3/4 DIGEST

a monthly review of relevant news, cases and articles Vol 9 No 2 February 2003

In this issue

In January this year the limits of the EC Regulation on Insolvency Proceedings were tested in court. In Re BRAC-rent-a-car Inc, Lloyd J ordered that a company incorporated in Delaware, USA be put into administration on the basis that the company's centre of main interest was located in England. His judgment is welcomed as a reasoned basis for this practice. Lexa Hilliard acted for the company.

Further issues relating to the EC Regulation are dealt with in a new book entitled "The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide", edited by Gabriel Moss QC, Stuart Isaacs QC and Professor Ian Fletcher. The editors were assisted by David Marks, Felicity Toube, Daniel Bayfield and Thomas Smith.

Richard Fisher

GENERAL NEWS

New measures to strengthen protection against business malpractice in the post-Enron world were announced by Trade and Industry Secretary Patricia Hewitt on 29 January 2003. Ms Hewitt unveiled a package of reforms to "improve the workings of company boardrooms", "strengthen the accountancy and audit professions" and "introduce more effective regulation of the professions". The package includes measures to create a single authoritative regulator with responsibility for setting accounting and auditing standards and a new independent audit inspection unit to monitor the audits of listed companies, major charities and pension funds.

ARBITRATION

Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich

Privy Council (Lords Bingham, Hoffmann, Hobhouse, Millett and Sir Christopher Staughton). The Times, 30 January 2003.

An agreement by the parties to an arbitration that any award should be kept confidential and not disclosed to any third party could not be relied upon to prevent the winner from enforcing the award. Such enforcement could include relying on the rights declared in the award to found a plea of issue estoppel in a subsequent arbitration between the same parties before a different tribunal.

COMPANY

Colin Gwyer and Associates Ltd v London Wharf (Limehouse) Ltd

Chancery Division (Mr Leslie Kosmin QC, sitting as a Deputy High Court Judge). The Times, 24 January 2003.

A director who had made no attempt to ascertain what the interests of his company were before voting on a resolution at a board meeting was not merely negligent but was also in breach of the fiduciary duty he owed to his company to exercise his discretion independently and bona fide in the best interests of the company. Where the company was on the brink of insolvency, the directors also owed a duty to consider as paramount the interests of the company's creditors. Whenever a director cast his vote in breach of his fiduciary duty, that vote was to be disregarded completely and could not therefore be counted towards a quorum.

Globallink Telecommunications Ltd v Wilmbury Ltd

Queen's Bench Division (Stanley Burnton J). [2002] BCC 958.

Section 727 Companies Act 1985 had no application where it was not sought to make the director in question liable for damages or costs incurred as a result of an alleged breach of duty. Therefore, where the only order sought against a company director was an order requiring him to make and serve a witness statement dealing with any agreement he had entered into on behalf of the company, the court did not have to determine whether the director had acted reasonably.

PNC Telecom plc v Thomas

Chancery Division (Sir Andrew Morritt VC). New Law Online 19 December 2002.

Service of notice by fax of an extraordinary general meeting on a members' requisition under section 368 of the Companies Act 1985 was valid service.

Regina (POW Trust) v Chief Executive and Registrar of Companies

Chancery Division (Lightman J). The Times, 2 January 2003.

Liability to pay a penalty for failure to deliver accounts to the Registrar of Companies on time was strict. The statutory provisions and internal procedures concerning the recovery of such fines were not legally objectionable and were compliant with the European Convention on Human Rights.

Unilever (UK) Holdings Ltd v Smith (Inspector of Taxes)

Court of Appeal (Auld, Clarke and Jonathan Parker LJJ). The Times, 22 January 2003.

A scheme of arrangement approved by the court under section 206 of the Companies Act 1948, and which took effect on April 29, 1965, reducing a company's share capital by cancelling its entire preference shareholdings, was not a reorganisation as defined in section 126(1) of the Taxation of Chargeable Gains Act 1992. It was the essence of a reorganisation that it resulted in a new holding and that was not established where the rights attaching to the company's remaining ordinary shares were the same both before and after the reductions.

CONFLICT OF LAWS

De Beer v Kanaar & Co (a firm)

Court of Appeal (Jonathan Parker LJJ and Rimer J). [2003] 1 WLR 38.

On an application for security for costs against a claimant, a Dutch national, on the grounds that the claimant was ordinarily resident in the United States and that if his claim failed the defendant would be unlikely to recover its costs of the litigation, the claimant contended that he had sufficient assets in the Netherlands and Switzerland, respectively signatories to the Brussels and Lugano Conventions, and therefore was not a person against whom an order for costs could not be enforced within the meaning of CPR r. 25.13(2)(a)(ii). The Court held that, since the words "a person against whom a claim can be enforced" in rule 25.13(2)(a)(ii) could refer to a person against whom either a claim for costs was brought or a judgment or order for costs was made, the court was entitled in resolving that ambiguity to construe the rule by reference to its background and context. It was fair to infer that the primary aim of the new rule was to remove the anomaly which had been found to exist in the old rule under RSC Ord 23, r 1(1)(a) and to eliminate the risk of the discretion being exercised in a manner which covertly discriminated against nationals of other Convention states in breach of Community law. It was also both legitimate and consistent with the other conditions in rule 25.13 to construe the word "claim" in sub-paragraph (a)(ii) as including any claim and not limited to an order for costs. The rule was directed at the juridical characteristics of the individual claimant rather than the value and situs of his current assets. The jurisdiction to order security for costs was therefore confined by rule 25.13(2)(a) to cases where the claimant was an individual who was not ordinarily resident within either the domestic jurisdiction or that of a Convention state and such a claimant could not deprive the court of jurisdiction to order security for costs merely by placing assets in a Convention state.

CONTRACT

Amiri Flight Authority v BAE Systems plc

Queen's Bench Division (Commercial Court, Tomlinson J). [2003] 1 All ER (Comm) 1.

There was no basis for the suggestion that section 26 of the Unfair Contract Terms Act 1977 was only applicable so far as the contract provided for the sale of goods. Although it was true that there might be arbitrary results under that section, as in different cases of a seller who entered into a separate support or maintenance contract in relation to goods sold and a seller who incorporated similar obligations into what was nominally a single contract, the anomaly was not that a different result ensued from the decision to make two contracts rather than one, but that the legislature had chosen to exclude international contracts for the sale of goods from the 1977 Act regime but not international contracts for the supply of services.

The definition of 'contract for the international sale of goods' was adopted from previous legislation which in turn followed the language of the Uniform Law on the International Sale of Goods in which the reference was to contracts providing for delivery of the goods to be made 'in' the territory of a state other than that within whose territory the acts constituting the offer and the acceptance had been effected. The policy of the section was not simply the protection of exporters, but was rather the exclusion of contracts of an international character from a regime largely devised for the protection of domestic consumers. To construe the Act as requiring that in order to attract exemption from the regime there had to be an element of delivery from one territory to another, would involve the imposition of a limitation which would frustrate the overriding legislative intention to accord freedom of contract to parties involved in substantial transactions of an international character.

Robertson v Anderson

Court of Session, Inner House (Lords MacLean, Reed and Weir). The Times, 2 January 2003.

An agreement to share a bingo prize would be enforced by the courts, and was not subject to the rules relating to the unenforceability of gaming contracts as such an agreement did not require either party to make a bet or wager. Although such a contract was related to gaming, it was not itself a gaming contract.

DAMAGES

Martin Graham, "Exemplary and Punitive Damages in Contract and Tort (Whiten v Pilot Insurance; A v Bottrill)", [2002] LMCLQ 453.

HUMAN RIGHTS

Re McHugh Southern Ltd (in Liquidation)

Chancery Division (Mr David Donaldson QC sitting as a Deputy High Court Judge). The Times, 30 January 2003.

The right to a fair and public hearing within a reasonable time by an independent and impartial tribunal in article 6.1 of the European Convention on Human Rights required civil proceedings to be struck out as an abuse of process by reason of the claimant's delay only where it would no longer be possible for the defendant to receive a fair trial.

Prudential Assurance Co Ltd v Prudential Insurance Co of America

Chancery Division (Sir Andrew Morritt VC). The Times, 2 January 2003.

In light of the provisions of the Human Rights Act 1998, the "without prejudice" rule, whereby negotiations, whether oral or written, aimed at settling proceedings, were excluded from being given in evidence, should be applied with restraint and only in cases to which the public interests underlying the rule were plainly applicable.

Richard A Edwards, "Judicial deference under the Human Rights Act", Vol 65 MLR No 6.

INSOLVENCY CORPORATE

Barclays Bank plc v Stuart Landon Ltd

Court of Appeal (Peter Gibson and Chadwick LJJ). [2002] BCC 917.

The imminent possibility of liquidation gave rise to the need for the standard proviso (for the protection of other parties and creditors) to an order for extension of time under section

404 of the Companies Act 1985 (rectification of the register of charges). The inclusion of the proviso reflected the court's recognition that the imminent possibility of liquidation was a relevant factor in the decision whether to extend time for registration. However likely it was that an application to set aside would be made, the relevant question was whether there were grounds for thinking that the application would be bound to succeed. If there were no grounds for thinking that the application to set aside would be bound to succeed, then the proper course was to make the order with the proviso.
[Antony Zacaroli]

Re BRAC-Rent-a-Car Inc

Chancery Division (Lloyd J). Unreported, 14 January 2003.
A company incorporated in Delaware USA could have its "centre of main interest" in England. Accordingly, the Court had jurisdiction to make an administration order under the EC Regulation on Insolvency Proceedings in relation to the Company.
[Lexa Hilliard]

Georgina Kyriss v Michael John Christopher Oldham; Mario Royle v Michael John Christopher Oldham

Chancery Division (Leeds District Registry, His Honour Judge Behrens). Unreported, 30 December 2002.
An unsecured creditor has no general right to sue the administrators for negligence and/or breach of the conduct of an administration. Although a right to sue may arise in special circumstances where there had been a direct contract with the administrator or where the creditors have suffered some special damage, no such right arose in this case. Knowles v Scott [1891] 1 Ch 717 applied; A J Fabrication Ltd v Grant Thornton [1998] 2 BCLC 227 distinguished. Where administrators had been informed of an agreement to create a charge on a date to be mutually agreed, it was arguable that the administrators had sufficient notice of the charge to owe the individual a duty as a secured creditor. The crucial question was not when the charge was actually created but whether the obligation to grant the charge was specifically enforceable. Once a reasonable period of time had elapsed, it was arguable that there was an obligation to create a charge which could be specifically enforced. Swiss Bank v Lloyds Bank [1982] AC 582 applied.
[Lexa Hilliard]

Miller v Bain

Chancery Division (Sir Andrew Morritt VC). [2002] BCC 899.
Although r 9.6(1) of the Insolvency Rules 1986 allowed the court to order costs against an examinee whose examination was made necessary by his unjustified refusal to provide the information, it applied to the costs of the examination once it had been ordered. Rule 9.6(2) dealt with the costs of the application for the order and empowered the court to order them to be paid by the respondent. The higher test imposed by r 9.6(1), that costs of the examination could be ordered against the respondent where examination was caused by the respondent's refusal to provide information, was not relevant to the matter of costs of the application for the examination. The relevant test for ordering the costs of the application for private examination was whether the liquidator was reasonably entitled to conclude that there was a serious risk that the examinee would not co-operate with him and attend for an interview otherwise than under the compulsion of a court order. That adequately reflected the question under section 236(2) of the 1986 Act of whether the court should order the attendance of some person for his examination to give information concerning the companies.

Re Rescupine Ltd

Chancery Division (Hart J). [2003] All ER (D) 161 (Jan).
The applicant company owned the freehold of a property in London which was mortgaged to First National bank. A winding up order was presented against the company and subsequently contracts for the sale of the property were exchanged.
The applicant therefore applied for a validation order pursuant to section 127 of the Insolvency Act 1986 in order that the sale could be completed. It was common ground that it would be entirely appropriate to make a validation order if the court was satisfied that the sale that had been negotiated was at a proper price.
The application was dismissed.
On the evidence before the court, F's past included the manufacture of fraudulent property transactions.

Furthermore, the evidence before the court in relation to offers that had been made on the property had to be regarded with scepticism since the persons making those offers did not seem to be writing from residential premises and did not have landline telephones. That evidence put a question mark over whether those offers were genuine. Accordingly, having regard to the evidence, the court was not satisfied that the property had been properly marketed, especially since the valuation evidence suggested that a considerably higher figure was indicated by other valuations, including the most recent. It followed that if the liquidator sold the property with the relevant professionalism, that sale would achieve a higher price than the proposed sale.
[Fidelis Oditah]

Secretary of State for Trade and Industry v Frid

Chancery Division (Mr David Mackie QC sitting as a Deputy High Court Judge). New Law Online, 6 December 2002.
The Company, West End Networks Ltd, was placed into creditors' voluntary liquidation with a debt due to it from HM Customs and Excise. Another company, acting for the secretary of State for Trade and Industry, the appellant, made redundancy payments to former employees of the company under section 167 of the Employment Rights Act 1996. The appellant sought to set-off the payments under the 1999 Act against the VAT debt under r. 4.90 of the Insolvency Rules 1986. The liquidator rejected the proof and the Registrar upheld that refusal on the basis that the applicant could not invoke a set-off as the payments under the 1996 Act were a contingent liability at the time of the insolvency and the source of the applicant's liability was not exclusively referable to any transaction between the parties to the set-off, namely, the appellant and the company. It was held on appeal that the ratio of the decision in Re a Debtor No.66 of 1955 [1956] 1 WLR 1266 was that if the liability of the surety is only contingent at the relevant date, the fact that he subsequently makes a payment under the "guarantee" does not entitle him to set-off. The instant case could not be distinguished in the manner the appellant argued for as the ratio was in broad terms and could be found in the decision and the reasons for it. That decision and these reasons did not draw or provide room for others to draw the distinction advanced by the appellant that the situation as regards a claim against rather than by an insolvent was different. Accordingly, the rule against set-off applied as the source of the appellant's liability to the company's former employees was not exclusively referable to any transaction between the parties to the set-off and was contingent as at the date of the insolvency. Whilst the basis on which the appellant argued that set-off should apply was entirely consistent with broad justice and with some authority, the court was bound by In Re A Debtor and the answer to any injustice did not lie in attempting to "navigate around" that authority but in a reconstruction of that case by a higher court.

David Marks, "Proofs of debt on liquidation: English and Irish Law viewpoints", December [2002] Irish Commercial Law Practitioner.
[David Marks]

Gabriel Moss QC, "Using section 304 of the US Bankruptcy Code", [2003] Insolvency Intelligence, No. 1.
[Gabriel Moss QC]

INSURANCE

Matadeen v Caribbean Insurance Co Ltd

Privy Council (Lords Bingham, Hobhouse, Millett, Scott and Rodger). The Times, 20 January 2003.
Where an insured company, having incurred a liability towards an injured third party, becomes insolvent and the third party pursued a claim directly against its insurers pursuant to section 1 of the Third Parties (Rights Against Insurers) Act 1930 or its equivalent, the third party's claim was subject to the same period of limitation as would have applied to a claim brought by the insured under its contract with the insurer. Neither the fact that the insurer's obligation arose under statue nor that the policy was issued under a corporate seal rendered it an action on a specialty so as to attract a longer limitation period.

PROCEDURE

Douglas v Hello! Ltd

Chancery Division (Sir Andrew Morritt VC). The Times, 30 January 2003.
Where a claimant applied for an order striking out the defence

on the ground that the defendants had destroyed the evidence prior to the commencement of the action, the order should be granted only where the destruction amounted to an attempt to pervert the course of justice. With regard to such destruction after commencement of proceedings, it was not necessary for the claimant to establish that when destroying the documents the defendants had the guilty intent required for a contempt of court. The court was concerned only with whether the rules had been transgressed, if so whether a fair trial was achievable and if not what to do about it.

Michael Zander, "Where are we now on conditional fees? – Or why this Emperor is Wearing Few, if any, Clothes", Vol 65 MLR No.6.

REGULATION

Arumugam v Law Society

Divisional Court (Rose LJ and Astill J). New Law Online, 2 December 2002.

The appellant was a solicitor. The Law Society intervened in his practice and subsequently alleged that he had deliberately and improperly used clients' funds for his own purposes. No specific allegation of dishonesty was alleged. Prior to the hearing the respondent informed the appellant that it was not in a position to allege dishonesty but that the matter would be put to the tribunal on the basis that the tribunal might infer it. The tribunal found the allegation against the appellant substantiated and made a finding of dishonesty. The appellant appealed and argued that the tribunal had no jurisdiction to make a finding of dishonesty. Since there had been no allegation to that effect and he had no opportunity to prepare to meet that case, he had been prejudiced and the procedure had been improper.

It was held on appeal that, in the circumstances, it had been open to the tribunal to make a finding of dishonesty. There were a number of signposts that suggested that the appellant could not have been ignorant of the allegation being made against him. He would have been informed at the time of the intervention that dishonesty had been suspected, the matter had been opened before the tribunal on the basis that it was being invited to make a finding of dishonesty and the appellant had earlier been informed that that invitation would be made. Indeed, on any fair and proper reading, the whole tenor of events prior to the tribunal hearing had made it abundantly plain to the appellant that his integrity would be called into question. Moreover, in the context of a solicitor whose accounts were in disorder to the extent that a charge of deliberate and improper use of funds had been brought, it was inconceivable that that solicitor did not realise that his honesty would be in issue. In all the instant circumstances, the words "deliberately and improperly" were not susceptible to any interpretation other than that there was an allegation of dishonesty.

Marion Simmons QC, "Public Hearing – whose right is it anyway?", Association of Regulatory & Disciplinary Lawyers Quarterly Bulletin, October 2002.

[Marion Simmons QC]

RESTITUTION

Jonathan Hilliard, "A case for the abolition of legal compulsion as a ground of restitution", [2002] CLJ 551.

Gerard McMeel, "'Equitable' mistake repudiated: the demise of Solle v Butcher? (The Great Peace)", [2002] LMCLQ 449.

SECURITIES

Adamson v Halifax plc

Court of Appeal (Potter LJ and Sir Murray Stuart-Smith). [2003] 1 WLR 60.

Where a mortgagee, in breach of its statutory duty, sold mortgaged property at an undervalue the prima facie measure of damage was the reduction in value of the equity of redemption.

Redwood Master Fund Ltd v TD Bank Europe Ltd

Chancery Division (Rimer J). The Times, 30 January 2003.

Where an agreement governing a syndicated loan facility created several classes of lender, any amendment to the terms of the facility agreement permitted under that agreement had to be made bona fide for the benefit of the lenders as a whole. However, the requirement of good faith should not be interpreted so literally as to mean that any change to the agreement which might have been prejudicial to one class of lenders, or a subgroup of that class, could not be held to be in the best interest of the lenders as a whole. As the purpose of the doctrine was to prevent the abuse of the majority power so as to favour sectional interests over those of the syndicate as a whole, it was sufficient for the Court to be satisfied that the power was being exercised in good faith.

Janet Currier, "Rights of Subrogation of a Mortgagee: Karasiewicz v Eagle Star Insurance Company Ltd", [2002] JIBL 339.

Bruce A. Markell & Richard F. Broude, "A Short introduction to the Priority Provisions of the UNCITRAL Convention on the Assignment of Receivables in International Trade", [2003] Insolvency Intelligence, No.1.

Sally Unwin, "Lien Over Title Deeds – Superpower?" [2003] Insolvency Intelligence, No.1.

SET-OFF

Professor Andrew Tettenborn, "Assignees, equities and cross-claims: principle and confusion", [2002] LMCLQ 485.

TORT

Akenzua v Secretary of State for the Home Department

Court of Appeal (Simon Brown, Sedley and Scott Baker LJJ). [2003] 1 All ER 35.

An action for misfeasance in public office was not excluded where the predictable victim was neither an identifiable individual nor an identifiable group of individuals. An individual or a class was not a free-standing requirement of the tort. Rather, the purpose of being required to specify an individual or class was to be able to establish that the harm done lay within the ambit of the material intent or recklessness.

TRUSTS

Patrick Parkinson, "Reconceptualising the Express Trust", Vol 61 [2002] CLJ Part 3.

Rosy Thornton, "Dishonest Assistance: guilty conduct or a guilty mind?" Vol 61 [2002] CLJ Part 3.

SEMINARS AND APPOINTMENTS

Marion Simmons QC gave a talk on "Decision Making and Dispute Resolution" to the Chartered Institute of Arbitrators on 16 October 2002 and was a key note speaker at the Society of Expert Witnesses' Seminar on 18 October 2002.

[Marion Simmons QC]

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