

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 8 No 5 May 2002

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This month sees the EC Regulation on Insolvency Proceedings coming into force. The Regulation takes effect from 31 May 2002 and, although its practical impact remains to be seen, there is little doubt that it has at least the potential to affect every insolvency proceeding which has a European element to it. It will also have an effect on insolvency practice and procedure generally. Indeed this month should see the Lord Chancellor publishing the new rules which will amend the Insolvency Rules 1986 and give effect to the Regulation.

This month's edition of the Digest was compiled by Richard Fisher.

Tom Smith

GENERAL NEWS

Insolvency Act 1986 (Amendment) Regulations 2002

The new Regulations which were made on 9 April 2002 and came into force on 3 May 2002 pursuant to Section 2(2) of the European Communities Act 1972 amend Sections 411, 412 and 420 of the Insolvency Act 1986 to provide for the Lord Chancellor to have the power to make rules giving effect to the EC Regulation on Insolvency Proceedings. It is expected that the new rules themselves will be placed in the House of Commons library shortly.

EC Regulation Guidance

The Insolvency Service has published its guidance for insolvency practitioners on the EC Regulation on Insolvency Proceedings. The Regulation will come into force on 31 May 2002 and is intended to ensure that cross-border insolvency proceedings operate efficiently and effectively by either

simplifying or removing formalities previously associated with recognition and enforcement. The guidance is available at www.insolvency.gov.uk.

Enterprise Bill

The second reading of the Enterprise Bill took place on 12 April 2002. It is intended that the Bill will pass through the legislative process within the current session with the aim that it should receive the Royal Assent by late October.

Insider Dealing

The draft Insider Dealing (Securities and Regulated Markets) (Amendment) Order 2002 was published on 25 February 2002. If implemented, it will update the list of markets for insider dealing purposes and extend the securities that are subject to the insider dealing regime by amending the Insider Dealing (Securities and Regulated Markets) Order 1994. Copies are available on the Treasury website.

ARBITRATION**North Range Shipping Ltd v Seatrans Shipping Corporation****CA (Peter Gibson, Aldous and Tuckey LJ). The Times, 18 April 2002.**

Where a court refused leave under Section 69(3) of the Arbitration Act 1996 to appeal against a decision made by arbitrators, the applicant should at the very least be told which of the threshold tests he had failed to meet. The court did not have to go further and explain in every case why the test had not been met. However, where the court was dealing with the test of whether the tribunal's decision was wrong or open to doubt brief reasons might be necessary.

I Duncan Wallace QC, "Arbitration: No contract, no jurisdiction?" [2002] LQR 175.

COMPANY**Braymist Ltd v Wise Finance Co Ltd****CA (Judge, Latham and Arden LJ). The Times, 5 April 2002.**

An agent who became personally liable on a contract made with an unformed company by virtue of Section 36C(1) of the Companies Act 1985 was also entitled to sue on the contract. Section 36C(1) therefore went further than was required by article 7 of the First Company Law Directive.

Ciro Citterio Menswear plc (in administration) v Thakrar Ch Div (Anthony Mann QC sitting as a deputy judge of the Chancery Division). The Times, 2 April 2002.

Under Sections 330 and 341 of the Companies Act 1985, a loan made from company funds to a director was voidable but until it was avoided the loan stood. This was inconsistent with the existence of a constructive trust or any form of tracing claim, at least in the absence of special circumstances making the loan a breach of fiduciary duty. A loan to a director was not necessarily a breach by the director of his trusteeship of the company assets. As such, the administrators were not entitled to claim the equity in the property in question on the footing that the director was a constructive trustee.

JJ Harrison (Properties) Limited v Harrison**CA (Chadwick and Laws LJ, Sir Anthony Evans). [2002] 1 BCLC 162.**

A company incorporated under the Companies Act is not a trustee of its own property; it is both legal and beneficial owner of that property. The property of a company so incorporated cannot lawfully be disposed of other than in accordance with the provisions of its memorandum and articles

of association. The power to dispose of the company's property, conferred upon the directors by the articles of association, must be exercised by the directors for the purposes and in the interests of the company. In that sense, the directors owe fiduciary duties to the company in relation to the exercise of those powers and any breach of those duties is to be treated as a breach of trust. Accordingly a director, on appointment to office, assumes the duties of a trustee in relation to the company's property. If, thereafter, he takes possession of that property, his possession is coloured by these trust obligations arising from his position as a director.

Larvin v Phoenix Office Supplies Ltd**Ch Div (Blackburne J). New Law Online. 10 April 2002.**

Where a director in a quasi-partnership company was excluded from the management and refused access to the records and accounts, he was unfairly prejudiced within the meaning of Section 459 of the Companies Act 1985. In order to calculate the value of his shares in the private company, the director had suggested adopting a profit/earnings ratio of 10:1 as an appropriate multiplier on a current post-tax maintainable earnings valuation of the

company. This was arrived at by taking the most comparable sector of quoted companies for which a P/E ratio could be stated and then discounting the ratio for a private company. The discount was based on an index called the private company price index and a comparison over a four month period of the figures in that index with the P/E for FT non-financials. This was rejected by the Court, holding that the method suggested, whilst fine in theory, broke down because of the absence of any P/E figures for equivalent quoted companies to the company in question. The Court decided that a ratio of 8:1 was appropriate.

D Cabrelli, "In dire need of assistance?: Sections 151-158 of the Companies Act 1985 revisited" [2002] JBL 272.

R Nolan and D Prentice, "The issue of shares – compensating the company for loss" [2002] LQR 180.

Dr S Sheikh, "Promoting Corporate Social Responsibilities within the European Union" [2002] ICCLR 143.

CONFLICT OF LAWS

Chellaram v Chellaram

**Ch Div (Lawrence Collins J).
New Law Online,
16 April 2002.**

It has always been a fundamental rule of English proce-

dure and jurisdiction that a defendant could be served within the jurisdiction only if he was present in the jurisdiction at the time of service or deemed service. The date for determining the applicable law of a trust was when permission to serve out was sought and not when the cause of action arose.

CONTRACT

Kevin Rogers, "Snap! Internet 'Offers' under Scrutiny Again", [2002] BLR 70.

COSTS

Totalise plc v The Motley Fool Ltd

CA (Aldous, Sedley and Arden LJ). [2002] 1 WLR 1233.

Applications made against an innocent party involved in the tortious acts of others, whereby that party comes under a duty to disclose information, are not ordinary adversarial proceedings where the general rule is that the unsuccessful party should pay the costs of the successful party but are more akin to proceedings for pre-action disclosure. In general the costs incurred should be recovered from the wrongdoer rather than from the innocent party, who should be paid his costs of the application, and of making any discovery ordered, by the applicant.

DIRECTORS' DISQUALIFICATION

Reynard v Secretary of State for Trade and Industry

**Court of Appeal (Pill, Mummery and Latham LJ).
New Law Online, 18 April 2002.**

The conduct of a director to be taken into account in assessing his fitness included his conduct in relation to the disqualification proceedings (Section 6(2) of the 1986 Act). It would be surprising if a court had to exclude from consideration of unfitness or length of disqualification serious misconduct by a director in the proceedings e.g. the shredding or fabrication documents in the course of the proceedings. The correct approach in disqualification proceedings was to consider the conduct of the director as a whole in relation to his fitness to be concerned in the management of a company.

B Clark, "Company Directors' Disqualification: the New Regime", [2002] BLR 54.

S Griffin, "Accelerating disqualification under Section 10 of the CDDA 1986", [2002] Insolvency Lawyer 32.

R Parry, "Undertakings and statements of agreed facts: Re Blackspur plc in the Court of Appeal", [2002] Butterworths Disqualification Newsletter Issue 14.

FINANCIAL SERVICES
Regina (Britannic Asset Management Ltd) v Pensions Ombudsman QBD (Lightman J sitting as an additional judge of the QBD). The Times, 16 April 2002.

A company administering a pension scheme could be investigated by the Pensions Ombudsman only if it was engaged to act, or advise in or about the trustees' affairs in running the scheme.

N Ryder, L Stewart and C Chambers, "The Rise and Fall of the Central Services Organisation" [2002] BLR 92.

HIRE PURCHASE

Shogan Finance Ltd v Hudson

CA (Brooke, Sedley and Dyson LJ). [2002] 2 WLR 867.

Where a fraudster, on the basis of stolen documents, persuaded a finance company to provide the majority of the monies needed to effect a car purchase, and the fraudster sold the car on to a good faith purchaser for value the following day, the purchaser did not obtain title to the car and remained liable to the finance company to give delivery up of the car or pay damages for conversion. Since the fraudster was not the individual named in the written hire purchase agreement, he was not the debtor within Section 27 of the Hire Purchase Act 1964 so as to be able to pass

title in the vehicle to the defendant. The party named was not a party to any agreement as his signature had been forged and there could be no presumption in the circumstances that the dealer as the Claimant's agent intended to enter into the contract with the fraudster.

INSOLVENCY – CORPORATE

Re Alpha Club (UK) Ltd

Ch Div (John Jarvis QC sitting as a deputy judge of the Chancery Division).

New Law Online, 23 April 2002.

A company which was already in creditors voluntarily liquidation could subsequently be compulsorily wound up under Section 124A of the Insolvency Act 1986 (petition for winding-up on grounds of public interest). The Court would so order in a case where it was satisfied that it was expedient to do so in the public interest and thus appropriate for the public to be aware that the company had been investigated by the Secretary of State who had concluded that the company ought to be compulsorily wound up. It was necessary in the present case for the message that the business carried on by the company ought not to be carried on by limited companies. In addition, further investigation of the company's affairs was required and should be carried out by a court-appointed liquidator.

Money Markets International Stockbrokers Ltd (in liq) v London Stock Exchange Ltd

Ch Div (Neuberger J).

[2002] 1 WLR 1150.

Although a term providing for the transfer of an asset on the condition that it would re-vest in the transferor in the event of the transferee's insolvency was generally invalid, a deprivation provision which might otherwise be invalid in light of the anti-deprivation principle could be held to be valid if the asset concerned was closely connected with or, more probably, subsidiary to, a right or other benefit in respect of which a deprivation provision was valid. If such a provision did not offend against that principle, then (subject to there being no other objection to it) it would be enforceable against a trustee in bankruptcy or on a liquidation just as much as it would have been enforceable in the absence of an insolvency.

On Demand Information plc v Michael Gerson (Finance) plc

HL (Lords Nicholls, Browne-Wilkinson, Hobhouse, Millett and Scott). [2002] 2 WLR 919.

Financial lessees of chattels went into administrative receivership and terminated the leases in accordance with the terms of the leases. They then sought relief from forfeiture in order to enable the administrative receivers to

sell the equipment as part of the business on a going concern basis. As a term of obtaining relief, the lessees would have to pay any arrears of primary rental and interest. The lessors would not agree to a sale because they did not agree that the administrative receivers would obtain the best price. An interim order was obtained to enable a sale of the business; the proceeds were paid into an escrow account pending hearing of the motion for relief against forfeiture. Their Lordships allowed an appeal on the basis that the order for sale had not defeated the lessees' claim for relief against forfeiture. It was clear that the conversion of the property into money effected by the sale was not intended to prejudice the parties' rights. The whole purpose of the sale was to preserve the value of their rights and particularly the rights of the party which was eventually successful. But while the proceeds of sale were merely a substitute for the property in question, the sale inevitably affected the nature of the remedy which the court could grant. If the lessees would have been entitled to the relief claimed immediately before the sale and the only reason why the court could not grant that relief was that the equipment had since been sold pursuant to an order of the court which was not intended to affect the parties rights, then it

should give effect to those rights by making whatever order in relation to the proceeds of sale best reflected them.

[Fidelis Oditah]

**Re A Company
(No. 2634 of 2002)**

Ch Div (Rimer J).

[2002] All ER (D) 175.

Where a company accepted that it owed monies under a bill of exchange but entertained genuine doubts on substantial grounds as to the propriety of the circumstances in which the bill had been endorsed to the current holder, the holder of the bill was not entitled to present a petition for the winding up of the company. The company in such circumstances held proper doubts as to whether the holder of the bill was a creditor of theirs at all for the purpose of Section 124 of the Insolvency Act 1986 and therefore, whilst the monies were due under the bill, the holder could not require the company to pay under threat of presentation of a winding-up petition.

[Richard Fisher]

**Orion Media Marketing
v Media Brook**

Ch Div (Laddie J).

[2002] 1 BCLC 184.

It is incumbent on the recipient of a statutory demand who wishes to put forward a substantial defence or a cross-claim to show that the defence or cross-claim was in fact genuine, serious and had

substance. That part of the claim can be met with such a defence will not suffice if the remainder is due.

[Lexa Hilliard]

**Re Pantone 485 Ltd
Ch Div (Richard Field QC
sitting as a deputy judge
of the Chancery Division).**

[2002] 1 BCLC 266.

It was not a breach of fiduciary duty for a director of a company to advance moneys for the benefit of a related company if he honestly and reasonably believed that the company would repay the moneys so advanced. The director in such a case does not need to prove that the sums were repaid; if a complaint was made that he breached his fiduciary duty by not ensuring repayment, then it was for the complainant in a misfeasance action to prove non-payment and not for the director to prove otherwise.

**Re Ringinfo Ltd
Ch Div (Pumfrey J).**

[2002] 1 BCLC 210.

The winding-up processes of the Companies Court could not be used in cases where there were issues of disputed facts. Such matters must be resolved by actions. A debt disputed on genuine and substantial grounds could not support a winding-up petition and an attempt to invoke the processes of the court in relation to a debt which was known to be disputed on such grounds was an abuse

of process. A petition presented in such circumstances would be struck out and an injunction to restrain its presentation would be granted if it had not.

Practice Statement

(Administration Orders: Reports). [2002] 1 WLR 1358.

Whether or not an order under rule 7.31(5) of the Insolvency Rules 1986 would be made restricting the right to inspect any report on the court file made in support of an application for an administration order would be made depends on the facts of each case and, in particular, whether the report refers to confidential information the disclosure of which would or might make the purposes for which the administration order is being sought (or for which it has been made) more difficult. Good reasons will, however, have to be put forward by the petitioner as to why any report should be withheld from inspection.

M Fennessy and L Tamlyn, "Fixed and floating charges: Brumark", [2002] *Insolvency Lawyer* 56.

[Lloyd Tamlyn]

D Milman, "Administration: A new role?", [2002] *Insolvency Lawyer* 31

P Omar, "Security interests and the European Insolvency Regulation 2000", [2002] *Insolvency Lawyer* 42.

F Toubé, "Is tax a liquidation expense?", [2002] 15(4) *Insolvency Intelligence*.

[Felicity Toubé]

A Walters, "Liquidation expenses principle – ruling in *Re Toshoku Finance (UK) plc* considered", [2002] *CCH Company Law Newsletter*, Issue 4.

B Brown and J Sampson, "Retention of Title under New Zealand's Personal Property Securities Act 1999", [2002] *JIBL* 102.

INSOLVENCY – PERSONAL

Engel v Peri

Ch Div (Ferris J). *New Law Online*, 20 April 2002.

The court retains the jurisdiction to determine the trustee in bankruptcy's fees and the reasonableness of legal expenses following an order made for the annulment of the bankruptcy order. Whilst a bankrupt will in the majority of cases need to show that there is likely to be a surplus in the bankruptcy in order to have an interest which is affected by any decision of the trustee for the purpose of Section 303 of the Insolvency Act 1986, this is not a universal requirement. Whether a bankrupt could show such an interest depended on the facts. Where the basis of the annulment was the payment of third party funds into court for the purpose of securing the

debts, the debtor did have such an interest because it affected the amount that needed to be paid and thus the size of his debt to the third party.

R v Kearns

CA (Kennedy LJ, Aikens and Pitchford JJ). *The Times*, 4 April 2002.

It was a matter of public interest that the affairs of bankrupts should be investigated and that assets should be traced, got in and distributed. That duty, under the Insolvency Act 1986, had to be backed by the appropriate statutory sanctions and therefore the regime which made it a criminal offence for a person to fail, without reasonable excuse, to account for the loss of a substantial part of his property when so required by the official receiver, was a proportionate response to the problem of administering and investigating bankrupt estates and did not infringe the bankrupt's right to silence nor his right not to incriminate himself.

J McQueen, "Insolvency Law Reform – A second chance?", [2002] *JIBL* 85.

LIMITATION

Khan v R M Falvey and Co (a firm)

CA (Schiemann and Chadwick LJ, Sir Murray Stuart-Smith). *The Times*, 12 April 2002.

The limitation period started to run against a solicitor from when an action in which he

was instructed might have been struck out for want of prosecution, not when it was in fact struck out.

PROCEDURE

Practice Statement

(Admiralty and Commercial Courts: Procedure). The Times, 2 April 2002.

On 25 March 2002, Parts 58, 61 and 62 of the CPR came into effect along with their associated practice directions. Those related to claims in the Commercial Court, admiralty claims and arbitration claims. A new edition of the Commercial Court Guide came into effect on the same date. Practitioners should note that as of 25 March 2002, proceedings in the Commercial Court would be governed primarily by the CPR and practice directions rather than the guide as had previously been the case.

PROPERTY

McKenna v British Aluminium Ltd

Ch. Div (Simon Berry QC sitting as a deputy judge of the Chancery Division). The Times, 25 April 2002.

When exercising its power of sale over property charged in its favour, a mortgage lender owed a duty of care to the legal owner of the property even if the owner was not the borrower.

P & O Overseas Holdings Limited v Rhys Braintree Ltd CA (Sir Andrew Morritt V-C, Mantell and Tuckey LJ). The Times, 5 April 2002.

Interest on the balance of the purchase price due from a purchaser to the vendor of land began to accrue from the contractual date for completion notwithstanding that the transfer to the vendor had not been stamped and/or the vendor was unable on that day to comply with any request of the purchaser made under Section 110(5) of the Land Registration Act 1925 to register the transfer.

D O'Sullivan, "The Rule in Phillips v Phillips", [2002] LQR 296.

REINSURANCE

R Leedham and S Linker, "Reinsurance Disputes: How, where and who to sue", [2002] BLR 86.

RESTITUTION

Karasiewicz v Eagle Star Insurance Company Ltd CA (Simon Brown, Mummery and Arden LJ). New Law Online, 25 April 2002.

Where a second mortgagor failed to obtain the consent of a spouse in occupation, it was nevertheless entitled to be subrogated to the secured rights of the first mortgagor on the basis of the principles in *Banque Financiere v Parc*.

The relevant questions remained whether the wife would be enriched at the expense of the claimant, whether such enrichment was unjust and whether there were nevertheless policy reasons for denying a remedy. On the facts, most of the money received from the claimant had gone to discharge the first charge by which the wife had been bound. If the second mortgagor was unable to rely on subrogation, the wife would receive a substantial benefit at the expense of the claimant which would be unjust and there was no policy reason to deny the claimant the remedy.

M McInnes, "Enrichment, Expenses and Restitutory Defences", [2002] LQR 209.

SCHEMES OF ARRANGEMENT

Practice Statement

(Companies: Schemes of Arrangement). [2002] 1 WLR 1345.

This practice statement replaces the previous Practice Note [1934] WN 142 and concerns the procedure to be adopted on applications made pursuant to Section 425 of the Companies Act 1985. It is the responsibility of the applicant to determine whether more than one meeting of creditors is necessary to sanction the proposed scheme. Unless there are good reasons for

not doing so, the applicant should contact all those affected by the scheme prior to the hearing at which a meetings order is sought. At that hearing the court will be considering whether more than one meeting of creditors is required and if so what is the required composition of the meetings.

D Marks, "Schemes of Arrangement: Hawking the Various Options ..." [2002] 52 Commercial Lawyer 50.

[David Marks]

SEMINARS AND APPOINTMENTS

David Marks has been admitted to the Irish Bar and will be formally called to the Bar in Dublin in July.

[David Marks]

Gabriel Moss QC spoke at the Mealeys Insurance and Reinsurance Conference in Scottsdale, Arizona on 10 to 13 April 2002.

[Gabriel Moss QC]

Daniel Bayfield and Tom Smith gave a talk to Berwin Leighton Paiser on 8 May 2002 on the new EC Regulation on Insolvency Proceedings.

[Daniel Bayfield, Tom Smith]

Tom Smith gave a talk to Clifford Chance on 7 May 2002 on the EC Regulation on Insolvency Proceedings.

[Tom Smith]

BOOKWATCH

A new book on the EC Regulation on Insolvency Proceedings edited by Gabriel Moss QC, Stuart Issacs QC and Ian Fletcher with contributions by members of chambers is to be published by Oxford University Press in the autumn.

[Gabriel Moss QC, Stuart Issacs QC, Ian Fletcher]

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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