



The New Year has seen a number of major Chapter 11 filings in the United States. Following the collapse of Enron, K-Mart and Global Crossing have both filed for protection from their creditors. On this side of the Atlantic, NTL has been engaged in negotiations over the restructuring of its debt mountain.

On another note, the policyholders of Equitable Life voted overwhelmingly in support of the proposals for a scheme of arrangement. On 8 February 2002 the scheme was approved by Mr Justice Lloyd at the final sanction hearing. Gabriel Moss QC and Barry Isaacs have been acting for Equitable Life.

Tom Smith

GENERAL NEWS

Company Investigations: Powers for the 21st Century

The DTI has announced that it proposes to modernise and strengthen its powers to investigate and inspect companies. The consultation paper "Company Investigations: Powers for the 21st Century" suggests alterations to the legal scope of Companies Act investigations in order to harmonise and expand the powers in respect of both inspections and investigations. The DTI's favoured approach would be for it to be granted broad general powers to investigate and inspect companies, which would include

powers to inspect and investigate the affairs of individuals and partnerships associated with a company under investigation.

Insolvency Statistics for the Third Quarter of 2001

The insolvency statistics for the third quarter of 2001 show that there were 3,649 compulsory and creditor's voluntary liquidations in England and Wales in the three months up to 30th September, a decrease of 4.1% on the figures for the second quarter. Individual insolvencies also decreased in the third quarter, when compared against the second quarter, this time by 3.1% to 7,368.

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Removing the 20 Partner Limit

Following proposals put forward by the DTI in a consultative document "Removing the 20 Partner Limit" (4 April 2001), the Consumer and Competition Minister, Melanie Johnson, has announced that the DTI is to go ahead with its plans to abolish the present limit of 20 on the maximum number of partners in a partnership.

BANKING

K Stock, "Australian Developments in the Law of Retention of Title" (2002) *Insolvency Intelligence* 1.

G J Tolhurst, "Equitable Assignment of Legal Rights: A Resolution to a Conundrum" (2002) 118 *LQR* 98.

COMPANY

CMS Dolphin Ltd v Simonet

Ch Div (Lawrence Collins J). [2001] 2 BCLC 704.

A director of a company who after his resignation exploits a business opportunity of the company of which he had knowledge as a result of his being a director was to be treated as a constructive trustee of that business opportunity and the profits generated by it. Accordingly he would be accountable for the profits attributable to the

breach of fiduciary duty, taking into account the expenses and overheads connected with those profits provided that there was a reasonable connection between the breach of duty and the profits. Moreover, the director would be liable to account for profits whether he exploited the opportunity personally, through a partnership or through a company controlled by him.

Coleman Taymar Ltd v Oakes

Ch Div (Robert Reid QC sitting as a judge of the High Court). [2001] 2 BCLC 745.

The general fiduciary duties of a director or an employee do not prevent a person from forming the intention, whilst a director, to set up in competition after his directorship or employment ceased nor does it prevent him from taking any preliminary steps to investigate or forward that intention provided he did not engage in any actual competitive activity whilst the directorship or employment continued. In the present case, although the defendant did nothing which could properly be regarded as competing with the company before his contract terminated, his actions in indirectly purchasing unwanted equipment belonging to the company went beyond the taking of preliminary steps

towards the commencement of his competing business.

Coxon v Small

Ch Div (Leeds District Registry) (HHJ Behrens QC). New Law Online, 2 February 2002.

Where a joint venture agreement was concluded between two parties in respect of an option to purchase land, and in breach of that agreement one of the parties transferred the option to a company controlled by him, then the court would pierce the corporate veil and treat the entering into the option by the company and the receipt of monies by the company as being the receipt by that party as well.

Re Joseph Holt plc

CA (Peter Gibson, Buxton and Jonathan Parker LJ). [2001] 2 BCLC 604.

The validity of a takeover offer depends on the primary contractual terms being the same for all shareholders, and not the mechanics of the acceptance of the offer. On the facts of the present case the differences were only in the mechanics of the acceptance of the offer and the primary contractual terms of the offers were the same for all shareholders. Moreover, the validity of a takeover offer was not dependent on the communication to each and every shareholder.

Noel v Poland**QBD (Comm Ct) (Toulson J). [2001] 2 BCLC 645.**

The claimant brought a claim against a director of a company personally in respect of negligent misstatements and misrepresentations allegedly made by that director. It was held that the claim in negligence had no real prospect of success because in order to establish liability for negligent misstatement against the director as well as the company in respect of statements made by director on behalf of the company, the claimant had to show a personal assumption of responsibility by the director such as to create a special relationship. On the facts there was no basis for such a finding. Liability in deceit does not require the existence of a special relationship. However, on the facts there was insufficient material to show that the director had acted with a lack of honesty.

M D J Conaglen, "Fiduciary Liability and Contribution to Loss" [2001] CLJ 480.

CONFLICT OF LAWS**Kuwait Oil Tanker Co SAK v Qabazard****CA (Peter Gibson, Laws and Longmore LJ). New Law Online, 1 February 2002.**

An English court has jurisdiction to make a garnishee order in respect of foreign debts. In the case of an English debt it is proper to make a garnishee order even if the judgment creditor does not or cannot specify the amount of the garnishee's debt which he wants to attach. Moreover, if the garnishee does not deny that he owes a debt to the judgment debtor the court can infer that there is a debt and make the garnishee order absolute. This principle should also apply in the case of a foreign debt, since until the extent of any indebtedness was known there could be no sensible debate on the issues of double jeopardy or state sanctions.

CONTRACT**Spice Girls Ltd v Aprilia World Service BV****CA (Sir Andrew Morritt V-C, Chadwick and Rix LJ). New Law Online, 2 February 2002.**

On the facts the judge had been correct to conclude there had been a series of continuing representations, leading to the agreement, with the effect that Aprilia did not know that any group member had declared an intention to leave the group. These representations were false when made or became

false and moreover they had induced Aprilia to enter into the agreement. The Spice Girls were therefore liable to Aprilia under section 2(1) of the Misrepresentation Act 1967. On a separate point, the finding of the judge that Aprilia had acted unreasonably in pursuing both a claim for breach of contract and the express misrepresentation claim could not be supported.

DIRECTORS DISQUALIFICATION**Re Howglen Ltd****Ch Div (Pumfrey J). [2001] 2 BCLC 695.**

A director facing disqualification sought the disclosure of documents from the bank which had appointed administrative receivers over the relevant company. It was held that the director was entitled under CPR r 31.17.3 to require the production by the bank, as a non-party to the disqualification proceedings, of the notes of the three identified meetings between the director and the branch manager since it was plain that the bank would have a record of those meetings, their disclosure was 'likely to support' the director's case in the disqualification proceedings and their disclosure was 'necessary in order to dispose fairly of the claim'.

Lewis v Secretary of State for Trade and Industry

Ch Div (Neuberger J). [2001] 2 BCLC 597.

The question whether a disqualification application is to be heard by a registrar or by a judge turns on the facts of each case but the factors to be taken into account include the likely date and length of the hearing (as a very long hearing is more appropriate for a judge than a registrar); the complexity of the case (it is more appropriate for the case to be heard by a judge if there are complex issues of fact or law involved); and the public interest in the outcome (it is more appropriate for high profile cases to be heard by a judge). On the facts of this case, although the issues raised were suitable for hearing by either a judge or a registrar, it was in the interests of justice for the case to be heard before a registrar having regard to the fact that such a hearing could take place much sooner than a hearing before a judge.

INSOLVENCY – CORPORATE

R v Carass

CA (Waller LJ, Rougier and Stanley Burnton JJ). The Times, 19 January 2002.

The words “It is a defence (a) for a person charged [with concealing debts in

anticipation of a winding-up, contrary to section 206(1)(a) of the Insolvency Act 1986]... to prove that he had no intent to defraud” in section 206(4) of the Insolvency Act 1986 impose only an evidential burden upon a defendant. If the legal burden of proof was to be reversed then that would have to be justified, and in particular it would have to be demonstrated why the defendant should be required to bear the onus of a legal or persuasive burden, rather than simply an evidential burden. From a practical perspective it will be very hard for a defendant to satisfy the evidential burden in circumstances where concealment of a debt is proved, but that is no reason for saying that the imposition of a legal burden of proof on the defendant is justified. Accordingly, the word “prove” in s 206(4) of the Insolvency Act 1986 should be read as “adduce sufficient evidence”.

Re Jabman Company Ltd; Tideswell Ltd v Wood

Ch Div (Lightman J). Unreported, 21 November 2001.

The Applicant applied to remove the liquidator of the company on the ground of conflict of interest. Without making findings of fact, the court ordered that the liquidator be removed and replaced with an independent liquidator. The court, having considered

Rule 4.120(5) of the Insolvency Rules 1986 (which provides that subject to any contrary order, the costs of the application are not payable out of the assets), ordered that the applicant’s costs be paid out of the assets and made no order in relation to the respondent liquidator’s costs.

[Robin Knowles QC, Barry Isaacs]

Lombard North Central plc v Bradley

QBD (Gross J). New Law Online, 29 January 2002.

The claimants obtained a freezing order against the assets of the managing director of the company. The application was based upon information supplied by the administrative receivers of the company who had received the information from an employee of the company after their appointment. Held that the mere fact that information was supplied by a company employee to a receiver after his appointment did not mean that the information had necessarily been obtained by the office-holder in exercise of his powers under section 235 of the Insolvency Act 1986. In this case, the court would assume that the information obtained was within section 235 and that accordingly it was not to be disclosed other than for the purposes of the receivership or with the

sanction of the court. However, the court would not have excluded the use of the evidence because if the receivers had applied for permission to disclose, it would have been granted on grounds that that was in the interests of and for the benefit of the receivership.

G Moss QC, "The Chairman's View – A Look at Three Recent Cases" (2002) 15 *Insolvency Intelligence* 3.
[Gabriel Moss QC]

P Watts, "The Rending of Charges" (2002) 118 *LQR* 1.

R J Mokal, "Priority as Pathology: The *Pari Passu* Myth" [2001] *CLJ* 581.

C Hare, "Banker's Liability for Post-Petition Dispositions" [2001] *CLJ* 468.

P R Wood, "Fixed and Floating Charges" [2001] *CLJ* 472.

INSOLVENCY – VOLUNTARY ARRANGEMENTS

Re a Debtor (No 101 of 1999) (No 2)

Ch Div (Ferris J). [2001] BPIR 996.

Following the revocation of an individual voluntary arrangement on the grounds of it being unfairly prejudicial to certain creditors, the test to

be applied when considering the question of whether the court should direct that there should be a further meeting to consider revised proposals is equivalent to that employed by the court when considering whether to grant an interim order, i.e. is the proposal a serious and viable one?

PROCEDURE

Ezekiel v Lehrer

CA (Ward, Jonathan Parker LJ, Harrison J). New Law Online, 1 February 2002.

Where a claimant sought to take advantage of section 32 of the Limitation Act 1980 on the grounds that facts relevant to his cause of action had been concealed from him, it is necessary for the claimant to have been ignorant of the relevant facts during the period preceding concealment. If he knew of them, no subsequent act of the defendant could have concealed them from him. In this case the claimant alleged that he had known but had forgotten the relevant facts. Accordingly he was not able to rely on section 32.

Re Practice Direction: Neutral Citations

Supreme Court (Lord Woolf CJ). [2002] 1 All ER 351.

With effect from 14 January 2002 the practice of neutral citation was extended to all

judgments given by judges in the High Court in London. A unique number will be furnished to each High Court judgment from a register kept at the High Court. Under these arrangements, it will be unnecessary to include the word "paragraph" or "para" in brackets when citing the paragraph number of a judgment. Thus paragraph 59 in *Smith v Jones* [2002] EWHC 124 (QB) would be cited: *Smith v Jones* [2002] EWHC 124 at [59]. There is to be no alteration to the arrangements for the neutral citation of judgments given in the two divisions of the Court of Appeal, where the official shorthand writers will continue to provide the number for the neutral citation.

P Devonshire, "Freezing Orders, Disappearing Assets and the Problem of Enjoining Non-Parties" (2002) 118 *LQR* 124.

PROPERTY

Mortgage Corporation v Shaire and Others

Ch Div (Neuberger J). [2001] Ch 743.

The Trusts of Land and Appointment of Trustees Act 1996 effected a change to the approach of the courts to the question of whether a chargee could require the sale of the family home, which had been charged as security, in the event of default on the

part of the chargor. Whereas previously the chargee was entitled to a sale in such circumstances, the position now is that where an application for sale is made under section 14(1) of the 1996 Act the court is required to take account of the matters contained in sections 15(1) and 15(3). The scheme of the legislation now is that the interests of the chargee are just one of the factors to which regard must be had, but that factor does not necessarily have any more importance than the interests of the family residing in the property, which must also now be considered. The weight to be accorded to any particular factor by the court when assessing the chargee's application is a matter of discretion according to the particular facts of the case in question.

R Thornton, "Shams, Pretences, Subterfuges and Devices" [2001] CLJ 474.

R Nolan, "Fraud, Trusts and Equities" [2001] CLJ 477.

RESTITUTION

National Westminster Bank plc v Somer International (UK) Ltd

CA (Peter Gibson, Potter and Clarke LJ). [2002] 1 All ER 198.

Although estoppel by representation as a defence to a claim for the recovery of money paid by mistake is a rule of evidence, it does not necessarily follow that it cannot therefore operate pro tanto. As estoppel by representation stems from and is governed by considerations of justice and equity it could, in an appropriate case, operate to bar recovery only to the extent that the party seeking to rely on the estoppel has relied to its detriment on the representation made to it, rather than to the full extent of the money paid to it by mistake.

P Key, "Estoppel by Representation as a Defence to Restitution: The Exception Proves the Rule?" [2001] CLJ 465.

K Dharmananda, "Contradictions in Considering Conduct Under Void Compromises" (2002) 118 LQR 38.

SPORT LAW

Wimbledon FC v The Football League

FA Tribunal. Unreported, 29 January 2002.

The FA Tribunal held that, in considering whether the Football League had acted reasonably and fairly in rejecting the application of Wimbledon FC to relocate from South London to Milton Keynes, the League had taken into account a number of irrelevant matters. Accordingly, the Football League were directed to consider the application afresh.

[Mark Phillips QC]

TORT

E McKendrick and J Edelman, "Employees Liability for Statements" (2002) 118 LQR 4.

TRUSTS

J Hopkins, "Constitution of Trusts – A Novel Point" [2001] CLJ 483.

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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