

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 8 No 6 June 2002

Michael Crystal QC
 Lord Alexander of Weedon QC
 Christopher Brougham QC
 Gabriel Moss QC
 Simon Mortimore QC
 Stuart Isaacs QC
 Marion Simmons QC
 Richard Adkins QC
 Richard Sheldon QC
 Richard Hacker QC
 Robin St. J Knowles QC
 Mark Phillips QC
 Robin Dicker QC
 William Trower QC
 Martin Pascoe QC
 Professor Ian Fletcher
 John Briggs
 David Marks
 David Alexander
 Antony Zacaroli
 Mark Arnold
 Lexa Hilliard
 Stephen Atherton
 Sandra Bristoll
 Adam Goodison
 Hilary Stonefrost
 Lloyd Tamlyn
 Glen Davis
 Andreas Gledhill
 Dr. Fidelis Oditah
 Roxanne Ismail
 Barry Isaacs
 Ben Valentin
 Felicity Toubé
 Jeremy Goldring
 Samantha Knights
 Lucy Frazer
 David Allison
 Daniel Bayfield
 Tom Smith
 Richard Fisher

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This month has seen the EC Regulation on Insolvency Proceedings come into force accompanied by a raft of statutory instruments making various changes to the Insolvency legislation and the various forms. Insolvency lawyers and practitioners are already becoming increasingly familiar with terms such as “centre of main interests” and “main and secondary proceedings”.

This month has also seen the Railtrack administration in court again, this time to determine whether the certain powers exercised by the Rail Regulator are caught by the statutory moratorium imposed by administration orders. The Rail Regulator lost at first instance but an expedited hearing before the Court of Appeal is on foot. Gabriel Moss QC and Stephen Atherton act for the administrators.

On another note, Mark Phillips QC represented Wimbledon FC before the FA Tribunal which sanctioned its move to Milton Keynes.

Tom Smith

GENERAL NEWS

New Statutory Instruments

Various statutory instruments came into force on 31 May 2002 to amend various parts of the Insolvency legislation in light of the new EC Regulation on Insolvency Proceedings which came into force across the European Union (except Denmark) on that date. The new amending statutory instruments include The Insolvency Act 1986 (Amendment) Regulations 2002, The Insolvency Act 1986 (Amendment) (No.2) Regulations 2002, The Insolvency (Amendment) Rules 2002, The Insolvent Partnerships (Amendment) Order 2002 and the Administration of Insolvent Estates of Deceased Persons (Amendment) Order 2002.

New Practice Note

The Chief Registrar has issued a new Practice Note dealing with the changes made to the Insolvency Rules 1986 to implement the new EC Regulation and in particular the new forms for administration,

winding up and bankruptcy petitions. The new forms of petition require statements to be made and verified regarding the whereabouts of the debtor's centre of main interests and, if the latter is not in the UK, his establishment; whether or not the EC Regulation will apply; and whether the proceedings will be main, secondary or territorial proceedings as defined in Article 3 of the EC Regulation.

Confirmation of creditors voluntary winding up by the court

The Insolvency (Amendment) Rules 2002 provide (Rule 7.62) that for a new procedure for a liquidator to apply to the court for confirmation of a creditors voluntary liquidation (CVL) such confirmation being necessary in order for a CVL to attract recognition under the EC Regulation. The rule sets out the details of the evidence required to support the application which may be made without notice. The Practice Direction states that these applications will normally be dealt with by a Registrar.

David Alexander

Paul Cooklin, the Senior Practice Manager to Chambers, is pleased to inform you that David Alexander returned to practice on 10 June 2002 following his involvement in the Thyssen litigation.

BANKING

E Hupkes, "Dealing with Distressed Banks – Some Insights from Switzerland" (2002) 17(6) *Journal of International Banking Law* 153

COMPANY

D Cabrelli, "In Dire Need of Assistance?: Sections 151 – 158 of the Companies Act 1985 Revisited" [2002] *Journal of Business Law* 272

N Bourne, "Pre-Incorporation Contracts" (2002) 23(5) *Business Law Review* 110

CONFLICT OF LAWS

C Santos Cruz, "Jurisdiction and Insolvency – the New Case of Cover Europe" (2002) 18(2) *Tolley's Insolvency Law and Practice* 50

CONTRACT**Heaton v AXA Equity and Law Life Assurance plc**

HL (Lord Bingham of Cornhill, Lord Mackay of Clashfern, Lord Steyn, Lord Hope of Craighead and Lord Rodger of Earlsferry). The Times, 15 May 2002; [2002] 2 WLR 1081.

In a situation where a claimant had linked, but separate, claims against more than one defendant, a compromise agreement concluded in full and final settlement with one defendant, did not automatically act as bar to proceedings as against the other defendant(s).

The proper approach was to ascertain the intended effect of the compromise agreement by construing its wording in the context of the relevant factual matrix.

Baird Textiles Holdings Ltd v Marks & Spencer plc

CA (Sir Andrew Morritt V-C, Judge and Mance LJ). [2002] 1 All ER (Comm) 737.

English law does not presently enable a claimant to rely upon either promissory estoppel or estoppel by convention in order to formulate a cause of action. Furthermore, the court will only imply a contract based upon the conduct of the parties in situations where it is absolutely necessary to do so, and this requirement of necessity was not displaced by, for example, the fact of a long continuing relationship or even that there had been a deliberate inducement as, on the facts of this case, it was clear that far from intending a contract what the parties had intended was the flexibility that a non contractual relationship provided.

K Rogers, "Snap-Happy Consumers Leave Kodak in the Dark" (2002) 23(5) *Business Law Review* 112

INSOLVENCY – CORPORATE**Buchler v Talbot**

CA (Gibson, Chadwick and Longmore LJ). (2002) 18(2) Tolley's Insolvency Law and Practice 58.

Where a joint liquidator has realised assets which had been subject to a floating charge, the liquidator was entitled to recoup his expenses and remuneration out of the proceeds of the funds so realised.

Re Ciro Citterio Menswear plc Ch Div (Pumfrey J). New Law Online, 3 May 2002.

In circumstances where the litigation in respect of an insolvent company was hostile, the court should be particularly cautious before making a pre-emptive costs order in favour of its administrators, as to do so could be to require the owner of a charged asset, to fund unsuccessful litigation against himself. Before making such an order the court needed to be completely confident that the administrator would win and that all the costs would be properly incurred. Additionally, it would be surprising if an administrator were given an unqualified right to recoup his costs in circumstances where the order was made without notice, as this would involve only a partial assessment of the merits of the case. A pre-emptive costs order could be made but only on the strongest possible grounds, so that if it were to be established that there was a more than negligible chance that the administrators might lose, it would be potentially unjust to grant a pre-emptive costs order.

County Bookshops v Alistair Grove and James Martin

Ch Div (Neuberger J). [2002] EWHC 1160.

A debt which is payable 30 days after an invoice which has not been raised is not a "contingent liability" within the meaning of the terms of a voluntary arrangement, although in one sense the liability to pay was contingent because there was no immediate liability unless and until the invoice was rendered. The question of

what "contingent liability" means cannot be determined by reference solely to authorities such as *Glenister v Rowe* [2000] Ch 76 or abstract principle. Its precise meaning must depend on its context.

[Lexa Hilliard]

**Re Railtrack plc
(in administration)**

**Ch Div (Sir Andrew Morritt V-C).
New Law Online, 21 May 2002.**

In a dispute between the rail regulator and the special railway administrators of Railtrack plc, a company the subject of a railway administration order as defined in Section 59 of the Railways Act 1993, the rail regulator purported to direct Railtrack to enter into an access contract with a train operator, pursuant to the power conferred on him by s 17 of the Railways Act 1993. The special railway administrators argued that the rail regulator was bound by Section 11(3)(d) of the Insolvency Act 1986 so that he required either their consent or the court's leave before making such a direction. The rail regulator contended that the words "other proceedings" within Section 11(3)(d) of the 1986 Act, for which consent was required, were not apt to cover determinations by a rail regulator under Section 17. The court held that the effect of Section 11(3)(d) of the Insolvency Act 1986 was that the consent of the administrators or the leave of the court was required prior to a direction by the rail regulator under Section 17 of the Railways Act 1993. The key issue was the context of the administration, and it was therefore appropriate to look at the purpose of the railway administration procedure for which the Railways Act 1993

provided. The court held that that purpose was the transfer of the undertaking as a going concern to some other company so as to ensure that its relevant activities were properly carried on. The responsibility for achieving that purpose fell primarily on the administrators. It followed from those conclusions that, as a direction under Section 17 of the 1993 Act could have a dramatic impact on the management of the affairs, business and property of the company, that either the consent of the administrators or the leave of the court was required before the rail regulator could act.

[Gabriel Moss QC and Stephen Atherton]

D Shah and I McDonald,
"Interpreting Transactions at an Undervalue" (2002) 15(5)
Insolvency Intelligence 33

B Lincoln, B Donnelly and J Briggs,
"Notice of the Section 98 Creditors' Meeting" (2002) 15(5) Insolvency Intelligence 36

[John Briggs]

**INSOLVENCY -
PERSONAL**

**Helen Mountney v Stephen
Treharne: Re Stewart Richard
Mountney**

**Ch Div (Burnton J). (2002)
18(2) Tolley's Insolvency Law
and Practice 59.**

Where a debtor's property is vested in his trustee in bankruptcy, an appeal by the debtor's wife against the vesting order based solely on a property transfer order made in the course of matrimonial proceedings will fail. The property transfer order does not create any proprietary rights enforceable against the interests of the trustee in bankruptcy.

G Miller, "Income Payment Orders" (2002) 18(2) Tolley's Insolvency Law and Practice 43

PROCEDURE

**Black v Sumitomo Corp
CA (Ward, May and Rix LJ).
[2002] 1 WLR 1562.**

On an application for pre-action disclosure under Section 33(2) of the Supreme Court Act 1981 and CPR r 33.16(3) a person is "likely to be a party to subsequent proceedings" if he may well be a party to proceedings if those proceedings are issued. Consideration of whether disclosure is desirable under paragraph (3)(d) then requires a two-stage process. In relation to jurisdiction, the court is only permitted to consider the granting of pre-action disclosure where there is a real prospect in principle of such an order being fair to the parties if litigation is commenced or of assisting the parties to avoid litigation or of saving costs in any event. If there is such a real prospect, then the court should go on to consider the question of discretion, which has to be considered on all the facts and not merely on principle but in detail.

**Cave v Robinson Jarvis & Rolf
(a Firm)**

HL (Lord Slynn of Hadley, Lord Mackay of Clashfern, Lord Hobhouse of Woodborough, Lord Millet and Lord Scott of Foscote). The Times, 7 May 2002.

For the purposes of Section 32(1)(b) of the Limitation Act 1980, the term "deliberate concealment" does not include a breach of duty that the actor was unaware that he had committed. An action ought not to be

statute barred before the claimant had had a reasonable opportunity of bringing it.

RESTITUTION

Vedatech Corp v Crystal Decisions (UK) Ltd Ch Div (Jacob J). [2002] EWHC 818.

Where the three constituent ingredients for a claim in unjust enrichment were present, such that a claimant was entitled to recover on the basis of a quantum meruit, the award was not automatically merely what the claimant had expended measured on a time basis. In an appropriate case the claimant would be entitled to participate in the success of the overall project to the extent that he had contributed to it, so that the appropriate measure of such a quantum meruit was on a time and success basis.

TORT

Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)

HL (Lord Nicholls of Birkenhead, Lord Steyn, Lord Hoffmann, Lord Hope of Craighead and Lord Scott of Foscote). The Times, 21 May 2002; [2002] 2 WLR 1353.

In appropriate circumstances where the standard being applied by the court was clear and manageable it was legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law. In the present case the Iraqi resolution by which the claimant's aircraft had been appropriated was contrary to public policy of English law and recognition of the resolution would be contrary to the United Kingdom's obligations under the United Nations Charter. Accordingly the resolution would not be recognised. The defendant's acts in treating the aircraft as its own property constituted usurpation under Iraqi law and conversion under English law so the double actionability rule was satisfied and the claimants were entitled to recover damages for their loss.

TRUSTS

UCB Corporate Services Ltd v Williams CA (Peter Gibson, Kay and Jonathan Parker LJ). The Times, 27 May 2002.

Where a husband had procured the execution of a legal charge by his wife by means of equitable fraud, that alone was sufficient to allow her to set aside the charge as against him, and it was not necessary to show that, absent the equitable fraud, she would not have executed the charge.

SEMINARS AND APPOINTMENTS

Daniel Bayfield and Tom Smith gave a talk to Simmons & Simmons on the EC Regulation on Insolvency Proceedings on 11 June 2002. **[Daniel Bayfield, Tom Smith]**

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. © 2002

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