

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 9 No 4 April 2003

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Christopher Brougham QC
Gabriel Moss QC
Simon Mortimore QC
Stuart Isaacs QC
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Robin St. J Knowles QC
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Samantha Knights
Lucy Frazer
David Allison
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Tom Smith
Richard Fisher
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In the latest decision in the BCCI v Bank of England saga, the Court of Appeal delivered an important judgment relating to the scope of legal advice privilege. The Court held that the privilege does not protect internal client documents prepared for the purpose of putting factual material before its advisors but is restricted to client/lawyer communications for the purpose of seeking legal advice. Barry Isaacs appeared on behalf of the Liquidators of BCCI.

3/4 South Square is pleased to announce that Ronald DeKoven has joined Chambers as an Associate Member. Mr DeKoven is admitted to practice law in New York and Illinois. He is recognised as an expert in international insolvency, reconstruction and leasing. Until recently he was a partner of Shearman & Sterling in New York, where he was head of their bankruptcy and leasing practices. As an Associate Member of Chambers, Mr DeKoven will focus his practice on international insolvency, reconstruction and finance. His arrival greatly compliments our services to the American and international insolvency and financial markets.

In recent years, Mr DeKoven has worked closely with Members of Chambers in a large number of international insolvencies, including BCCI, Barings and Olympia & York. He has acted for the US Department of State and the United Nations in matters of private international and domestic law and was the principal reporter of Article 2A of the Uniform Commercial Code. As an Associate Member of 3/4 South Square, Mr DeKoven will be contactable in the normal way through the Practice Managers to Chambers.

Richard Fisher

GENERAL NEWS

The Treasury has commenced a consultation exercise in relation to regulations which, if approved, would implement the EC Directive on the re-organisation and winding-up of insurance companies. Copies of "Implementation of the Insurers Re-organisation and Winding-Up Directive" can be downloaded at <http://www.hm-treasury.gov.uk>.

The Association of British Insurers (ABI) and the National Association of Pension Funds (NAPF) have published a joint statement providing best practice on payments for severance of executive directors' contracts while a Private Member's bill on directors' compensation was introduced into Parliament. Copies of the joint statement are available on the ABI's website at www.abi.org.uk

ADMINISTRATIVE LAW**(1) National Farmers' Union****(2) Geo E Gittus & Sons****Limited v (1) Secretary of State for the Environment, Food and Rural Affairs (2)****Secretary of State for Wales****QB Division (Admin. Ct,****Forbes J). Lawtel, 14 March 2003.**

This case arose out of the epidemic of foot and mouth disease that broke out in the UK in early 2001. On an application for judicial review of the defendants' decisions to (i) modify the rates of payment for animals entering the Welfare of Livestock Disposal Scheme from a certain date; and (ii) reduce payments under the scheme to certain applicants, the Court held, *inter alia*, that:

(1) The evidence clearly showed that the relevant parties had been fully aware of the need to avoid the scheme being or becoming a market-distorting support measure. In those circumstances it would have been extraordinary if the Prime Minister had unequivocally committed the government to payment of the scheme rates with an absolute guarantee that there would not be any alteration or adjustment of those rates as the claimants alleged. Moreover, none of the documents or announcements relied upon by the claimants amounted to evidence sufficient to show that the government had entered into an unequivocal commitment to maintain the rates.

(2) The claimants had not enjoyed any legitimate expectation that they would be consulted prior to the revision of the rates. In any event, there were overriding public interests for not entering into a process of full consultation with the claimants. The decisions were not procedurally unfair for lack of a formal consultation process.

(3) The defendants' decision to implement the revised rates from 30 April 2001, by reference to the date of the collection or on-farm slaughter of eligible livestock fell within the broad band of criteria that the government had been entitled to adopt in the circumstances. It was not irrational nor was it unreasonable in the *Wednesbury* sense.

(4) If the claimants' expectation at the time of making the application could constitute an "existing possession" within the meaning of Protocol 1 Art.1 of the Convention, the decision to revise the rates was manifestly justifiable in the public interest. Even if both Protocol 1 Art.1 and Art.14 of the Convention were engaged, the claim of discrimination was unfounded. Mere difference in treatment did not constitute discrimination unless the difference was without objective and reasonable justification.

[Stuart Isaacs QC]

ARBITRATION**Hussmann (Europe) Ltd****v Pharaon****CA (Lord Phillips MR,****Rix and Scott Baker LJ).****The Times, 12 March 2003.**

A declaration that an arbitration award was of no effect did not mean that the jurisdiction of the tribunal was spent. The arbitration reverted to the position it was in before the arbitrator published his award, whether the award was set aside or declared to be of no effect.

COMPANY**Globalink Telecommunica-****tions Ltd v Wilmbury Ltd****and others****QB Division (Stanley****Burnton J). [2003] 1 BCLC 145**

The articles of association of a company were a statutory contract between a company and its members and were not automatically binding as between a company and its officers as such. However, the articles could be expressly or impliedly incorporated into the contract between the company and a director if the director accepted his appointment 'on the footing of the articles'.

Regent Leisuretime Ltd**v Natwest Finance Ltd****CA (Schiemann, Jonathan****Parker & Keene LJ).****New Law Online, 26 March 2003.**

There was no basis for the bank's submission that the jurisdiction conferred by section 653(3) of the

Companies Act 1985 to give a limitation direction was confined to a direction in favour of creditors. The subsection also conferred jurisdiction to give a limitation direction in favour of the company being restored where it seemed just to the court to do so. Such a direction inevitably operated to give back to the company an opportunity which it might otherwise have lost, i.e. a claim which might otherwise have become statute-barred during the period of dissolution. The court had to consider the position as at the date of dissolution and not at the date of restoration. Putting the company back in the same position as if it had not been struck off might in an appropriate case require ignoring the period of dissolution for limitation purposes (*Tymans Ltd v Craven* [1952] 2 QB 100, *Re Donald Kenyon Ltd* [1956] 1 WLR 1397). There was also jurisdiction to join third parties to the restoration proceedings. Third parties who would be prejudiced by a limitation direction sought by the company were entitled to be heard in opposition to it (*Re Blenheim Leisure (Restaurants) Ltd* (NLC 2990712604) and *Smith v White Knight Laundry Ltd* [2001] EWCA CIV 660; [2001] 1 WLR 616; NLC 201058702 applied).

Alan Berg, "Recharacterisations after Enron", May [2003] JBL.

CONFLICTS OF LAWS

Antony Durbeck GmbH v Den Norske Bank ASA CA (Lord Phillips MR, Brooke and Laws LJ).

The Independent, 14 February 2003.

There had to be such a nexus between the operations of a branch and a dispute as to render it natural to describe the dispute as one that had arisen out of the operations of the branch before jurisdiction could be conferred by Article 5(5) of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (incorporated into English law by section 3A(1) of the Civil Jurisdiction and Judgments Act 1982).

Chare v Fairclough and Ors QB Division (Treacy J). The Independent, 10 March, 2003.

Service out of the jurisdiction through the Foreign and Commonwealth Office pursuant to CPR 6.26 was effected by the claimant through the medium of the FCO rather than by the court. Accordingly, such cases fell within CPR 7.6(3(b)) rather than 7.6(3(a)), so that the claimant had to show that he had taken all reasonable steps to effect service.

Rayner v Davies CA (Pill, Waller and Mummery LJ). [2003] 1 All ER (Comm) 394.

Article 13(3) of the Brussels Convention applied only to

consumer contracts that had the particular attributes of being preceded by 'specific invitation' or advertising and where the consumer had taken in the State of his or her domicile the steps necessary for the conclusion of the contract. Such 'specific invitation' would precede the conclusion of the contract, and so some positive conduct on the part of the seller of the goods or services preceding the contract, and normally preceding the involvement of the consumer, was contemplated. Moreover, 'invitation' connoted that it was the seller who had invited the business and not the consumer. The appropriate test was to stand back from the factual situation and ask who had asked whom to do business.

SMAY Investments Ltd and Another v Sachdev and others

Ch Division (Patten J). The Times, 1 April 2003.

Any conduct on the part of a defendant said to amount to a submission to the jurisdiction of the English courts and therefore a waiver of the right to challenge the jurisdiction of these courts had to be wholly unequivocal. An application for the extension of time for the service of a defence could only operate as an unequivocal submission to the jurisdiction if the only possible explanation for it was an intention on the part of the first defendant to have the

case tried in England. A party attended before the judge to challenge a freezing order obtained without notice did not thereby waive his right to contest jurisdiction unless as part of these proceedings he agreed to an order which in terms regulated his position until the trial of the action.

Adrian Briggs, "Choice of choice of law?" [2003] LMCLQ Part 1.

CONTRACT

Wilson and Another v Truelove and Another Ch Division (Mr Simon Berry QC sitting as a Deputy Judge of the High Court). The Times, 26 March 2003.

A defendant could not be estopped from enjoying its strict legal rights unless the claimant could point to some unconscionable conduct on the part of the defendant justifying the intervention of equity. A claim based upon estoppel by convention, however, did not require any evidence of unconscionability, although the parties' common mistake had to give rise to a course of dealing based upon that mistake to the point where that course of dealing had replaced the letter of the parties' contract.

Professor Gerard McMeel, "Prior negotiations and subsequent conduct – the next step forward for contractual interpretation?" April [2003] LQR.

DIRECTORS

Secretary of State for Trade and Industry v Bairstow CA (Sir Andrew Morritt VC, Potter LJ, Hale LJ). The Times, 31 March 2003.

A respondent to proceedings brought under the Company Directors Disqualification Act 1986 was not precluded from challenging findings of fact made in a previous action to which he had been a party which were relevant in the disqualification proceedings.

Leslie Wise, "To be concerned in the management of a company: a review of the state of play re section 17 applications following disqualification from acting as a director", *Insolvency Intelligence*, Vol 16 No 3.

EUROPEAN LAW

King v Crown Energy Trading AG and Another QB Division (Judge Chambers QC). The Times, 14 March 2003.

In the context of Article 60 of Council Regulation (EC) No 44/2001 (OJ 2001 No L 12/1) the "principal place of business" of a company was the place at the heart of its operations.

Leeds City Council v (1) James Stuart Watkins (2) Derek Whiteley Ch Division (Peter Smith J). Lawtel, 28 March 2003.

In an action by the claimant council ('C') for final injunctions to restrain the defendants from holding unlicensed seasonal Sunday

markets/car boot sales without its licence or consent, C alleged that the defendants had infringed its market rights, which it enjoyed under Royal Charter and the provisions of the Leeds Corporation (Consolidation) Act 1905. The Defendants contended that C's policy prevented, restricted or distorted competition and/or constituted an abuse of a dominant position, contrary to Articles 81 and 82 of the Treaty of Rome. It was held, inter alia, that the council's market rights did not infringe Articles 81 and 82 of the Treaty of Rome.

[Stuart Isaacs QC]

INSOLVENCY – CORPORATE

Commissioners of Customs and Excise v Allen and Others Ch Division (Judge Gilliland QC). The Times, 20 March, 2003.

This was an application by the Commissioners of Customs and Excise to review two block transfer orders that had removed, pursuant to sections 7, 19, 108, 172 and 263 of the Insolvency Act 1986, an insolvency practitioner from his office as trustee in bankruptcy, liquidator, administrator or supervisor of various companies, individuals and partnerships. The correct approach of the court on a review of a block transfer order which had been made in the absence of any notice to the creditors was to consider first whether, in the light of objections put forward

by the applicant and the facts and circumstances known to the court at the time of the hearing of the application for review, it would still make the order which was the subject of the review. The Court should then consider whether it was still right to make the order in the circumstances as they were now known to the court. The application was not an appeal against the order. Rather the review should be approached as a true review or rehearing of the original application but with the benefit of hearing any objections from creditors and any additional evidence.

**Re Henry Charles Ltd
Ch Division (Etherton J).
[2003] All ER (D) 432 (Feb)**

A creditor of a company which had been struck off the register for failure to file its annual return applied to restore the company to the register for the purpose of an administration order being made. The Company had also been served with a winding up petition which had been adjourned to be heard with the administration petition. The court ruled that on the evidence an administration order would result in a greater realisation of the company's assets than a liquidation. Accordingly, the court dismissed the winding up petition and made an order restoring the company to the register and for its administration (an order analogous to the usual double

barrelled order obtained in the *Winders* Court).

[Daniel Bayfield]

**Morphitis v Bernasconi
and Others**

**CA (Aldous and Chadwick
LJJ and Mumby J). The
Times, 12 March 2003.**

In order to establish that any business of a company which had become insolvent had been carried on with intent to defraud creditors of the company within section 213 of the Insolvency Act 1986, it was not enough to show that in the course of carrying on the business any creditor of the company had been defrauded. It was necessary to show that the business of the company had been carried on with intent to defraud.

Re Seaquest Systems Ltd

**Ch Division, Manchester
(HHJ Maddocks).**

Unreported, 24 March 2003.

The Judge held that a liquidator in what had become a creditors' voluntary liquidation, who was in effect the nominee of the contributory, should not be removed on the application of the person claiming to be the majority creditor and replaced by a person appointed by the Court. In this case the contributory wanted the liquidator to pursue a substantial claim by the company against the creditor and was willing to fund the claim. After referring to section 100 Insolvency Act 1986, the Judge directed himself to 9

principles: (1) the identity of the liquidator had to be considered by reference to the purpose for which he was appointed; (2) an application in relation to the appointment of a liquidator was to be considered by reference to the test in *Re Barings plc* (No 6) [2001] 2 BCLC 158, whether "it will be conducive to both the proper operation of the process of liquidation, and to justice as between all those interested in the liquidation"; (3) although the majority vote of creditors will normally prevail, they do not have an absolute right to appoint the liquidator; (4) the liquidator should not be the choice of person with interests conflicting with the duties of the liquidator; (5) more specifically, the liquidator should not be the choice of a person against whom there were claims or whose conduct was under investigation; (6) it was no objection that the liquidator was the choice of a person concerned to pursue claims of the company through the liquidator; (7) where the company was in liquidation it was proper for a creditor or contributory, in the first instance, to seek to have claims of the company pursued through the liquidator, in which case (8) the liquidator should be indemnified and/or provision made to secure the interests of other creditors (*Fargro v Godfroy* [1986] BCLC 370); (9) where the creditor or contributory was

prepared to take those steps the Court may allow his choice to prevail (*Re Ayton* (1887) 36 Ch 299).

[Simon Mortimer QC]

John Alexander, "The Enterprise Act 2002", *Insolvency Law & Practice*, Vol 19 No 1.

Jennifer Bierly-Seipp and Uwe Pirl, "German Insolvency Proceedings under the Insolvency Code of 1999 – Part 1", *Insolvency Law & Practice*, Vol 19 No 1.

Look Chan Ho, "On pari passu, equality and hotchpot in cross-border insolvency", [2003] LMCLQ part 1.

Louise Gullifer, "Will the Law Commission sink the floating charge?" [2003] LMCLQ part 1.

David Marks & Tom Smith, "The Enterprise Act 2002 and the EU Regulation on Insolvency Proceedings 2000", April/May [2003] *Eurofenix*.

[David Marks, Tom Smith]

Andrew Pickin, "Distributions and Payments by Administrators", *Insolvency Intelligence*, Vol 16 No 3.

Joanne Rumley & Graham Jeffries, "Brumark: where are we now?" *Insolvency Intelligence*, Vol 16 No 3.

Carolyn Swain, "A move towards a stakeholder society", *Insolvency Law & Practice*, Vol 19 No 1.

INSOLVENCY – PERSONAL

Geveran Trading v Skjevesland

Bankruptcy Registry (Registrar Jaques), Ch Division (HHJ Howarth sitting as a Judge of the Chancery Division). [2003] BPIR 73.

On 29 February 2000, G Ltd presented a bankruptcy petition against S in respect of an unpaid judgment debt created by an order of the Norwegian courts which had been registered in this country. S, who regarded himself as a Swiss banker, travelled between various countries and operated an international business practice making extensive use of telecommunications and the internet. He was registered in England and Wales with the Financial Services Authority.

The court held that S did not have his Centre of Main Interest in England; he had not lived here nor conducted business here for several years. Nor, indeed, on the evidence in this case could the COMI be located in Spain, even though he spent more of his time there than in any other country and clearly conducted business there. It followed that the EC Regulation did not apply.

In examining whether the debtor fell within the jurisdiction catchment operated by section 265 of the Insolvency Act 1986, the following conclusions were arrived at:

(a) S was not domiciled in England and Wales when the petition was presented;

(b) S had not carried on business in England and Wales during the previous 3 years; but

(c) S had been ordinarily resident and had a place of residence in England and Wales within the previous 3 years as he had an address in London. The English courts therefore enjoyed jurisdiction to make a bankruptcy order in respect of S.

On appeal, the Court upheld the Registrar's decision on the same grounds.

[David Marks, Lexa Hilliard]

Re Pozzuto Chancery Division

(Lawrence Collins J). New Law Online, 7 March 2003.

A bankrupt ('PG') and his wife ('AG') were shareholders in a company which was dissolved in 1998. The company's assets, including the freehold reversion to various flats, vested in the Crown *bona vacantia*. PG and AG took advantage of a Treasury Solicitor scheme whereby the former shareholders of the dissolved company could purchase the freehold reversion property at a discounted price. Their daughter, ("MI"), provided the purchase monies. PG and AG subsequently transferred the freehold reversion property for nil consideration into the names of AG and MI. A bankruptcy order was made and the trustee in bankruptcy challenged the transfer pursuant to section 339 Insolvency Act 1986.

The Court held, refusing the appeal against the Registrar's order, that a transaction at an undervalue had occurred. On the face of the documents, PG had acquired an interest in the freehold reversion property which he disposed of for no consideration. In order to challenge this conclusion, the onus shifted to AG and MI to show that PG had acquired no such beneficial interest in the freehold reversion property upon exercising in conjunction with AG the right to purchase at a discount. The evidence did not indicate that PG was not intended to have obtained a beneficial interest in the property. Adopting a resulting trust approach, the effect of recognising MI's contribution to the purchase price led to a division of the beneficial interest which recognised that contribution and the contributions of PG and AG by virtue of their ability to obtain a discount. The effect was that PG and AG were entitled to 48.2 per cent each of the beneficial interest in the freehold reversion (recognising their discount entitlement) and MI to the remaining 3.2 per cent representing her contribution. The subsequent transfer of PG's interest for no consideration divested his estate of its interest and constituted a transaction at an undervalue within the meaning of section 339 Insolvency Act 1986.

[Richard Fisher]

INSOLVENCY – VOLUNTARY ARRANGEMENTS

Ross Miller, "Individual Voluntary Arrangements: secured creditors?" *Insolvency Law & Practice*, Vol 19 No 1.

Simeon Walker, "What is the nature of a supervisor's role in an IVA?" *Insolvency Law & Practice*, Vol 19 No 1.

PARTNERSHIP

Stuart R. Cross, "Limited Liability Partnerships Act 2000: problems ahead?" *May* [2003] *JBL*.

Dr Michael Twomey, "Protection for partners from unlimited liability in certain circumstances?" *The Company Lawyer*, Vol 24 No 3.

PRIVILEGE

Three Rivers DC v Bank of England

CA (Lord Phillips MR, Sedley and Longmore LJ). Unreported, 3 April 2003.

The Bank of England established the Bingham Inquiry Unit (BIU) to deal with communications between the Bank and the Bingham Inquiry into the supervision of BCCI. The BIU's communications with the Inquiry were the subject of advice from the Bank's lawyers. The Court held that documents prepared by the Bank's employees (including those prepared for submission to or at the direction of the Bank's

lawyers) were prepared for the dominant purpose of putting relevant factual material before the Inquiry and not for the dominant purpose of taking legal advice. Such documents were not therefore covered by legal advice privilege.

As a general proposition, the Court of Appeal held that legal advice privilege is confined to client/lawyer communications for the purpose of seeking or obtaining legal advice (and evidence thereof). It does not extend to internal client documents preparatory to such communications, even if prepared for the dominant purpose of being shown to the solicitor or at the solicitor's request or sent to the solicitor.

[Barry Isaacs]

REAL PROPERTY

Macepark (Whittlebury) Limited v (1) Jeffrey Ian Sargeant and (2) Carol Elizabeth Sargeant

Ch Division (Gabriel Moss QC sitting as a Deputy High Court Judge).

The Times, 29 March 2003.

An easement must be used for the benefit of the dominant land. It must not "in substance" be used for the benefit of non-dominant land. Under the "ancillary" doctrine, use is not "in substance" use for the benefit of the non-dominant land if (1) there is no benefit to the non-dominant land or if (2) the

extent of the use for the benefit of the non-dominant land is insubstantial, i.e. it can still be said that in substance the access is used for the benefit of the dominant land and not for the benefit of both the dominant land and the non-dominant land.

"Benefit" in this context includes use of an access in such a way that a profit may be made out of the use of the non-dominant land, e.g. as a result of an arrangement with the owner of the dominant land.

[Gabriel Moss QC]

Paul McCartney, "Possession – the constructive approach", *Insolvency Law & Practice*, Vol 19 No 1.

REINSURANCE

North Atlantic Insurance Company Limited (in Provisional Liquidation) v Nationwide General Insurance Company Limited and others QB Division (Comm. Ct., Cooke J). Unreported, 13 March 2003.

The Ruddy reinsurance pool operated by one or more companies "fronting" on inwards claims, with reinsurance placed for common account. On an application for directions by the provisional liquidators of an insolvent pool member, the Judge held that each member of the pool owns its proportionate share of all reinsurance recoveries, and can claim that share direct

from the reinsurers. Any recovery beyond the pool member's entitlement would be held as fiduciary for the other pool members. The contract to be implied between the pool members had not survived the termination or disappearance of the pool agent. If it had survived, it would be unenforceable as contrary to the principles set out in *British Eagle*.

[Antony Zacaroli, Lloyd Tamlyn, Glen Davis]

SECURITIES

Professor Gerard McCormack, "Quasi Securities" and the Law Commission Consultation Paper on security interests – a brave new world", [2003] LMCLQ Part 1.

TALKS AND SEMINARS

David Marks gave a talk on the Enterprise Act 2002 to Latham & Watkins on 26 March 2003.

[David Marks]

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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