contracting state even though the defendant was domiciled in England or another contracting state. **Re Harrods (Buenos Aires) Ltd** [1991] 4 All ER 334 followed.

Dexter Ltd (In Administrative Receivership) v Harley Ch.Div (Lloyd J). *The Times*, 2 April 2001. In applying the concept of a harmful event (within the meaning of Article 5(3) of the Brussels Convention) to a constructive trust claim based on knowing receipt or dishonest assistance, it was irrelevant that an original breach of trust or fiduciary duty by someone other than the defendant took place within the jurisdiction. The harmful event must directly result from an act or omission for which the defendant was responsible.

CONTRACT

Kalsep Ltd v X-Flow BV Ch Div (Pumfrey J). *The Times*, 3 May 2001.

Before the doctrines of mutual or unilateral mistake could be applied to a contract, the court had to consider whether the terms of the contract itself allocated the risk of the relevant mistake to one of the parties. For a contract to be set aside as an unconscionable bargain, the party seeking to do so had to establish impropriety, and not merely harshness, by the other party in relation to both the terms of the agreement and the manner in which the agreement was arrived at.

Edelman: "Profits and gains from breach of contract" [2001] LMCLQ 9.

Lord Irvine of Lairg LC: "The law: an engine for trade" (2001) 64 MLR 333.

Meisel: "What price auctions without reserve?" (2001) 64 MLR 468.

CORPORATE INSOLVENCY

Re Allard Holdings Ltd Ch Div (Hazel Williamson QC). [2001] 1 BCLC 404.

Having once admitted a debt to proof, in seeking to expunge the proof under rule 4.85 of the Insolvency Rules 1986 it was for the liquidator to prove on the

balance of probabilities that it was improperly admitted. This did not require the liquidator to show impropriety but merely that the proof should not have been admitted at all.

Re Botterill Builders Ltd Ch Div (Rattee J). *New Law Online*, 25 April 2001.

Where three brothers had run a company as a partnership which had become deadlocked due to disputes between the three of the, a winding up petition presented by one of the brothers on the just and equitable ground was not liable to be struck out merely because the other two brothers had presented a section 459 petition in the absence of having actually made an offer found by the court to be a reasonable offer to purchase the petitioner's shares.

Re Brumark Investments Ltd PC (Lords Bingham, Nicholls, Hoffmann, Hobhouse and Millett). *New Law Online*, 5 June 2001.

The Privy Council held that the decision of the Court of Appeal in **Re New Bullas Trading Ltd** [1994] 1 BCLC 449 which held that it was possible for a debenture to provide for a fixed charge over book debts but a floating charge over the proceeds was wrongly decided. In determining whether a charge over book debts is fixed or floating the relevant test is whether the charged assets were intended to be under the control of the company or of the charge holder. In this regard it was not possible to separate a debt from its proceeds since in deciding whether a charge was fixed or floating it was necessary to consider whether the company was free to deal with the both the debts and the proceeds for its own benefit.

Re Kudos Glass Ltd Ch Div.

Digested at Vol.6, No.10. Now further reported at [2001] 1 BCLC 390.

Re Leyland DAF Ltd Ch Div.

Digested at Vol.6, No.9. Now further reported at [2001] 1 BCLC 419.

Munns v Perkins Ch Div (Evans-Lombe J). *Unreported*, 24 May 2001.

In the absence of an express agreement governing the remuneration of an administrative receiver, the receiver was entitled to receive a reasonable sum pursuant to section 15 of the Sale of Goods and Services Act 1979. What was reasonable was dictated by the market rate for such services. A statement by the receiver that his minimum likely fees would be £3,000 - £4,000 but that this was a very approximate estimate did not impose any cap on the fees.

[Barry Isaacs]

O'Donnell v Midland Bank Plc Ch Div (HHJ Behrens). *Unreported*, 31 January 2001.

The bank had the benefit of a fixed and floating charge over the assets of the chargor company, including a

fixed charge over its "book debts and other debts". Under the charge document, the company was obliged to collect in such debts in the ordinary course of its business. The company became insolvent, and having been advised that it should go into liquidation, transferred the bulk of its business to a connected entity on credit terms, and subsequently placed itself into liquidation. The issue was whether the price fell within the bank's fixed charge over book debts and other debts, or was merely subject to a floating charge. The Court held that, notwithstanding the fact that the debt had not been created in the ordinary course of the company's business, the price was an "other debt" within the meaning of the bank's charge.

[Lloyd Tamlyn]

Acton: "Just and equitable winding up: the strange case of the disappearing jurisdiction", *The Company Lawyer*, Vol.22, No.5, page 134.

Dawson: "Transaction avoidance – *Phillips v Brewin Dolphin* considered", *Company Law Newsletter*, issue 72.

Gregory and Walton: "Fixed and floating charges: a revelation" [2001] LMCLQ 123.

Moss QC: "Avoidance of transactions – no cherry picking", *Insolvency Intelligence*, Vol.14, No.4, page 29.

[Gabriel Moss QC]

Pugh: "*Hollicourt* to reduce banks' exposure under section 127", *Tolley's ILP*, Vol.17, No.2, page 53.

Ulph: "Sale and lease-back agreements in a world of title relativity: *Michael Gerson (Leasing) Ltd v Wilkinson and State Securities Ltd*" (2001) 64 MLR 481.

COSTS

Scammell v Dicker CA (Aldous and Mance LJJ). [2001] 1 WLR 631.

The purpose of making an offer under CPR part 36 was to attain the advantages the rules provided. Part 36 did not seek to exclude the general law of contract that an unaccepted offer could be withdrawn and a Part 36 offer could, therefore, be withdrawn at any time prior to acceptance.

DIRECTORS AND DISQUALIFICATION

Re Pantmaenog Timber Company Ltd Ch. Div. (Judge Weeks QC).

Digested at Vol. 7, No. 1. Now further reported at [2001] 1 WLR 730.

Secretary of State for Trade and Industry v Crane Ch Div (Ferris J). *New Law Online*, 11 April 2001.

There is a strong public interest in bringing disqualification proceedings to a substantive hearing, which proceedings should not be indefinitely postponed. Moreover, section 20(2) of the 1986 Act provided the Defendant to disqualification proceedings, who was also facing the prospect of subsequent criminal proceedings arising out of substantially the same facts, with sufficient protection so that the disqualification proceedings would not be stayed.

Secretary of State for Trade and Industry v Deverell CA (Morritt and Potter LJJ, Morison J).

Digested at Vol.6, No.2. Now further reported at [2001] Ch. 340.

Secretary of State for Trade and Industry v Reyna Ch Div (Anthony Mann QC). *The Times*, 3 April 2001.

It was not an abuse of the process of the court for the Secretary of State to seek to restore civil disqualification proceedings which had been adjourned pending the resolution of related criminal proceedings.

Worthington: "Reforming directors' duties" (2001) 64 MLR 439.

INSURANCE

Tarback v Avon Insurance Plc QBD (Comm Ct) (Toulson J). [2001] 2 All ER 503.

Section 1 of the Third Parties (Rights Against Insurers) Act 1930 does not apply to legal expenses insurance (such insurance being pecuniary loss insurance rather than liability insurance). As such the rights under the policy did not automatically transfer to the insured's legal advisers in the event of the insured becoming insolvent.

EUROPEAN UNION

R v Secretary of State for Transport ex p Factortame Ltd (No 7) QBD (Technology and Construction Court).

Digested at Vol.6, No.9. Now further reported at [2001] 1 WLR 942.

[David Marks]

GUARANTEES

Bank of Scotland v Henry Butcher & Co Ch Div. (Michel Kalipetis QC). New Law Online, 21 May 2001

The judge held that: (1) An alteration to a guarantee made after it was executed by four partners, and only initialled by two of them, did not vitiate the guarantee where its only effect was to limit the liability of the guarantors. (2) Where it was intended that a guarantee signed by four partners would also bind the partnership as a whole, the four partners remained personally liable on the guarantee even if the partnership as a whole was not in fact bound, by reason of an express term in the guarantee to that effect, unless there was a mutual agreement that the four partners signed subject to a condition precedent that the remaining partners were also bound. On the facts no such agreement could be inferred.

[Antony Zacoroli]

INTERNATIONAL INSOLVENCY

Re Banco Nacional de Cuba Ch Div (Lightman J). *The Times*, 18 May 2001.

Proceedings brought by creditors as a result of transactions entered into at an undervalue for the purpose of putting assets beyond the reach of creditors pursuant to Section 423 of the Insolvency Act 1986 could be commenced against a defendant situated outside the United Kingdom only with the leave of the court under rule 6.20 of the CPR.

[Richard Sheldon QC, William Trower QC]

Re Transnational Insurance Co Ltd, Cleaver v Delta Amercian Reinsurance Co PC.

Digested at Vol.7, No.2. Now further reported at [2001] 2 WLR 1202.

[Jeremy Goldring]

New publication:

Moss and Others, *Cross-Frontier Insolvency of Insurance Companies*. A survey of cross frontier insurance insolvency law in the principal jurisdictions of England, US and Bermuda and in a number of other common law, civil law and other jurisdictions. The co-authors of the chapter on English law include Gabriel Moss QC and Tom Smith. The book is due to be published by Sweet & Maxwell in May. Further information can be obtained from anita.gaspar@sweetandmaxwell.co.uk

[Gabriel Moss QC, Tom Smith]

LIMITATION

Ezekiel v Lehrer Ch Div (Evans-Lombe J). *The Times*, 4 April 2001.

A claimant who was or, had he investigated the circumstances of his case with due diligence, would have been in possession of all the facts relevant to his cause of action, was not entitled to have the limitation period applicable to that cause of action suspended by reason of the defendant's attempts deliberately to conceal one or more facts relevant to that cause of action.

Raja v Lloyds TSB Bank Plc CA (Sir Andrew Morritt V-C, Judge and Mance LJ). [2001] Lloyd's Rep Bank 113.

The duty of a mortgagee in possession to obtain the true market value or a proper price arises in equity. Accordingly the appropriate limitation period in respect of an action brought against the mortgagee for breach of that duty was 6 years (section 2 Limitation Act 1980 applied by analogy under section 36).

PARTNERSHIP

Bank of Scotland v Henry Butcher & Co Ch Div. (Michel Kalipetis QC). New Law Online 21 May 2001

Where four partners entered into a guarantee on behalf of the partnership, and where the entry into guarantees was not within the ordinary course of the partnership's business, nevertheless the partnership was bound (a) because the remaining partners consented to the guarantee by acquiescence or (b) because (applying *Sandilands v Marsh* (1819) the guarantee was an integral part of a wider transaction which the partners had approved or ratified.

[Antony Zacoroli]

Re White (Dennis), decd CA (Peter Gibson, Chadwick and Mance LJ).

Digested at Vol. 6, No. 6. Now further reported at [2001] Ch. 393.

Sheikh: "Partnership reform: legal and practical implications", [2001] ICCLR 89.

PROCEDURE

Barings plc (in liquidation) v Coopers & Lybrand Ch Div (Evans-Lombe J).

Digested at Vol.7, No.2. Now further reported at [2001] Lloyd's Rep Banking 85.

Barry v Ablere Construction (Midlands) Ltd CA (Henry, Judge and Hale LJJ). *The Times*, 3 April 2001. While guidelines set by the House of Lords were not tramlines, there would be little point in the House laying down guidance for lower courts unless it was intended that it should be followed.

Beedell v West Ferry Printers CA (Aldous, Mummery and May LJJ). *The Times*, 5 April 2001. It was not appropriate for the Court of Appeal to set aside the grant of permission to appeal where, although the appeal was absolutely hopeless and bound to fail, the area of law in question was the subject of considerable controversy.

De Beer v Kanaar & Co Ch Div (Elizabeth Gloster QC). *New Law Online*, 19 February 2001. The court had no jurisdiction to order security for costs against a person ordinarily resident out of the jurisdiction in the US who had assets in Holland and Switzerland and was therefore a person against whom a claim could be enforced under the Brussels or Lugano Conventions.

Re Medicaments and Related Classes of Goods (No 2) CA (Lord Phillips MR, Brooke and Robert Walker LJJ). Digested at Vol. 7, No. 2. Now further reported at [2001] 1 WLR 700.

Petroleo Brasileiro SA v Mellitus Shipping Inc CA (Potter, Sedley and Jonathan Parker LJJ). *The Times*, 5 April 2001. When exercising its discretion to permit service out of the jurisdiction under rules 6.20 and 6.21 of the CPR, although the circumstances would not otherwise have warranted granting permission to serve a Part 20 claim form for contribution out of the jurisdiction, the court was entitled to take into account the special factor that the law of the other available jurisdiction allowed no remedy of contribution and that, therefore, the party seeking to join the foreign defendant for contribution purposes in England would otherwise be unable to enforce its claim.

Reliance National Insurance Co (Europe) Ltd v Ropner Insurance Services CA (Chadwick and Latham LJJ). [2001] 1 Lloyd's Rep 477. The mere writing of a letter to the court, even if it was brought to the attention of the judge and he responded to it, did not mean that the "proceedings had come before the court... on paper" within the meaning of the practice direction to part 51 CPR. Such a letter did not constitute a notice of application and unless what the judge did thereafter could properly be construed as an exercise of his powers under CPR part 3.3, any consideration he gave to that letter did not constitute an occasion on which proceedings had come before him as envisaged by CPR 51 PD-019.

Royal Brompton Hospital NHS Trust v Hammond CA (Aldous, Clarke and Laws LJJ). *The Times*, 11 April 2001.

In considering whether to strike out a claim, the CPR required the judge to decide whether there was a real prospect of success. The judge should therefore have regard not only to witness statements but also to the question of whether supplemented by evidence at trial, the claim was bound to fail even though unchallenged by any evidence for the defendants. The normal standard of proof, on a balance of probabilities, was not appropriate.

Springsteen v Masquerade Music Ltd CA (Waller, Laws and Jonathan Parker LJJ). *The Independent*, 24 April 2001.

The admissibility of secondary evidence of the contents of a document was entirely dependent upon whether or not any weight was to be attached to that evidence, and it was a matter for the court to decide, in the light of all the circumstances of the case, what if any weight to attach to it.

United Film Distribution Ltd v Chhabria CA (Aldous and Laws LJJ, Blackburne J). *The Times*, 5 April 2001.

The court's power to permit service out of the jurisdiction under rule 6.20(3) of the CPR was not more restricted than the court's power to add or substitute a party under rule 19.1(2).

PROPERTY

Poplar Housing and Regeneration Community Association Ltd v Donoghue CA (Lord Woolf CJ, May and Jonathan Parker LJJ). *The Independent*, 2 May 2001.

The making of a mandatory possession order under section 21(4) of the Housing Act 1988 did not breach either article 6 or article 8 of the European Convention on Human Rights.

Skipton Building Society v Bratley and Stott CA (Evans and Potter LJJ, Alliot J). Digested at Vol. 6, No. 4. Now further reported at [2001] QB 261.

Smith: "Relief against forfeiture: a restatement" [2001] CLJ 178.

PUBLIC LAW

R v Secretary of State for the Environment, Transport and the Regions ex p Alconbury Developments Ltd HL (Lords Slynn, Nolan,

Hoffmann, Hutton and Clyde). *The Times*, 10 May 2001; [2001] 2 WLR 1389.

The powers by which the Secretary of State for the Environment, Transport and the regions could make decisions on planning applications were not incompatible with the right, pursuant to article 6.1 of the European Convention on Human Rights, to have civil rights and obligations determined by an independent and impartial tribunal as such decisions were subject to judicial review which ensured the compatibility of the overall procedure.

R (Javed) v Secretary of State for the Home Department CA (Lord Phillips MR, Peter Gibson and Latham LJ). *The Times*, 24 May 2001.

The court was entitled to review, on grounds of illegality, procedural impropriety or *Wednesbury* unreasonableness, subordinate legislation which had been debated in and approved by affirmative resolution of both Houses of Parliament

TORT

Standard Chartered Bank v Pakistan National Shipping Corporation CA.

Digested at Vol.6, No.3. Now further reported at [2001] 1 All ER (Comm) 822.

Mitchell: "Civil liability for bribery" [2001] LQR 207.

SEMINARS/ APPOINTMENTS

Gabriel Moss QC was a member of the panel on Co-ordinating Multinational Insolvencies and

Reorganisations at the First Annual Conference of the International Insolvency Institute in New York on 12 June 2001

[Gabriel Moss QC]

Stuart Isaacs QC gave a talk to the Bermuda Bar Association entitled "Anti-Suit Injunctions and Jurisdiction" in April.

[Stuart Isaacs QC]

Mark Phillips QC gave a talk hosted by the Turnaround Managers Association about the DTI's review of Company Rescue and Business Reconstruction mechanisms on 22 May 2001.

[Mark Phillips QC]

Adam Goodison and Antony Zacaroli gave a presentation to Sidley & Austin on insolvency.

[Antony Zacaroli, Adam Goodison]

Daniel Bayfield gave a talk on "Recent developments in Voluntary Arrangements" to the R3 conference on Voluntary Arrangements held in Sutton Coldfield on 6 June 2001.

[Daniel Bayfield]

William Trower QC has accepted an invitation to serve on the Insolvency Rules Committee.

[William Trower QC]

Glen Davis has accepted an invitation from the Vice Chancellor to serve on the re-formed Insolvency Courts Users Committee.

[Glen Davis]

Dr Michael Peglow resigned from Chambers on 1st June 2001 and has moved to new international chambers

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