

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 8 No 4 April 2002

The ILA Conference took place in Brussels last month. Speakers included Lord Hoffmann and Sir Andrew Morritt V-C with Lord Alexander of Weedon QC, Gabriel Moss QC and Ian Fletcher from Chambers. Mark Phillips QC chaired the conference and has now taken over as President of the ILA.

The Court of Appeal in its judgment in **Re NT Gallagher & Son Ltd** considered the question of whether following the failure of a CVA and the company going into liquidation, the trusts created by the arrangement also terminate. Martin Pascoe appeared for the supervisors and Antony Zacaroli appeared for the liquidators. Meanwhile ITV Digital joined the ranks of companies in administration. Gabriel Moss QC and Stephen Atherton acted for the directors.

The Digest would also like to take this opportunity to congratulate Martin Pascoe QC on taking silk.

Tom Smith

GENERAL NEWS

The Enterprise Bill

The Enterprise Bill was introduced into the House of Commons on Tuesday 26 March 2002. The Second Reading is scheduled for Wednesday 10 April 2002. The Bill follows the recommendations in the White Paper *Productivity and Enterprise: Insolvency – A Second Chance* published on 31 July 2001. The main recommendation for corporate insolvency is to restrict the use of administrative receivership by shifting the balance in favour of an enhanced and streamlined version of administration. In addition, the Crown's status as a preferential creditor is to be abolished in both bankruptcy and corporate insolvency. The Bill can be found online at <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/115/2002115.htm>

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ARBITRATION

Gannet Shipping Ltd v Eastrade Commodities Inc

QBD (Langley J). [2002] 1 All ER (Comm) 297.

On its true construction, Section 57(3)(a) of the Arbitration Act 1996 was wide enough to include corrections both as to the award made and to an order of costs based upon that award. In the instant case, the error as to costs was an error "arising from" the "accidental slip" in the amount of the award and as such there was power to correct it.

G Petrochilos, "On the judicial character of the seat in the Arbitration Act 1996 (Dubai Islamic Bank v Paymentech)" [2002] LMCLQ 66.

BANKING

X Gao, "Presenters immune from the fraud rule in the law of letters of credit" [2002] LMCLQ 10.

K Dharmananda and P Dzakpasu, "Central Bank liability to depositors: Three Rivers may not open flood-gates" [2002] 17(2) JIBL 41.

COMPANY**Profinance Trust SA
v Gladstone**

CA (Schiemann, Robert Walker LJ and Lloyd J). [2002] 1 WLR 1024.

Where an order was made that a majority shareholder purchase the interest of a minority shareholder in a company, the starting point in selecting the valuation date of the shares should be the proposition that the interest in a going concern ought to be valued at the date when it was ordered to be purchased, subject to the overriding requirement that the valuation should be fair on the facts of the particular case.

**Rakusens Ltd v Baser
Ambalaj Plastik Sanayi
Ticaret AS**

CA (Buxton and Arden LJ and Bodey J). [2002] 1 BCLC 104.

The provisions of Section 695(2) of the Companies Act 1985 relating to service on a

foreign company which had not notified the registrar of companies of an address for service only applied if it was shown that the company had established a place of business within the United Kingdom. Where it was sought to show the establishment of a place of business by the conduct of persons who were merely agents, not employees, of the company at that place, it was not sufficient to show that the agent had established a place of business at the relevant address. A relevant factor was whether the agent was entitled to conclude contracts or merely passed on orders from customers to the foreign company.

J Gray, "Restoring a company to the Registrar of Companies pursuant to Section 653 of the Companies Act 1985" [2002] 23(4) The Company Lawyer 125.

C Howell, "Section 35A of the Companies Act 1985 and an inquorate board: one won't do" [2002] 23(3) The Company Lawyer 96.

G Scanlon, "Dishonesty in corporate offences – a need for reform?" [2002] 23(4) The Company Lawyer 114.

CONFLICT OF LAWS

**De Molestina v Ponton
QBD (Colman J). [2001] CLC**

**1412; [2002] 1 Lloyd's
Rep 271.**

The test for service out of the jurisdiction under CPR r 6.20 is in substance not materially different from that under CPR r 24.2 regarding summary judgment. However, if the law was in issue but there was no serious issue to be tried in relation to any conceivably relevant fact, there might in some cases be good reason to determine the question of law at the application stage and decline permission to serve out rather than impose on a foreign defendant the inconvenience and expense of subsequently applying to strike out the claim under CPR r 3.4(2) or r 24.2.

The merits threshold test under CPR 6.20 should not differ in substance from that under CPR 24.2; that was demanded by the whole philosophy of the overriding objective under the CPR; and the fact that the defendant was foreign should make no difference in principle.

**Konamaneni v Rolls-Royce
Industrial Power**

Ch D (Lawrence Collins J). [2002] 1 All ER 979.

In a derivative claim, an English court could have jurisdiction to hear an action pursuant to CPR r 6.20(3) notwithstanding that the company on whose behalf the action was brought was incorporated abroad.

Furthermore, the question whether the case was suitable for a derivative action had to be taken into account in determining the appropriate forum for the trial, notwithstanding the habitual definition of such issues as purely procedural, and therefore determinable at a preliminary stage.

CONTRACT

George Hunt Cranes Ltd v Scottish Boiler & General Insurance Co Ltd

CA (Potter LJ and Morland J). [2002] 1 All ER (Comm) 366.

Where one clause of a contract was labelled 'condition precedent' and a question arose as to the status of a clause not so labelled, the latter was not ipso facto precluded from being regarded as such. If the wording of the clause in question was apt to make its intention unambiguously clear, the absence of the rubric was not fatal. As with any other contract, the task of construction required one to construe the policy as a whole. However, if there was a clear expression of intention in the wording of the clause that it was to be treated as a condition precedent, that label or apparent intention could not simply be ignored, but should be regarded at least as a starting point. Such a clause should not be treated as a mere formality to be evaded at the cost of a

false and unnatural construction of the words used in the policy, but should be construed fairly to give effect to the object for which it was inserted.

Libra Bank Plc v Financiera De La Republica S.A.

Ch D (Michael Briggs QC sitting as a deputy judge of the High Court). Lawtel, 22 March 2002.

An assignee (B) entered into an assignment with a subsequent assignee (C) which by its terms provided for the transfer of rights that had expressly been retained by the original assignor (A). The court refused to imply a term in the assignment agreement between A and B that B would not purport to transfer rights that it did not own. Further the court refused to hold that B held A's rights on trust.

[Lexa Hilliard]

Veba Oil Supply & Trading GmbH v Petrograde Inc

CA (Simon Brown, Tuckey, Dyson LJ). [2002] 1 All ER 703; [2002] 1 Lloyd's Rep 295; [2002] 1 All ER (Comm) 306.

When parties entered into a contract on certain terms as to inspection, it was important that the court should not lightly relieve one of them from being bound by those terms. A departure from instructions was material unless it could truly be characterised as trivial or de minimis in the sense of

it being obvious that it could make no possible difference to the party. Once a material departure from instructions was established, the court was not concerned with its effect on the result. Such a determination was not binding on the parties because if an expert departed from his instructions the parties would not have agreed to be bound by his decision.

DAMAGES

Jaura v Ahmed

CA (Potter, Mummery and Rix LJ). The Times, 18 March 2002.

It was right that defendants who had kept a small businessman out of money to which a court ultimately judged him to have been entitled, should pay a rate of interest properly reflective of the real cost of borrowing incurred by such a class of businessman and not merely the conventional rate of 1 per cent over base available to first-class borrowers. In this case a rate of 3 per cent over base was appropriate.

DIRECTORS DISQUALIFICATION

Official Receiver v Stern (No 2)

CA (Sir Andrew Morritt V-C, Buxton and Arden LJ). [2002] 1 BCLC 119.

A disqualification order for a period of 12 years was entirely appropriate for a director who

had traded at the risk of creditors, had made unauthorised and excessive drawings and had caused the company to make payments to another company created by him.

Dr D Arsalidou, "The liability of non-executive directors for negligent omissions: a new approach under legislation?" [2002] 23(4) *The Company Lawyer* 107.

M B Hemraj, "Australia: the responsibility of company directors" [2002] 23(4) *The Company Lawyer* 126.

L Linklater, "Section 727 relief from liability – redundant or relevant?" [2002] Issue 3 *Company Law Newsletter* 1.

A Walters, "Bare undertakings in disqualification proceedings: a postscript" 23(4) *The Company Lawyer* 123.

INJUNCTIONS

Gwembe Valley Development Co Ltd (in Receivership) v Kosky and others (No 4)

Ch D (Rimer J). The Times, 28 February 2002.

A successful party to an action who sought an asset freezing order could be required to give a cross-undertaking in damages where the trial judge has given the unsuccessful party leave to appeal.

INSOLVENCY – BANKRUPTCY

Boorer v Trustee in Bankruptcy of Boorer

Ch D (Jacob J). [2002] BPIR 21.

The second defendant, who was the wife of the bankrupt, sought to have a consent order in bankruptcy proceedings set aside by the court invoking its review jurisdiction under Section 375 of the Insolvency Act 1986. The grounds for the application were that the order was unfair because the trustee, having earlier agreed to treat the matrimonial home as being subject to negative equity, had revised that opinion and had placed a value of £40,000 on the bankrupt's share. That value had been embodied in a settlement forming the basis of the consent order. In dismissing the application for review, the court held that the jurisdiction to review could only be exercised in an exceptional case where there was serious injustice. The trustee in bankruptcy, having come into possession of new information relating to the value of the bankrupt's share in the matrimonial home, was perfectly entitled to seek payment for the transfer of that share from the estate to the second defendant.

[Lloyd Tamlyn]

Re Malcolm Ross (A Bankrupt) (No 3)

CA (Nourse and Mantell LJ). [2002] BPIR 185.

The Court of Appeal having allowed the applicant's appeal and dismissed a bankruptcy petition which had been presented against him by Stonewood Securities plc (see [2000] BPIR 636) had adjourned all questions of costs including any application under Section 51 of the Supreme Court Act 1981. On the restored application in addition to seeking an order for the costs against the petitioning creditor, the applicant sought an order under Section 51 SCA 1951 against Miss J, a majority shareholder of petitioning creditor, whom the applicant claimed held those shares on trust for him. It was held that the petitioning creditor was to pay part of the costs but that it would not be just or reasonable to make an order for costs against the Miss J given in particular that the bankruptcy petition was not an abuse of the process of the court.

[Felicity Toubé]

Re Lorraine Share

Ch D (Patten J). [2002] BPIR 194.

On the evidence the second respondent had established that he had borne the entirety of the financial costs associated

with the acquisition of a residential property in the sole name of the first respondent (the bankrupt) and was therefore the sole beneficial owner of it. Although the flat had been registered in the sole name of the first respondent and that the mortgage application form contained a clear statement that the first respondent was to pay the deposit personally and meet the instalments out of her own income, it was not open to the court to reject the respondents' evidence in the absence of cross-examination.

[Samantha Knights]

C Brougham QC and J Briggs, "Current Issues in Insolvency – Bankruptcy Reform Proposals" [2002] 15(3) *Insolvency Intelligence* 17.

[Christopher Broom QC, John Briggs]

INSOLVENCY – CORPORATE

Re Allard Holdings Limited

Ch D (Hazel Williamson QC sitting as a deputy judge of the High Court). [2002] BPIR 1.

On an application by a liquidator to expunge proofs of debt under rule 4.85 *Insolvency Rules* 1986, the onus was on the liquidator to demonstrate on the balance of probabilities that they were 'improperly' admitted which meant no

more than that the proof was wrongly admitted in the sense that it should not have been admitted at all. Any period of delay between admission of the proof and the application to expunge was a matter to be taken into account in determining whether the onus of proof on the liquidator had been discharged.

Arthur D Little v Ableco Finance LLC

Ch D (Roger Kaye QC sitting as a deputy judge of the Ch D). Unreported, 27 March 2002.

A company registered in Scotland granted a charge over the shares in its subsidiary company in England. The Scottish company went into administration and its administrators sought directions as to whether the charge was invalid for non-registration of a floating charge. The court held firstly that chapter II of Part X of the Companies Act 1985 was part of the law of England such that the English court had jurisdiction to determine the issue. Moreover, the charge was a fixed charge since the shares were not part of the circulating assets of the company and, in addition, the company was not free to dispose or deal with the shares without reference to the charge-holder. *Agnew v Commissioners of*

Inland Revenue [2001] 2 *BCLC* 188 considered.

[Gabriel Moss QC, Simon Mortimore QC, Jeremy Goldring]

Chiemgauer, Membrand und Zeltbau GmbH v The New Millennium Experience Co Ltd

Ch D (Geoffrey Vos QC sitting as a deputy judge of the Ch D). [2002] BPIR 42.

As a matter of construction of the contract for the erection of the roof for the Millennium Dome, the Claimant's entitlement to "direct loss and/or damage" included any profit that it could prove it would have made from the contract. In assessing that entitlement, it was to be assumed that the Claimant would have been able to perform the contract according to its terms, notwithstanding its subsequent insolvency.

A Berg, "Cosslett – Section 395 and set-off in the House of Lords – Part 2" [2002] 15(3) *Insolvency Intelligence* 21.

P Godfrey, "The Turnaround Practitioner – adviser or director?" [2002] 18(1) *Insolvency Law & Practice* 3.

S Plant "The administration of Railtrack Plc – law in the making" [2002] 18(1) *Insolvency Law & Practice* 18.

C Pugh, "Liquidators survive Barings Challenge" [2002] 18(1) *Insolvency Law & Practice* 21.

INSOLVENCY – VOLUNTARY ARRANGEMENTS

Re N.T. Gallagher & Son Ltd

CA (Peter Gibson, Ward and Dyson LJ). Lawtel, 26 March 2002

Where a CVA or IVA provides for monies or other assets to be paid to or transferred or held for the benefit of CVA or IVA creditors, this will create a trust of those monies or assets for those creditors. The effect of the liquidation of the company or the bankruptcy of the debtor on a trust created by the CVA or IVA will depend on the provisions of the arrangements. If the arrangement provides what is to happen on liquidation or bankruptcy or failure of the CVA or IVA, effect must be given thereto. If the CVA or IVA does not so provide, the trust will continue notwithstanding the liquidation, bankruptcy or failure and must take effect according to its terms. The CVA or IVA creditors can prove in the liquidation or bankruptcy for so much of their debt as remains after payment of what has been or will be recovered under the trust.

[Martin Pascoe, Antony Zacaroli]

Hurst v Bennett (No 2)

Ch D (Ferris J). [2002] BPIR 102; CA (Mummery and Jonathan Parker LJ). [2002] BPIR 102.

It was not proper to use the jurisdiction to review under Section 375(1) *Insolvency Act* 1986 to by-pass the unequivocal provisions of Section 255(1)(c) of the Act which prohibited the making of a second application for an interim order less than 12 months after the making of a first application. The Court of Appeal refused permission to appeal.

K Pound, "New rules and new roles for the individual voluntary arrangement" [2002] 18(1) *Insolvency Law & Practice* 9.

JUDICIAL REVIEW

Doll-Steinberg v The Society of Lloyd's

QBD (Stanley Burnton J). Unreported, 19 March 2002.

Notwithstanding that the source of the powers of a committee of Lloyd's was statutory its decisions were not amenable to judicial review. Further, the Society of Lloyd's was not a public authority within the meaning of Section 6(1) of the Human Rights Act 1998.

[Lexa Hilliard]

PROPERTY

Aubergine Enterprises Ltd v Lakewood International Ltd.

CA (Auld, Ward and Robert Walker LJ). The Independent, 7 March 2002.

The use of the words "if a consent to assign... is required to complete the contract" in the standard condition 8.3.1 of the Standard Conditions of Sale (third edition), concerning the sale of leasehold interests, was a plain reference to a requirement for "prior written consent" in the lease to be assigned. It was not, however, a reference confining the prior written consent to an unconditional consent or to a consent by deed or other formal document, nor, in the case of conditional consent, to fulfilment of the conditions by completion date. It followed that clearly indicated consent by correspondence subject to conditions agreed but not necessarily fulfilled by completion date could amount to "consent" under standard condition 8.1.3.

SECURITIES

BUHR v Barclays Bank Plc

CA (Lord Woolf LCJ and Tuckey and Arden LJ). [2002] BPIR 25.

By Section 4(5) of the Land Charges Act 1972, the consequence of non-registration of a charge was that it was void only against a purchaser and

that the position as between the mortgagor and mortgagee was unaffected such that the charge had remained valid and enforceable as between them until the sale. Accordingly, where a mortgagor made a disposition of the mortgaged property in a manner that destroyed the mortgagee's estate in that property, a security interest in the proceeds of sale automatically came into existence even if the mortgage relied upon was itself void as against the purchaser for want of registration.

G McCormack, "The nature of security over receivables" [2002] 23(3) The Company Lawyer 84.

SPORTS

Re Thierry Henry

FA Disciplinary Commission. Unreported, 6 March 2002.

TH was charged with improper conduct by the FA in connection with an incident following the Arsenal v Sunderland.

TH admitted the charge and at a hearing in relation to the penalty only received a three match ban.

[Mark Phillips QC, Daniel Bayfield]

Re Patrick Viera

FA Disciplinary Commission. Unreported, 14 March 2002.

PV was charged with violent conduct relating to the im-

proper use of his elbow. At the disciplinary hearing the charge was found not to have been proved.

[Mark Phillips QC, Daniel Bayfield]

TORT

Credit Suisse First Boston v Al Rawi

QBD (Comm Ct) (Tomlinson J). Unreported, 21 February 2002.

The Defendant was held liable for procuring a company of which he was a director to commit tort of deceit by making fraudulent representations on behalf of the company to CSFB. CSFB was therefore entitled to recover all its loss directly flowing from the fraudulently induced transaction.

[Robin Dicker QC]

TRUSTS

Rahman v Chase Bank (CI) Trust Company Ltd and others

Royal Court of Jersey (Tomes, Deputy Bailiff and Jurats Lucas and Le Boutiller). [2002] BPIR 129.

Mr Rahman, the deceased, created a settlement under Jersey law constituting the first defendant, CTBC, a trust corporation, as trustee to hold the trust fund and income upon such trusts as the deceased should appoint in his lifetime with its consent subject to the proviso that the deceased could

in any 12-months period appoint one-third of the capital of the trust fund without that consent. Provision was also made for distribution of the trust capital and income in default of such appointment and on the death of Mr Rahman. Notwithstanding these provisions CTBC was empowered to pay the capital or income to or for the benefit of the deceased and was directed to have regard exclusively to his interests in exercising such power. Many of the administrative powers in the settlement required his prior written consent for their exercise in his life time. The settlement was held to be wholly invalid and of no effect under the law of Jersey because the powers contained in the settlement as a matter of construction infringed the rule of law – *donner et retenir ne vaut* – by virtue of the deceased retaining such powers exercisable directly or indirectly as enabled him substantially or wholly to revoke or otherwise terminate the settlement for his own absolute benefit or for the benefit of those he chose to benefit. In any event the deceased exercised control over the trust fund in clear contravention of the said rule of law and treated the assets comprised therein as his own. Further it was clear on the facts that the settlement was a sham which the deceased did not intend to have legal effect according to its terms.

Twinsectra Ltd v Yardley**HL (Lords Slynn, Steyn, Hoffmann, Hutton, Millett). The Times, 25 March 2002.**

Where money was lent on the express terms that it would be used only in the acquisition of property, it was a breach of trust for the money to be used for any other purpose. While the Quistclose type cases had generally concerned loans for the payment of specific debts or classes of debt, there was no inherent reason why the imposition of a wider special purpose should not impose a trust.

SEMINARS AND APPOINTMENTS

On 22 March 2002, Herbert Smith and University College London marked the 20th anniversary of the publication of the Cork Report by jointly hosting a conference to commemorate the contribution to insolvency law and practice made by the Committee and its advisors. Speakers included Lord Millett, Michael Crystal QC and Professor Ian Fletcher.

[Michael Crystal QC, Ian Fletcher]

Samantha Knights gave a talk to the employment department of Charles Russell on insolvency and employment on 28 March 2002.

[Samantha Knights]

Glen Davis has been elected to the Board of the Society for Computers and Law. He will serve as the Trustee/Director taking responsibility for SCL's magazine and website and will continue to chair SCL's Media Board.

[Glen Davis]

The digest is a collation of references to reported and unreported cases and other items of relevance to the professional practices of the Barristers at 3/4 South Square, Gray's Inn, London WC1R 5HP. It is not intended to constitute legal advice, and the contents should not be relied upon without checking the original text of any authority or periodical cited. No duty of care is hereby assumed to any person, and no liability is accepted for the content.
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