

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 9 No 8 August 2003

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Christopher Brougham QC
Gabriel Moss QC
Simon Mortimore QC
Stuart Isaacs QC
Marion Simmons QC
Richard Adkins QC
Richard Sheldon QC
Richard Hacker QC
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Mark Phillips QC
Robin Dicker QC
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Professor Ian Fletcher
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Lucy Frazer
David Allison
Daniel Bayfield
Tom Smith
Richard Fisher
Blair Leahy
Stephen Robins

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Members of chambers have been involved in a number of interesting cases decided in the previous month. Robin Knowles QC and John Briggs appeared before the House of Lords in *Mulkerrins v Pricewaterhouse Coopers*. Their Lordships considered the question of rights of action vesting in the bankrupt's estate and the ability of potential defendants to an action to be heard on an application pursuant to section 303 of the Insolvency Act 1986 determining whether or not the right of action did so vest.

In *Pan Atlantic Insurance Company Limited*, the court considered the viability of a "cheap and cheerful" scheme aimed at maximizing the assets available for creditors by allowing claims to be put on a self-certified basis and limiting the creditors' right of recourse to the courts. Sanction for the scheme was given. Gabriel Moss QC and Tom Smith acted for the provisional liquidators.

The liquidators of BCCI were unsuccessful in their claim against the State Bank of India pursuant to section 213 of the Insolvency Act 1986. The liquidators had alleged that the bank had knowingly participated in a fraudulent scheme devised by BCCI to enable it to manipulate its accounts. Lloyd Tamlyn and Blair Leahy acted respectively for the bank and the BCCI liquidators.

This edition of the Digest was compiled by Blair Leahy.

Richard Fisher

GENERAL NEWS

A new tax regime will apply to administrations under the Enterprise Act 2002. Previously, an administrator has not been concerned with the tax affairs of a company other than in attempting to maximize recoveries for creditors.

Unlike a liquidation, where the liquidator becomes the proper officer under the Taxes Management Act 1970 and consequently responsible for making the company's returns, an administrator has not had that responsibility. Under Clause 193 of the Finance Bill and Sch. 41 thereto, an administrator appointed under the Enterprise Act 2002 regime will become the proper officer.

ARBITRATION

**BLCT (13096) Ltd v J Sainsbury plc
Court of Appeal (Civil Division)
(Arden & Longmore LJ).**

[2003] EWCA Civ 884.

BLCT were refused leave on paper to appeal against an arbitrator's award on grounds that the award was not obviously wrong and did not raise an issue of general public importance.

BLCT applied for reconsideration of that decision at an oral hearing pursuant to CPR r 52.3(4) or leave to appeal under s 69(6) of the Arbitration Act 1996. The judge refused an oral hearing on the basis that CPR r 52.3(4) was subject to a contrary statutory provisions such as s 69 of the 1996 Act and that the court

had already decided to deal with the application on paper under s 69(5). He also refused leave to appeal under s 69(6). BLCT applied to the Court of Appeal for permission to appeal against the judge's refusal to hold an oral hearing on the basis that an oral hearing was required by Article 6(1) of the European Convention on Human Rights.

The Court held that, notwithstanding s 69(6) of the Arbitration Act 1996, there was a residual jurisdiction to grant permission to appeal in a case of unfairness (*North Range Shipping Ltd v Seatrans Shipping Corp* [2002] 1 WLR 2397 applied) so as to ensure that the process of reaching a decision under s 69(5) was a "fair hearing" for the purposes of Article 6 of the convention. However, s 69(5) provided that the court would "determine" the application on paper unless it positively decided that a hearing was required. This did not offend against Article 6; in the case of an appeal on a point of law only, Article 6 did not require an oral hearing save in exceptional circumstances. The particular characteristics of the application in this case did not constitute exceptional circumstances justifying an oral hearing.

Warborough Investments Ltd v S. Robinson & Sons (Holdings) Ltd.

Court of Appeal (Jonathan Parker & Clarke LJ).

[2003] EWCA Civ 751.

Pursuit of the overall objective of arbitral proceedings, namely "the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense" required a reasonably generous margin of appreciation in the discharge of their functions. The arbitrator had not acted in breach of his statutory duty of fairness in making the rent determination but, even if there had been an irregularity, the arbitrator had not gone so far wrong in his conduct of the arbitration that justice called out for it to be corrected.

BANKING

Philip R Wood, "Syndicated Credit Agreement: majority voting," Vol. 62 [2003] CLJ 261.

COMPANY

John Armour, "Financial Assistance: a restatement," Vol 62 [2003] CLJ 266.

Neil Campbell & John Armour, "Demystifying the civil liability of corporate agents," Vol. 62 [2003] CLJ 290.

Mohammed B Hemraj, "Company Directors: the defence of business judgment rule," *The Company Lawyer*, Volume 24, page 218 (July 2003).

Hans C Hirt, "In what circumstances can a shareholder succeed with a claim for reflective loss? The Court of Appeal's decision in *Giles v Rhind*," *Journal of Business Law*, July 2003, Page 420.

Pearlie Koh, "Once a director, always a fiduciary?" Vol. 62 [2003] CLJ 403.

Nicholas J McBride, "Vicarious Liability in England and Australia," Vol. 62 [2003] CLJ 255.

Bree Taylor, "The rights of outgoing investors and directors in private companies," *The Company Lawyer*, Volume 24, page 220 (July 2003).

CONTRACT

L.S. Sealy, "Sale of Goods – reliance on a third party's skill and judgment," Vol. 62 [2003] CLJ 260.

INSOLVENCY – CORPORATE

BCCI v State Bank of India

Ch Div (Patten J).

[2003] EWHC 1868 (Ch).

The BCCI liquidators' claim against the defendant bank was brought under s 213 of the Insolvency Act 1986 and alleged that the bank knowingly participated in a fraudulent scheme devised by BCCI to enable it to manipulate its accounts for the year-ended December 1983. The defendant accepted that the trans-

actions it entered into were designed by BCCI to manipulate its year-end accounts. The sole issue was therefore whether the defendant knew that it was participating in the fraudulent manipulation of BCCI's 1983 year-end accounts.

The Court held that, on the facts of the instant case the Liquidators failed to establish the relevant knowledge. Knowledge includes deliberately shutting ones eyes to the obvious. It was well established that it was no defence to say that one declined to ask questions, when the only reason for not doing so was an actual appreciation that the answers to those questions would be likely to disclose the existence of a fraud. But liability in those cases depended upon that stage of consciousness having been reached. One had to be careful to draw a distinction between a conscious appreciation of the true nature of the business being carried on and a failure, however, negligent, to appreciate that fraud was being perpetrated.

[Lloyd Tamlyn, Blair Leahy]

Kyrris v Oldham

Ch Div (His Honour Judge Behrens QC sitting as a judge of the High Court). [2003] 2 BCLC 35.

Save in special circumstances, an unsecured creditor had no general right to sue the administrators for negligence

and/or breach of duty in the conduct of the administration. Once a partnership was in liquidation, a creditor must proceed by way of a misfeasance application under section 212 of the Insolvency Act 1986 to compel the administrators to pay compensation for the misfeasance. However, if the administrators had obtained their release the permission of the court was required to make such an application. On the facts it was arguable that both claimants had an equitable charge over specific properties and accordingly those claims made in their capacity as secured creditors would not be struck out. However, in so far as their claims were based on a separate duty to unsecured creditors, those claims would be struck out and/or permission to amend refused.

[Lexa Hilliard]

Leicester v Stevenson

Ch Div (Lightman J). [2002] EWHC 2831 (Ch).

Under the Insolvency Rules an application to rescind the decision to make a winding-up order could be made within seven days or such further period as the court allowed. However, any extension of time to cover a substantial period of delay had to be strictly justified by showing that the extension was required to correct an obvious injustice, as the court would be very

cautious in exercising the jurisdiction to grant an extension. The applicant had not shown any conceivable requirement of justice for rescission of the winding-up order made on 14 March 1997 and in any event it would not be appropriate for the court to decide, on an application to rescind the winding up order, the question whether or not the debt of £170, 000 was due to the applicant rather than L Ltd, since that was a matter which ought to be resolved by the Liquidator of WF Ltd if the applicant and L Ltd submitted competing proofs of debts.

Re Namco UK Ltd

Ch Div (Blackburne J). [2003] EWHC 989 (Ch).

The applicants were directors of the claimant, Namco, which chartered a vessel from the defendant, Seatruck. The charterparty required Namco to deposit \$638, 750 into an escrow account as security for the payment of any damages payable to Seatruck arising out of Namco's default of its obligations under the charterparty. Namco subsequently fell into default of its obligations under the charterparty. Seatruck claimed that Namco agreed that it was in default under the charterparty but refused to agree to the release of the money in the escrow account. Seatruck accordingly brought proceedings in the

Commercial Court, claiming specific performance of the escrow agreement and/or damages for breach of the escrow agreement and applied for summary judgment pursuant to Pt 24. Before the application could be heard the applicants presented a petition for the winding up of Namco on the grounds of its insolvency and applied to the court for the appointment of provisional liquidators of Namco. Seatruck in turn applied for an order, in the event that a provisional liquidators were appointed, giving them permission under section 130(2) of the 1986 Act to proceed with their claim in the Commercial Court. The applicant's purpose in making their applications was to preserve the status quo to enable the provisional liquidators to consider whether, in the interests of Namco's other creditors, Seatruck's claim should be opposed on the ground that the escrow agreement constituted a registrable charge under section 396 of the Companies Act 1985 which was void under section 395 against Namco's liquidators and creditors because it was unregistered.

The Court refused to make the order. The usual purpose for which provisional liquidators were appointed was to collect and protect assets of the company in question pending

the making of a winding up order and the appointment of liquidators, particularly where the assets were, or were credibly believed to be, in jeopardy. In the present case the appointment of provisional liquidators was not necessary to maintain the status quo as there was no risk to the security amount which was entirely secure in the escrow account. In any event it was not a proper exercise of the court's power under section 135 of the Insolvency Act 1986 to assist a company to put itself into a better position as against one of its creditors by being able to maintain the argument that a charge which it was primarily the company's duty under section 399 of the 1985 Act to register was in fact unregistered and therefore void.

**Re Pan Atlantic Insurance Company Limited ("Paico")
Ch Div (Lloyd J).**

Unreported, 22 July 2003.

The provisional liquidators put forward a cheap and cheerful scheme so as to terminate the costs of the run off and to provide for a simple mode of valuation of contingent claims. The benefit of the scheme to creditors was that they would obtain a dividend over a short period of time and the rather limited assets would not be used up in expenses. Because of the Company's poor records,

claims were to be put in on a self-certified basis but with auditor backing. There was a discretion to waive the auditor backing if other satisfactory objective proof could be put forward. A very proximate bar date was provided for, to be notified to all known creditors.

In keeping with its cheap and cheerful nature, the scheme provided for independent adjudication of any disputes as to claims, excluding recourse to the courts, save in case of dishonesty or the adjudicator travelling outside his remit. The Court considered whether this met the standard of Article 6 of the European Convention on Human Rights and held that the right to a court decision was not an absolute right and that non-consensual limitations could be put on the right as long as certain standards were met. Lloyd J decided that the restriction on court access pursued the legitimate aim of a cheap and cost effective resolution of disputes. In pursuing that aim, the restrictions were proportionate, being no greater than the restrictions needed to achieve the legitimate aim.

The Court also considered the Insurers (Reorganisation and Winding Up) Regulations 2003. The Regulations provide, subject to transitional provisions, that in a liquidation commencing after the 20 April 2003

priority is to be given to insurance creditors over other creditors. That does not directly effect the terms of a scheme. However, it has an important indirect effect, in that questions of “classes” and “fairness” in a scheme will to some extent depend on how far the scheme mirrors the liquidation situation. The effect of the Regulation needs to be looked at two different points: firstly, as at the date of the proposed sanction of the scheme, to see whether there is any point on classes or fairness arising out of a comparison with the terms of the Regulation, and secondly, during the time that the scheme is likely to be running, to see whether there could realistically be a supervening winding up and the effect that such a winding up would have on priorities.

Lloyd J accepted the submission that, as a result of the transitional provisions, the scheme did not have to reflect the new priority. Those transitional provisions provide that where a provisional liquidator was appointed prior to the 20 April 2003 and has not been discharged by the time a winding up order is made after the 20 April 2003, the new priority does not apply. With regard to the future position while the scheme would still be running, the situation was that the lifetime

of the scheme was expected to be short, since there was a proximate bar date, a brief dispute resolution process, a quick distribution and an early termination after the end of the distribution envisaged by the terms of the scheme. Since Lloyd J considered the terms of the scheme to be fair, he found it improbable that any creditor would succeed in obtaining a supervening winding up order. He considered therefore that there was very unlikely to be a subsequent priority problem.

[Gabriel Moss QC, Tom Smith]

Rose v AIB Group (UK) plc Ch Div (Nicholas Warren QC sitting as a deputy judge of the High Court). The Times, 8 July 2003.

The defence of change of position could be available to a creditor so as to defeat a restitutionary claim by a liquidator made under section 127 of the Insolvency Act 1986, pursuant to which any disposition of a company's property made after the commencement of a winding up was void.

Nigel Feetham, “Gibraltar Insolvency and Restructuring Proceedings of Insurance companies: Part 1: Liquidation,” *Insolvency Intelligence*, Vol.16 No.7 (July/August 2003).

Andrea Keay, “The service of statutory demands on companies,” *Insolvency Lawyer*, Issue 4, July 2003.

David Milman, “Winding up of Companies: recent litigation and legislative developments,” *Insolvency Lawyer*, Issue 4, July 2003.

Fiona Tolmie, “Funding litigation by liquidators: a consideration of the amendment to rule 4.218,” *Insolvency Lawyer*, Issue 4, July 2003.

INSOLVENCY – PERSONAL

Bagnall v Official Receiver Ch Div (Evans-Lombe J). The Times, 8 July 2003.

The court could make an ex parte, interim order suspending a bankrupt's automatic discharge, where it was of the opinion that the making of the order was urgent and appropriate.

Mulkerrins v Pricewaterhouse Coopers (a firm) House of Lords (Lords Bingham, Nicholls, Millett, Scott and Walker).

[2003] UKHL 42.

The defendant accountants were not entitled to be heard on an application by the bankrupt under s 303 Insolvency Act 1986 to determine whether the bankrupt or the trustee had title to a right of action

against the accountants and the decision in the bankruptcy proceedings that the right of action belonged to the bankrupt was thereby not open to challenge by the accountants.

**[Robin Knowles QC,
John Briggs]**

**In the matter of Thoars
(Deceased) sub nom Reid
v Ramlort Ltd**

**Ch Div (HH Judge Norris QC).
Lawtel, 18 July 2003.**

On 1 February 1994 the deceased took out a unit-linked life insurance policy which secured a sum of £180,000, payable on death. By July 1996, the deceased was suffering from cirrhosis of the liver and was put on the active list for a liver transplant. On 26 July, he assigned the benefit of the policy to the defendant (the company) by means of a written declaration of trust which was not expressed to be made for any consideration. In December, the deceased underwent a liver transplant, as a result of which he died, both intestate and insolvent. The claimant, the judicial factor of the deceased's insolvent estate, applied for an order to set aside the assignment of the policy under s 339 of the Insolvency Act 1986 on the grounds that it was a transaction at an undervalue. The claimant relied on the sum payable on death and contended that his claim came within each of the grounds set out in s 339(3). The com-

pany contended that, at 26 July 1996, the policy had no value or none exceeding its surrender value of £71.96.

It was held that, in order to determine whether or not a transaction had been at an undervalue, a comparison of the incoming and outgoing values of the transaction in money or money's worth was required from the perspective of the deceased's estate at the time that the transaction took place. The general rule that the court should attribute an actual figure to the incoming and outgoing values, such figures having been established by expert evidence, was not an absolute necessity in every case. In the instant case, the outgoing value from the perspective of the deceased's estate was the benefit of the value of a policy, written on the life of a man suffering from liver disease and facing the prospect of a liver transplant, secured for the sum of £185,000 by the date that the declaration of trust was executed on the basis of premiums calculated when he was in good health, which the court put at a value at £10,000 minimum. The incoming value of the transaction to the estate was put at nil. It followed that the transaction had taken place at an undervalue within the meaning of s 339 of the 1986 Act. Accordingly, the court would grant the order sought by the claimant.

[David Alexander]

**INSOLVENCY –
VOLUNTARY
ARRANGEMENTS**

**Prosser v Castle Anderson
Solicitors (a Firm) & Anor
Court of Appeal (Civil Division)
(Mummery, Clarke and
Hale LJ). [2003] BCC 440.**

P was a property developer. He controlled a property company called Lakeland. P was under considerable pressure from creditors and sought the advice of the first defendants (solicitors) who referred him to the second defendant insolvency practitioners. P proposed an IVA to his creditors. At the creditors' meeting it became clear that the proposal would only be approved if P agreed to place Lakeside into members' voluntary liquidation with immediate effect. There was a short break in which P considered the creditors' demand and decided to accede to it.

The IVA and the liquidation of Lakeside were failures and were disastrous for P. He issued proceedings against the defendants claiming that they negligently failed to advise him to seek an adjournment of the creditors meeting for the 14 days permitted under r.5.19 of the Insolvency Rules 1986 during the short break at the creditors meeting when P considered whether to accede to the creditors' pressure to place Lakeland into liquidation.

The Court held that courts should be careful not to impose duties upon nominees or chairmen of creditors' meetings

when they were acting in that capacity. However, the insolvency practitioner was not acting in that capacity during the discussion with P during the short adjournment. He was acting in precisely the same capacity as he had when he gave advice in the period before the meeting. Moreover, it was advice on the very same questions, namely what options were available to P. In the absence of a clear indication to P that S was no longer acting in that capacity but as a nominee or chairman it would be fair, just and reasonable to impost a duty upon him. He was then acting pursuant to the contract just as he had been before the meeting when the IVA was suggested. P was no doubt looking to him as the expert insolvency practitioner just as they had before. In all the circumstances S owed a duty of care to P during the short adjournment. He did not simply stand by, but either gave or expressly associated himself with the advice that here was no alternative to placing Lakeside in immediate liquidation. However, P had to show that he a real and substantial chance that the creditors would have been willing to agree a different and more beneficial arrangement if P had been advised to seek an adjournment of the meeting and he had failed to do so.

Pranai Karia and Ross Miller, "Company voluntary arrangements – the landlord's position," *Insolvency Law & Practice*, Vol 19, No 3, 2003.

MORTGAGES

Newport Farms Ltd v Damesh Holdings Ltd Privy Council (Lords Hutton, Slynn and Hobhouse). [2003] UKPC 54.

The duty of a mortgage lender exercising a power of sale of land to take sufficient care to obtain the best price reasonably obtainable at the time of sale depended on the circumstances of the case and did not necessarily require taking a series of defined steps or conforming to a set of invariable rules. In deciding whether reasonable steps had been taken to obtain the best price, the steps taken had to be looked at in the round. The issue was a commercial one, to be viewed in commercial terms.

PROCEDURE

Price v Price (trading as Poppyland Headware) Court of Appeal (Civil Division) (Brooke, Sedley LJ and Hale LJ). [2003] EWCA Civ 888.

The necessity for a judge to follow the checklist in CPR 3.9 when considering an application in a complex case for an extension of time applied equally whether the application was made for an extension of

time in which to appeal or in which to serve particulars of claim. In the present case, neither the deputy district judge nor the judge had followed the checklist. The judge had actually taken many of the matters set out in CPR 3.9 into account, but he did not appear to have taken account of the fact that the claimant would be barred from prosecuting what was represented as a valid claim for over £500,000 if he denied him the relief which was sought. The real tension was between the interests of the administration of justice and the effect that granting relief would have on each party, and whether despite the fact that other considerations tended strongly in favour of the defendant, the fact that the claimant was being denied access to the court could drive the balance the other way.

Bhamjee v Forsdick & ors Court of Appeal (Civil Division) (Lord Phillips MR, Brooke & Dyson LJ). [2003] EWCA Civ 1113.

The Court of Appeal set out guidance on the range of remedies available to the courts under their inherent jurisdiction to protect their processes from being abused by litigants who persisted in making applications or instituting procedures which were totally devoid of merit.

Simon Atrill, "Who is the "fair-minded and informed observer"? Bias after Magill," Vol. 62 [2003] CLJ 27

TRUSTS

Abigail Doggett, "Explaining Re Rose: the search goes on," Vol. 62 [2003] CLJ 263.

TALKS & SEMINARS

On 7 July, David Marks gave a talk entitled to "Insolvent Partnerships: a selection of issues", to Freshfields.

[David Marks]

Stuart Isaacs QC gave a talk this month on arbitration to the British Council in Dhaka, Bangladesh.

[Stuart Isaacs QC]

On 23 July Gabriel Moss QC and Felicity Toubé gave a talk to Latham & Watkins on Schemes of Arrangements.

[Gabriel Moss QC, Felicity Toubé]

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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