3/4 DIGEST

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

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The end of term has seen a number of judgments being delivered. In **Three Rivers DC v Bank of England** the Court of Appeal considered the scope of non party disclosure obligations under Part 31 of the CPR. In **Re Railtrack plc** the Court of Appeal gave guidance on the scope of the moratorium imposed in administrations by section 11(3) of the Insolvency Act 1986. Meanwhile, in **Re Independent Insurance** the Court considered the question of how remuneration claimed by provisional liquidators is to be fixed, though it did not lay down any general guidelines for future applications.

The Digest is delighted to congratulate Blair Leahy upon becoming a tenant in Chambers following the completion of her pupillage.

Tom Smith

GENERAL NEWS

The Companies Bill

In 1998 the DTI launched a three year review of company law managed by an independent steering group, which presented its findings on 26 July 2001. The Government published its response to the Company Law Review in a White Paper – "Modernising Company Law" – issued on 16 July 2002. This sets out the Government's core proposals for simplifying and modernising company law, taking particular account of the needs of small companies. Views are now sought on the proposals. www.dti.gov.uk/companiesbill.

Move to strengthen International Accounting Standards

A new European Regulation will, from 1 January 2005, require listed companies in Europe to adhere to internationally agreed accounting standards when preparing their consolidated accounts. The Regulation is intended to ensure that listed company accounts throughout the EU are more reliable and transparent and that they can be more easily compared.

ARBITRATION

Welex AG v Rosa Maritime Ltd (The 'Epsilon Rosa')

QBD (David Steele J). [2002] 2 Lloyd's Rep 81.

A right to a public hearing could be waived so long as the waiver was clear and unequivocal. Accordingly, Article 6 of the Human Rights Act 1998 was not material to the issue of whether as a matter of law an agreement for arbitration had been entered into.

BANKING

Sirius International Insurance Co Ltd v FAI General Insurance Ltd

Ch Div (Jacob J). New Law Online, 23 July 2002.

In the very special case where a party expressly agrees not to draw down on

a letter of credit unless certain conditions are met, a court could permit an exception to the "autonomy principle" embodied in Art 3 of UCP 500.

Lijuan Zhou, "Legal Position Between Advising Bank and Confirming Bank: Contrast and Comparison", [2002] JIBL Vol. 17 Issue 7.

Gabriel Moss QC & Felicity Toube, "Subrogation and construction issues in bonds", [2002] Insolvency Intelligence, Vol. 15 No.7.

[Gabriel Moss QC, Felicity Toube]

COMPANY

DPP v Dziurzynski

QBD (Rose LJ and Gibbs J). The Times, 8 July 2002.

The Protection from Harassment Act 1997 was not intended to criminalise behaviour directed at a limited company as opposed to an individual.

Dranez Anstalt v Hayek

Ch Div (Evans-Lombe J). [2002] 1 BCLC 693.

A director, like any employee is bound for the duration of his contract of employment to preserve the confidentiality of information which came into his hands in the course of that employment and which he knew his employer wished to keep confidential. However, a director of a company who resigned and left the employment of a company should not be in a worse position than an ordinary employee in relation to the future exploitation of skills and information acquired by him while he was a director, and since an employee in the same position as the director could not be restrained from using information acquired by him, an employee who was in fact a director could likewise not be restrained.

Re Oakhouse Property Holding plc

(Rimer J). Unreported, 30 July 2002.

In a derivative action successfully brought by a shareholder against the wrongdoers and the companies, the companies were ordered to indemnify the shareholder for his costs out of their assets (following Wallersteiner v Moir and CPR 19.9(7)). This made the shareholder an unsecured creditor of the companies for his costs. After the companies went into administration the shareholder claimed to be entitled to a lien for his costs on assets recovered as a result of his proceedings, relying on dicta of Sir Richard Scott VC in Halle v Trax [2000] BCC 1020. Rimer J refused to apply those dicta, holding that as a matter of principle there could be no lien.

[Simon Mortimore QC]

Smith v Henniker-Major & Co (a Firm)

Ch Div (Rimer J). [2002] BCC 544.

Section 35A of the Companies Act 1985 merely deemed a board of directors to be free of any limitation on its powers which the company's constitution imposed. In this context, the reference in section 35A to the power of the "board of directors to bind the company" could sensibly only be to the powers exercisable by the directors when they gathered together as a board. It was only possible to ascertain how the board of directors could act by examining the articles relating to their proceedings. If the articles provided that a quorum for board meetings was three, then a meeting of only two directors would not be a meeting of "the board" at all, or at any rate not one at which the board could transact business, and any resolution at such a meeting to bind the company to a transaction would not be an exercise of the board's power at all, and would be a nullity.

Archana Sinha, "Directors' Duties – Breach of Fiduciary Duties", [2002] ICCLR, Vol. 13 Issue 7.

Richard Nolan & DD Prentice, "The issue of shares – compensating the company for loss", [2002] LQR 180.

R Mitchell and Dr M Stockdale, "Your Answers May not be Used in Evidence Against You", [2002] Company Lawyer, Vol 23. No. 8, P. 232.

Md Anowar Zahid & Andrew McGee, "The Proposed Prospectus Directive: a defective proposal in need of a rethink", [2002] Company Lawyer, Vol. 23 No. 8, P. 250.

Claire Howell, "Two be quorate or not two be quorate, that is the question – the answer to CA 1985, s35A at last!" Sweet & Maxwell's Company Law Newsletter, Issue11/2002.

CONTRACT

Carlton Communications v The Football League

QBD (Langley J). New Law Online, 1 August 2002.

The claimants sought a declaration that they were not liable under an alleged guarantee of their former subsidiary's obligations under a contract with the defendant. In support of its claim that there was such a guarantee the defendant relied on a statement made in an initial bid document under the heading "Financial Arrangements" that Ondigital and its shareholders would guarantee all funding due to the League. The defendant said that this represented an offer to guarantee which was accepted by the League when it entered into the contract. Held that the initial bid document was subject to contract and as such contained no offer capable of acceptance. In any event the statement was not expressed in terms of an offer capable of acceptance. Moreover, it was clear from the terms of the contract itself that any part of the initial bid which was not incorporated in the contract did not become binding. In any event, the subsidiary had no actual authority to offer guarantees by the claimants.

SFH Trading and Brokerage Ltd v Fischer

QBD (Comm Ct) (Morison J). Unreported, 19 July 2002.

Where a defendant sought permission to amend a statement of case to allege that performance of obligations under a contract governed by English law had become illegal under the laws of a foreign country and that the contract was therefore unenforceable (applying the Ralli Brothers principle), it was a necessary allegation that the contract by its terms (whether express or to be implied) required performance of the relevant obligations in that foreign country.

[Ben Valentin]

David Campbell, "The Treatment of Teacher v Calder in AG v Blake", [2002] MLR, Vol. 65, No. 2, P. 256.

INJUNCTIONS

Motorola Credit Corporation v Uzan

CA (Lord Woolf LCJ, Waller and Sedley LJJ). The Times, 10 July 2002.

An asset-freezing order would not usually be effective without disclosure of a defendant's assets. Accordingly, where a defendant was seeking to set aside a freezing order but accepted that it should continue pending a full court hearing, the requirement of disclosure should not normally be stayed pending that hearing.

INSOLVENCY – BANKRUPTCY

Cartwright v Cartwright

CA (Thorpe, Rix and Arden LJJ). The Times, 31 July 2002.

A maintenance order made in matrimonial proceedings by a foreign court, which was variable by that court and so could not be regarded as final and conclusive, constituted a debt which at common law was unenforceable in England and was therefore not provable as a bankruptcy debt.

[Lloyd Tamlyn]

Shepherd v Legal Services Commission

Ch Div (Gabriel Moss QC). Unreported, 23 May 2002.

The appeal against a bankruptcy order was not allowed notwithstanding that the debtor alleged a cause of action against the petitioning creditor which formed the sole asset in the estate. Given the history of the matter, it was more sensible to allow an independent officer of the court to consider the matter in a dispassionate way and

see whether there could sensibly and properly be brought any further proceedings against the petitioner. This purpose was a proper purpose for which to make a bankruptcy order because it sought the "proper administration" of the debtor's assets within the meaning of that phrase as used by Harman J in Re A Company [1983] BCLC 492.

[Gabriel Moss QC]

Re S

Bankruptcy Registry (Registrar Jacques). Unreported, 15 July 2002.

The question of whether a debtor is ordinarily resident in England and Wales and whether a debtor has a place of residence in England and Wales for the purposes of section 265 of the Insolvency Act 1986 are ones of fact and degree. Typical factors would include the debtor continuing to enjoy an unqualified right and ability to occupy premises in this country, the fact that a fire arms certificate was held in this country by the debtor describing the address in question as a permanent address, the fact that the debtor was registered as an officer of a trading company under the rules of the Securities & Futures Authority, the fact that an English address was given as the Debtor's address in foreign legal proceedings and the unchallenged evidence of an English process server with regard to the service of a statutory demand leading to the position in which the question of jurisdiction was raised.

The new European Regulation on Insolvency Proceedings embodies the concept considered by the Virgos-Schmidt report that in cases where an individual debtor claims to carry on business or owns or occupies residences in more than one Member State, his centre of main interests will generally be where his creditors can habitually find him.

[David Marks, Lexa Hilliard]

Woodland-Ferrari v UCL Group Retirement Benefits Scheme

Ch Div (Ferris J). The Times, 17 July 2002.

An application was brought by the former trustee of the respondent pension scheme, to set aside a statutory demand for sums claimed to be owed to the scheme by reason of a determination of the Pensions Ombudsman that certain investments made by the trustee were made in breach of trust. The applicant claimed he was released from this debt by reason of the discharge following his bankruptcy. Held that unconscionable behaviour giving rise to a breach of trust was not a fraudulent breach of trust within the meaning of section 281(3) of the Insolvency Act 1986 such that the discharge following bankruptcy would not have the effect of releasing the bankrupt from liability. Accordingly, in the present case the applicant had been discharged from liability and the statutory demand would be set aside.

[Mark Arnold, Andreas Gledhill]

INSOLVENCY – CORPORATE

Re Swissair, Flightline Ltd v Edwards

Ch Div (Neuberger J). Unreported, 2 August 2002.

Prior to a company going into provisional liquidation, the applicant had obtained a freezing order against certain of the company's assets. The order was subsequently discharged by consent on the basis that funds were to be paid into a joint account in the names of the parties' solicitors. Held that the funds in the account were to be treated as security for the applicant's claim. Accordingly the applicant would be granted permission to continue its claim against the company in provisional liquidation.

[Gabriel Moss QC, Martin Pascoe QC]

Re Independent Insurance Co Ltd (In Provisional Liquidation)

Ch Div (Ferris J). New Law Online, 25 July 2002.

Where the amount of the provisional liquidators'

remuneration was approved by an informal creditor's committee (ICC), the court would not fix the remuneration on the basis of the ICC's report. Although under other insolvency regimes the fixing of the office-holder's remuneration was a matter for the creditors' committee, the task of fixing the remuneration of provisional liquidators was by law committed to the court and not to any body of creditors. Further the ICC was brought into existence by the provisional liquidators and the provisional liquidators put forward the terms of reference for the ICC review. Therefore, although the ICC had acted with complete openness and conscientiously it could not be said that there had been complete objective independence.

Re Leyland Daf Ltd

CA (Peter Gibson, Chadwick and Longmore LJJ). [2002] 1 BCLC 571.

The reference to "company's assets" in sections 115 and 175(2) of the Insolvency Act 1986 when read together with the definition of "floating charge" in section 251 of the Act include assets comprised in a floating charge which has crystallised prior to the commencement of the winding up of the company. Accordingly, the liquidators may have recourse to such assets for the payment of the liquidation expenses properly so incurred in priority to the claims of the chargee in so far as such property remains undistributed.

Re Railtrack plc (In Railway Administration)

CA (Lord Woolf LCJ, Waller and Robert Walker LJJ). The Times, 15 July 2002.

The determination by the Rail Regulator of an application under section 17 of the Railways Act 1993 was not covered by section 11(3)(d) of the Insolvency Act 1986, as it applied to companies in railway administration by virtue of section 59(3) of and Schedule 6 to the 1993 Act. Accordingly, the Rail Regulator was not required to obtain the leave of the court or the consent of the special railway administrators before determining an application under section 17 of the Railways Act 1993 for directions requiring a rail facility owner which was in railway administration to enter an access contract allowing another party to operate trains on part of the track. **[Gabriel Moss QC, Stephen Atherton]**

TFB Mortgages Limited v Pimlico Capital Ltd

Ch Div (Lawrence Collins J). Unreported, 3 May 2002.

The sole shareholder of the respondent company was a trust entity which had charged its shareholding to a financial institution with whom it had also entered into power of attorney giving the institution rights to act generally on its behalf. The institution sought to enforce its security rights in relation to the share capital in the company and presented a winding-up petition. Held that although the petitioner did not fall within section 124(2) of the Insolvency Act 1986, the charge enabled the petitioner to exercise the power of attorney generally, the effect of which was that the petitioning creditor could exercise all of the powers or rights exercisable by the sole shareholder at anytime after a demand was made. Accordingly it was held that, as default had occurred, the petitioning creditor was able to exercise the power of attorney and present a winding up petition.

Re Trading Partners Ltd

Ch Div (Patten J). [2002] 1 BCLC 655.

Although section 426(4) of the Insolvency Act 1986 was not mandatory in the sense of excluding any element of discretion, the policy behind section 426(4) was to encourage the English court to recognise the appointment of a foreign liquidator from an approved jurisdiction unless recognition would permit the liquidator to operate within the jurisdiction in a manner which the English court regarded as impermissible.

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UCA France champignon v FF Limited (In Receivership)
QBD (Jackson J). Unreported, 17 July 2002.
The Court of Appeal's decision in Lipe v Leyland Daf [1993] BCC 385 will not apply in a case brought under the Regulation on Enforcement of Judgments in Civil Matters (EC44-2001 of December 2000) where the interim relief sought in this country mirrors relief sought in a Member State which seeks to attach sales effected by a company prior to the appointment of administrative receivers as well as those effected after their appointment.
[David Marks]

Paul McCartney, "Disclaimer of leases and its impact: 'pecking order'", [2002] Insolvency Law & Practice, Vol. 18 No. 3, pages 79-89.

Nick Pearson, "Asset Tracing and Recovery", [2002] Insolvency Law & Practice, Vol. 18 No. 3, pages 90-97.

Michael Briggs QC, "Re Tosh-oku Finance UK Plc: unfinished business", Company Lawyer, Vol. 23 No. 8, P. 230.

Adrian Walters, "Better prospects for corporate rescue", Company Lawyer, Vol. 23 No. 7, Page 199.

Barry Isaacs, "The Equitable life scheme of arrangement sanction hearing: classes, human rights and fairness," [2002] Insolvency Intelligence, Vol. 15 No. 7.
[Barry Isaacs]

INSOLVENCY – VOLUNTARY ARRANGEMENTS

Cooper v Official Receiver
Ch Div (Jacob J). Unreported, 25 July 2002.
As a matter of principle it is possible for the contributions made by a third party into an IVA to be subject to a purpose trust so that in the event of the IVA failing the contribut-ions were to be held to the order of the third party. However, in order for there to be such a trust, it was neces-sary for it to made expressly clear in the IVA proposal that the funds were being provid-ed by the third party on this basis. In absence of clear word-ing no such trust would exist.
[Tom Smith]

HUMAN RIGHTS

Adam Aldred, "Businesses have rights too: the Human Rights Act 1998", Company Lawyer, Vol. 23 No.8 P. 241.

PROCEDURE

AIMS Asset Management v Kazakhstan Investment Fund Ltd
Ch Div (Gabriel Moss QC). Unreported, 22 May 2002.
Where a defence, set-off and counterclaim puts forward a whole series of facts, matters and issues going completely beyond the facts, matters and issues that need to be proved by the claimants, then it may be fair and just in those circumstances for the court to order security for costs both in relation to the claim and counterclaim. The security for costs must, in all circum-stances, however, be tailored to reflect the nature and size of the risk against which it is designed to protect.
[Gabriel Moss QC]

Regina (Factortame Ltd and Others) v Secretary of State for Transport, Local Government and the Regions (No 8)
CA (Lord Phillips MR, Robert Walker and Clarke LJJ). The Times, 9 July 2002.
In deciding whether an agree-ment by a firm of accountants to provide a claimant with ancillary litigation service for a contingent fee was champer-tous, the court had to see whether it conflicted with public policy directed to protecting the due administ-ration of justice, having particular regard to the defendant's interests and the need for access to justice. The giving of expert evidence on a contingency fee basis gave an otherwise indepen-dent expert a significant financial interest in the out-come of the case and was therefore undesirable. However, in the present case the accountants were not giving expert evidence and the agreement for the pay-

ment of their fees on a contingency basis, was not champertous and could be enforced.

Sengupta v Holmes

CA (Laws, Jonathan Parker and Keene LJJ). New Law Online, 31 July 2002.

There was no procedural rule whereby a Lord Justice who had refused permission to appeal on paper should be recused from sitting on the substantive appeal where permission was subsequently granted. The procedure by which applications for permission to appeal were made was set out in CPR r 52.3 and the associated Practice Direction at CPR r 52PD 10.4.13. There was no rule or practice direction that stipulated whether or not a judge who had refused permission to appeal could sit as a member of the court at a substantive hearing.

Three Rivers DC v (1) HM Treasury (2) Governor and Company of the Bank of England

CA (Lord Phillips MR, Chadwick and Keene LJJ). [2002] EWCA Civ: 1182.

On an application for disclosure against a non-party under CPR 31.17, it is sufficient to satisfy the threshold requirement in CPR 31.17(3)(a) that the documents of which disclosure is sought "may well" support the support its case. The use of the word "likely" in CPR 31.17(3)(a) did not mean "more probable than not". There is no objection to an order for disclosure of a class of documents by a non-party provided that the Court is satisfied that all the documents in the class, viewed individually or as members of that class, meet the threshold requirement that they "may well" support the applicant's case.

[Barry Isaacs, Ben Valentin]

Barings Bank Plc v Coopers and Lybrand (a firm) & ors

CA (Laws, Jonathan Parker LJJ). New Law Online, 18 July 2002.

"Compelling reason" in r 52.9(2) connoted something which was sufficiently serious to be in the nature of an irregularity in the grant of permission. Unless the nature of the application showed that some decisive authority or statutory provision had been overlooked by the Lord Justice granting permission, an applicant would normally have to show that the Lord Justice had actually been misled in the course of the application (Nathan v Smilovitch [2002] EWCA Civ 759). The power conferred by r 52.9(1) to set aside a grant of permission was not a power to entertain an appeal against the grant of permission.

RESTITUTION

National Westminster Bank Plc v Somer International (UK) Ltd

CA (Peter Gibson, Potter and Clarke LJJ). [2002] 3 WLR 64.

Although the doctrine of estoppel by representation was a rule of evidence which ordinarily provided that a more than de minimis degree of detriment was definitive of the recipient's right to retain the entirety of a mistaken payment, there was scope for exception to that strict rule where, having regard to the nature of the representation and what the recipient did in reliance upon it, it would be unconscionable or wholly inequitable to permit the recipient to retain the whole of the money; that, consequently, equity could require a recipient to rely on the defence of estoppel by representation only to the extent of any detriment found to have been suffered.

J Beatson & G J Virgo, "Contract, unjust enrichment & unconscionability", [2002] LQR 352.

John Cartwright, "Common mistake in common law and in equity", [2002] LQR 196.

Mitchell McInnes, "Enrichment, expenses and restitutionary defences", [2002] LQR 209.

Andrew Phang & Hans Tjio, "The Uncertain boundaries of undue influence", [2002] LMCLQ 231.

SECURITIES

Andrew McKnight, "Restrictions on Dealing with Assets in Financing Documents: Their Role, Meaning and Effect", [2002] JIBL Vol. 17 issue 7.

Lawrence Leporte, "Security Interests over Receivables: Divergent Trends in the US and the UK", [2002] JIBL Vol. 17 Issue 7.

David Copper, "Fixed charges over book debts – back to basics but how far back?" [2002] LMCLQ 246.

TORT

Hilton v Baker Booth and Eastwood (a firm)

CA (Sir Andrew Morritt V-C, Judge and Jonathan Parker LJJ). New Law Online, 22 May 2002.

A solicitor's duty of disclosure depends on the nature and terms of his retainer (Mortgage Express Ltd v Bowerman and Partners [1996] 2 All ER 836 and National Home Loans Corp v Giffen Couch and Archer [1997] 3 All ER 808). A solicitor is under no obligation (quite the reverse) to disclose to a later client confidential information obtained under an earlier retainer from a former client (Bristol and West Building Society v Baden, Barnes and Groves [2002] Lloyd's Rep PN 788 and Darlington Building Society v O'Rourke [1999] PNLR 365). If a solicitor acted for more than one party to a transaction then he could be obliged to disclose information obtained in that transaction from one of them to the other (Mortgage Express (above)) and in that event he could not excuse his breach of duty to either of them by reference to the duty he owed the other (Moody v Cox [1917] 2 Ch 71).

BOOKWATCH

Robin Dicker QC and Jeremy Goldring have contributed a chapter on insolvency practitioners to **Professional Negligence and Liability**. **[Robin Dicker QC, Jeremy Goldring]**

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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