

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 9 No 1 January 2003

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A number of important cases concerning administration were decided during December. Re TXU UK Ltd saw Peter Smith J consider the issue of administrators' powers to make payments which are not a step towards the fulfilment of any statutory purpose (but are for the benefit of the creditors). TXU were represented by Gabriel Moss QC. In Re Colt Telecom Group Plc, Richard Sheldon QC and Hilary Stonefrost successfully defended an aggressive creditor's petition to place the company into administration. The petition was brought by bondholders (whose bonds had not matured) who claimed that the company was insolvent on a balance sheet basis and/or was likely to become insolvent and required Mr Justice Jacob to rule on various matters including the meaning of the phrase "likely to become unable to pay its debts" in Section 8 of the Insolvency Act 1986.

Over two years after they were enacted, the remaining provisions of the Insolvency Act 2000 came into force on 1 January 2003. The New Year has seen, therefore, the introduction of the long awaited CVA moratorium and various amendments to the Insolvency Rules 1986.

We would like to take the opportunity to wish all those who receive the digest a very happy new year. This edition of the digest was compiled by Blair Leahy.

Richard Fisher

GENERAL NEWS

On 21 December 2002, the Regulatory Reform Order (SI no: 2002/3203) came into force. The Order repeals sections 716 and 717 of the Companies Act 1985 and thereby removes the 20 member limit which applied (with some exceptions) to partnerships, limited partnerships, unregistered companies and associations formed for the purpose of gain.

AGENCY

Bell Electric Ltd v Aweco Appliance Systems GmbH & Co KG

Queen's Bench Division (Elias J).

[2002] CLC 1246.

Regulation 18(a)(i) of the Commercial Agents (Council Directive) Regulations 1993 was intended to indicate that there would be no right to compensation where the principal had terminated the agency contract in

circumstances where at common law he would have been entitled to do so because of the agent's failure to carry out his side of the bargain. Regulations 18(a) and 18(b)(i) ought to be seen as the reverse sides of the same coin so that compensation was not payable if the principal terminated in circumstances which would be justifiable at common law because of the agent's conduct; but on the other hand compensation was payable if the commercial agent terminated the contract in circumstances which were justifiable at common law because of the conduct of the principal. In either case, if the innocent party affirmed the contract and precluded the right to rely on the repudiatory breach, any attempt thereafter to terminate the contract, absent some fresh repudiatory breach, would not be justifiable within the meaning of the regulations. If the agent had

lost the right, for whatever reason, justifiably to terminate the contract at common law, he could not rely on reg. 18(b)(i).

ARBITRATION

Lesotho Highlands Development Authority v Impregilo SpA and Others Queen's Bench Division (Morison J). The Times, 6 December 2002.

Where an award by an arbitral tribunal was in the nature of a sum due under the contract rather than as damages for breach of contract, it followed that the currency in which the award was to be made, and any entitlement to interest, were governed by the applicable law of the contract and not by the procedural law of the arbitration.

COMPANY

MT Realisations Ltd v Digital Equipment Co Ltd Chancery Division (Laddie J). [2002] 2 BCLC 688.

The purpose of section 151 of the Companies Act 1985 was to prohibit, and render criminal, actions by a target company or its subsidiaries which were designed to help fund another in the purchase of its own shares either at the time of acquisition (under section 151(1) or subsequently (under section 151(2)). Sections 151(1) and (2) required that some financial assistance was given to the purchaser 'for the purpose' of the acquisition of the target company's shares before any breach of the section could be established. A distinction was to be drawn between incentives to enter into an agreement or

concurrent benefits and the acquisition of the shares in the target company, since the undertaking of obligations, absolute or contingent, in connection with the transfer of the shares did not itself constitute the giving of financial assistance for that transfer. On the true construction of section 151(1)(a)(iv) of the 1985 Act the meaning of 'financial assistance' was essentially the same whatever the financial strength of the target company, and no distinction was to be made between cases in which the target company had net assets and those where it did not. Where a target company had net assets no breach was committed if the transaction did not materially reduce its assets. However, if the target company had no assets, a breach occurred if a transaction entered into for the purpose of assisting in the purchase of its own share reduced its assets or increased its liabilities even by a small amount.

OTV Birwelco Ltd v Technical and General Guarantee Co Ltd Queen's Bench Division (TCC) (Thornton J). [2002] 2 BCLC 723.

There is nothing in section 36A of the Companies Act 1985 which requires a company to use its registered name rather than its trading name in the body of a deed or bond. If there had been such a requirement, it would have abrogated the common law rule that extraneous evidence was admissible to identify a contracting party when its identity was not clear from the face of the deed.

Where a bond had been entered into as a deed, but the

company obtaining the bond had used a seal engraved with its trading name rather than its registered name as required by section 350, this did not in itself render the bond a nullity or unenforceable. A conclusion to the contrary would produce a situation in which there was no proportionality between the loss ensuing from non-enforcement and the breach of the statute. It would also mean, in the instant case, that the surety would be unjustly enriched because of an apparently unwitting breach of the statute that had not misled anybody. The only sufferer would be the contractor, an innocent party which was not even a party to the bond that was the subject of the illegal act. Furthermore, since the underlying contract was not a nullity merely because one of the parties sealing it had failed to comply with section 350, there was no reason why the contractor should not enforce its rights against the surety whose separate seal was validly affixed to the bond.

Sanofi-Sythelabo SpA v 3M Health Care Ltd Chancery Division (Laddie J). [2002] CLC 1208.

A company could be considered to be in the control of the person or those persons who could make or unmake its officers and dictate their conduct mediately or immediately. That did not mean that the controller would be involved in the day to day running of the company. He might never need to exert his control. If he had control he could, when necessary, directly or indirectly make the company do his bidding.

Lisa Linklater "Reshaping criminal sanctions in company law", *The Company Lawyer*, Issue 24 No 1.

David Milman, "Compulsory acquisition of shares: contemporary judicial attitudes and possible reforms considered", *Sweet & Maxwell's Company Law Newsletter*, 21-22/2002.

CONFLICT OF LAWS

Swithenbank Foods Ltd

v Bowers

Queen's Bench Division at Leeds (Mercantile Court) (Judge McGonigal sitting as a Judge of the High Court). [2002] 2 All ER (Comm) 974.

Section 5 of the Brussels Regulation (on jurisdiction in civil and commercial matters), including art 20, related only to jurisdiction over contractual claims under individual employment contracts. It did not relate to proceedings brought qua employer against a defendant qua employee and did not relate to any claim on any basis where the claimant happened to be the defendant's employer. Article 5 of the regulation drew a distinction between 'matters relating to a contract' and 'matters relating to a tort', and the heading of section 5 was 'Jurisdiction over individual contracts of employment'. It followed that where a claim was brought against a defendant who was or had been his or her employee, prima facie that claimant should be permitted to bring the claim if the court would have jurisdiction over that claim if the defendant was not or had not been the claimant's employee. Such an interpretation of the phrase 'matters relating to

individual contracts of employment' provided a clear test and led to high predictability regarding jurisdiction. Moreover, there was no policy justification for conspirators or other tortfeasors who were employees of the claimant receiving jurisdictional advantages not enjoyed by conspirators or other tortfeasors who were not employees of the claimant.

CONTRACT

Crest Nicholson Residential (South) Ltd v McAllister

Chancery Division (Neuberger J). The Times, 10 December 2002.

The court had to be careful of relying on authority when construing an expression in a document. However, where the Court of Appeal had taken a clear view as to the natural meaning of an expression, while accepting that the same expression could obviously have a different meaning because of its textual or factual context, the court should be slow to depart from that without some reason.

Sarah Worthington, "Reviewing Rescission: Real Rights or Mere Possibilities". [2003] *Insolvency Lawyer*, Issue 1.

DAMAGES

Great Future International Ltd v Sealand Housing Corporation

Chancery Division (Lightman J). The Times, 27 December 2002.

Where a claimant was fraudulently induced to buy shares but chose for his own reasons to retain those shares after the fraud had become apparent, the base measure of damages to which he was entitled was the

excess he had paid over the market value of the shares at the time, together with any consequential expenses he had incurred.

Where the value of those shares had subsequently recovered, the interests of justice did not allow defendants to reduce their liability by requiring the shares to be valued at a later date, especially where the reason that the dispute had not been resolved earlier was due to the defendant's own delaying tactics.

DIRECTORS

Inn Spirit Ltd v Burns

Chancery Division (Rimer J). [2002] 2 BCLC 780.

An application was brought by the Liquidator of ISL for summary judgment under Pt 24 of the CPR against two of its former officers. The claim was for payment by the officers of £1, 937, 105.71 on the grounds that the defendants, in breach of their fiduciary duties, wrongfully removed that sum from ISL. The sums were recorded as dividend payments in the Company's accounts.

The Court held that, since the purported dividends had been paid unlawfully and amounted to an improper misapplication of ISL's assets, the defendant had no defence to ISL's claim to recover compensation from them in the full amount of the loss which their breach of duty had caused to ISL, namely the amount of £1.9 million, which either was or might be required by ISL to meet its liabilities, and to the extent that there was any surplus, that would be payable to its parent company to meet that company's liabilities. In those circumstances

the judgment or order against the defendants for repayment was not limited to the excess over the amount of a lawful dividend which might have been declared. However, since it was possible that the defendants might at trial be able to establish the defence under section 727(1) of the Companies Act 1985 that they had acted honestly and reasonably and should thereby be relieved from liability for any negligence, default, breach of duty or breach of trust, summary judgment would not be entered against them. Instead they would be ordered to make an interim payment of £1million and the freezing orders already in place would be continued.

[David Alexander]

**Re Windows West Ltd
Chancery Division (Gabriel Moss
QC sitting as a deputy High
Court judge). [2002] BCC 760.**

An appeal was brought by a director against a disqualification order for 11 years made by the registrar against the director for unfitness by his 'phoenix' trading through five companies controlled by the director going into successive insolvent liquidation.

Dismissing the appeal, the court held that:

(1) It was unlikely that hearing a director might be prepared to admit facts as part of a 'settlement' leading to a Carecraft proceeding meant that a court could not give the director a fair trial if those negotiations failed to come to a successful conclusion. In any event, the defendant did not ask the registrar to disqualify

himself from hearing the matter at the time of the trial and having decided not take the point when it arose or within a reasonable time thereafter it would be very unfair to allow him to take it now.

(2) The controlling director of a proprietary company could not simply resign and then run the company as a shareholder together with his wife and not incur any of the responsibilities, liabilities, or penalties of being a de facto or shadow director.

(3) The registrar did not err in law or in principle as to the length of disqualification period and the court was not at liberty to re-exercise the discretion that was exercised below.

Per curiam the court stated that, whilst the decision to bring disqualification proceedings was a policy issue for the relevant authorities, consideration (depending on resources) could and perhaps should be given to bringing disqualification proceedings against those who allowed themselves to be used as nominee directors in order to conceal the fact that someone else was managing the business of the company. If conniving with a fraudulent director's activities led to proceedings, it might prove to be at least some deterrent for those willing to go along with the type of conduct engaged in by the director in this case.

[Gabriel Moss QC]

**R v Doring
Court of Appeal (Crim Division)
(Buxton LJ, Grigson and
Pitchford JJ). [2002] BCC 838.**

A director appealed against her

conviction in the Crown Court on counts of being concerned in or taking part in the management of a company known by a prohibited name, without the leave of the court, contrary to section 216 of the Insolvency Act 1986, and of acting as a director or taking part in the management of a company as an undischarged bankrupt without the leave of the court, contrary to s11(1) of the Company Directors Disqualification Act 1986.

The D argued that the offences were not ones of strict liability so that the jury should have been asked to consider whether D had the necessary mens rea. D argued that the decision in *R v Brockley* [1994] BCC 131 should be reconsidered in the light of *B (a child) v DPP* [2000] 2 Cr App R 65 on the basis that D did not know that she was taking part in management and thought that she was not. On appeal the court had held that in *Brockley* the offence under section 11 of the CDDA 1986 of acting as director while an undischarged bankrupt was one of strict liability and that mens rea was not necessary for reasons of social policy and prudence. It was not open to the court to depart from the approach in *Brockley*, since the authorities that the court had in mind in *Brockley* were authorities that were relied on in the case of *B (a child)*. In any event the principle in *B(a child)* would not assist D, even if it were to be adopted in this case. It was not her case that she was ignorant of some essential fact that was crucial to the constitution of the prosecution case, such as whether she was bankrupt.

Her case was that she did not realise that what she was doing constituted being concerned in the management of a company. But as the judge's direction to the jury showed, that was a question for the jury to determine, having decided the primary facts. That D did not realise that what she was consciously and deliberately doing would or might count as management was not to the point, even if the offences were ones requiring mens rea.

HUMAN RIGHTS

Berry Trade Ltd v Moussavi

Court of Appeal (Potter, Mummery and Arden LJ).

[2002] BPIR 881

The claimants had obtained a worldwide seizure order against the defendant and other individuals. It was then alleged that the defendant had infringed the terms of the order and an application was made to the court for his committal for contempt. The application was adjourned on several occasions and the defendant (who had been made bankrupt on his own petition 4 months previously) had run out of funds to pay for legal representation. In order to facilitate the hearing of the committal application the claimants had offered funds to pay for legal representation at the rates prescribed by the Legal Services Commission using lawyers of the defendant's own choice. The defendant refused this offer. An application for public funding had earlier been turned down but a subsequent application made after the commencement of the defen-

dant's bankruptcy was still pending. The defence lawyers, relying on guides to professional conduct, supported the concerns raised by the defendant by indicating that their independence might appear to be compromised if they were seen to be funded by the other side. Nevertheless, the trial judge had indicated that the defendant should accept the claimants' offer as his case cried out for legal representation. The defendant appealed and appeared in person. The court held, allowing the appeal, that the defendant was entitled to refuse the offer of funding for legal representation from the claimants and to insist on his right to apply for public funding to enable him to instruct his own solicitors and counsel. This conclusion was consistent with the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 which would treat an application for committal as akin to a criminal charge thereby activating the right to be defended by counsel of one's own choice or by oneself as conferred by those of Art 6(3)(c).

INJUNCTIONS

Thane Investments Ltd v Tomlinson

Chancery Division (Neuberger J). The Times, 10 December 2002.

Where a party obtained an asset-freezing order in the absence of the respondent, there was a duty on that party's legal representatives to provide the respondent with a full note of the hearing

irrespective of whether he asked for it. In the circumstances, however, the claimant's failure was not severe enough to justify setting aside the order.

INSOLVENCY – CORPORATE

Re: COLT Telecom Group plc

Chancery Division (Jacob J). Unreported, 20 December 2002.

The Petitioners, hedge funds which form part of the American Elliott Associates group, having acquired bonds issued by COLT Telecom Group Plc, issued a petition for an administration order supported by a r. 2.2 report which alleged that COLT was insolvent on a balance sheet basis and/or that it was likely to become insolvent in 2006.

Mr. Justice Jacob held that there was not and never had been any substance whatever in the Petition and that it should never have been launched.

A number of issues arose for determination in these proceedings as follows:

(1) *The meaning of "likely" in section 8(1)(a) of IA86*

Where a petitioner alleges that a company is "likely to become unable to pay its debts", it must be shown that this is more probable than not. A company should not be put into administration where there was only a "real prospect" of insolvency. (In this case Mr. Justice Jacob also stated that he did not consider insolvency to be proved on the "real prospect test" either.)

(2) *The no-action clause*

New York law governed the Indenture that applied to the

bonds that had been acquired by the Petitioners. The parties' respective experts agreed that there was no binding authority on whether the Petitioners were prevented from bringing a petition for an administration order by the terms of the Indenture. Mr. Justice Jacob held that the provision that a holder of the notes could not pursue "any remedy with respect to the Indenture or the Notes" unless certain conditions were satisfied ("the no-action clause") prevented the Petitioners from presenting an administration petition.

(3) *Public policy*

The Petitioners' argument that the no-action clause was contrary to public policy and should be struck down was rejected. To advance this proposition the Petitioners argued that the principle that the right of a contributory to petition cannot be abrogated or restricted by provisions in the memorandum or articles of a company should be extended to contracts made by companies with their creditors.

(4) *Insolvency*

The Court addressed the nature of the evidence given by Mr. Heis, the author of the r. 2.2 report and one of the proposed administrators. On the evidence in support of the Petition, Mr. Justice Jacob held that:

(a) CPR Part 35 on expert evidence governs expert opinion evidence given in r. 2.2 reports.

(b) Where a petition is likely to be contested, the author of the report ought to re-read the Rules and the Code governing expert evidence before writing the report.

(c) Where the petition is likely to be contested the insolvency practitioner asked to give evidence to support such a case should not propose himself as the administrator. This does not apply, however, to petitions initiated by directors, notwithstanding that there is a small conflict of interest in those cases.

(d) Where, in contested creditors' petitions, the author of a r. 2.2 report has a direct interest in the outcome of the proceedings, then he should make an express and full statement to this effect in the report, because the existence of a conflict has an effect on the weight to be attached to the evidence in the report.

(e) Where evidence in support of a Petition is opinion evidence and not within the expertise of an insolvency practitioner, individuals who are 'true experts' should give evidence. It is not expert evidence when a person says, as Mr. Justice Jacob put it, "I know a man who knows and he has explained it to me".

**[Richard Sheldon QC
Hilary Stonefrost]**

**Lloyds Bank Plc v Cassidy
Queen's Bench Division
(Mercantile List) (Behrens J).
[2002] BPIR 1006.**

On an application by a bank and receivers to strike out various counterclaims made by the defendant, it was held that neither the bank nor receivers were under a duty to consider and adopt any reasonable proposal by the defendant to repay the sums due and to end the receivership.

**Re Ryan Developments Ltd
Chancery Division (Neuberger J).
[2002] 2 BCLC 792.**

A claim for costs in relation to a company's application to stay a petition which in fact did not come on for hearing fell within the court's wide discretion under section 51(1) of the Supreme Court Act 1981 to award the "costs of, and incidental to, all proceedings in the High Court".

Where a creditor presented a winding up petition against a debtor company for a sum greater than the statutory minimum and established in the petition proceedings either by concession or by determination of the court that the debt was due, the creditor was entitled to payment not only of the debt but also all his reasonable costs of, and in connection with, the petition. Furthermore, that general principle applied where the debtor paid off the debt and effectively bought off the petition before it was heard, and also applied to the costs of applications in connection with the petition, unless there was good reason to the contrary.

**Re TXU UK Limited
Chancery Division (Peter
Smith J). Unreported,
20 December 2002.**

The Court has an inherent jurisdiction to authorise an administrator to exercise his powers for the benefit of the creditors even where that exercise is not a step towards the fulfilment of any of the statutory purposes for which the administrator is appointed. The administrators proposed to make a payment as

part of a three-way compromise to which the third party was contributing and which was likely to be in the interests of the creditors. However, the compromise did not further any of the statutory purposes. In exercising the court's inherent jurisdiction the Judge followed *Re Mark One* [1998] BCC 984 (Jacob J). The Judge also approved a dictum of Jacob J in *Denny v Yeldon* [1995] 1 BCLC 560 to the effect that the statutory grounds go only to what the administrators should be trying to achieve and do not limit the powers of the administrators once they are appointed. The Judge, however, considered that administrators would be unwise to exercise powers in this way without an application to the court for approval.

[Gabriel Moss QC]

Sophie Elboz, "Exiting Administration – Railtrack and the future", *Insolvency Law & Practice*, Vol 18 No 6.

Dr Demetra Arsalidou, "The Brewin Dolphin Appeal", *The Company Lawyer*, Vol 23 No 12.

Prof. Harry Rajak, "The Enterprise Act and Insolvency Law Reform", *The Company Lawyer*, Issue 24 No 1.

Patrick Bourke, "AMP Enterprises v Hoffman: when will the Court remove a liquidator from office?" *The Company Lawyer*, Issue 24 No 1.

Adrian Walters, "Unlawful preferences and proprietary rights", (2002) 119 LQR 28.

INSOLVENCY – PERSONAL

Hoare v Commissioners of Inland Revenue

Chancery Division (Peter Smith J). [2002] BPIR 986.

On 18 July 2001, the Inland Revenue presented a bankruptcy petition against Mr Hoare at a time when Mr Hoare had issued an application to set aside the statutory demand on which the petition was based. That application was in fact dismissed in August 2001 when Mr Hoare failed to attend the hearing. The bankruptcy order was made on 30 October 2001. On 6 February 2002, on Mr Hoare's application, the registrar accepted that the petition was defective both on the basis that there was an outstanding application to set aside the statutory demand at the date of the petition but also because it was not correct to say that there was a debt which Mr Hoare had no reasonable prospect of paying or was unable to pay. As such, he rescinded the order but refused to annul it. Mr Hoare appealed against the refusal to annul. There were compelling commercial reasons from Mr Hoare's point of view as to why there should be an annulment, the effect of which would be that the bankruptcy order was never made at all rather than a rescission, which would constitute a retrospective termination of the bankruptcy.

Held, allowing the appeal and setting aside the rescission of the bankruptcy order and granting an annulment that: (1) the registrar fell into error in concluding that annulment was not

available where the basis for the application was something that had arisen after the making of the order – in this case a change in Mr Hoare's advisers; (2) an application for annulment is necessarily retrospective in nature and requires the court to look at the facts and submissions placed before the court on the application to see whether, had those facts taken place before or those submissions been made at the hearing of the bankruptcy petition, the bankruptcy order would have been made.

[John Briggs]

John Lewis Plc v Tomlin Chancery Division (Charles Aldous QC sitting as a deputy judge of the High Court). [2002] BPIR 989.

John Lewis obtained judgment in default against T in the county court in October 2000 and on 17 May 2001 served a statutory demand which remained unsatisfied. A bankruptcy petition was presented which was then allegedly served on 13 August 2001. An offer by T to pay £50 per month until such time as he found employment when he would be in a position to pay more was rejected. On 11 December 2001, T was made bankrupt. That order was annulled on 24 January 2002 on the basis that T had not been served with the petition which was re-listed for 14 February 2002. On 25 January 2002, T applied to vary the judgment so as to enable him to pay the debt by instalments of £55 per month. Such application was not going to be determined by the time fixed for

the re-listed hearing of the petition and T therefore obtained an order staying execution of the judgment pending resolution of his application. In consequence, the hearing of the petition was adjourned to 15 March 2002. On 13 March 2002, T's application was dismissed by the county court 'on paper'. On 15 March 2002, before the hearing of the petition, T applied for an interim order to enable him to put forward an individual voluntary arrangement. At the hearing the deputy registrar made a bankruptcy order. T appealed.

T's appeal was dismissed. The appeal was an appeal in the true sense; the decision of the deputy registrar could only be interfered with if the judge was satisfied that she reached it on a wrong principle or took into account matters which she should not have taken into account. The court was not so satisfied; indeed the judge would have made the same order as the deputy registrar. It would not be right to set aside the bankruptcy order to afford T a further opportunity to pursue his county court application unless that application had a real prospect of success, which it did not. In any event, it remained open to T to pursue his application for an interim order notwithstanding the fact that the bankruptcy order had been made.

[Richard Fisher]

Legal Services Commission v Leonard

Court of Appeal (Simon Brown and Laws LJ and Arden LJ). [2002] BPIR 994.

If there is a serious argument as

to whether a judgment debt has been stayed, it is the duty of the advocate for the petitioning creditor to draw the same to the attention of the court where the debtor is unrepresented (per Arden LJ).

INSOLVENCY – VOLUNTARY ARRANGEMENTS

Re N (a Debtor)

Bankruptcy Court (Reg. Baister). [2002] BPIR 1024.

On the true construction of section 257(1) of the Insolvency Act 1986, the statutory binding of creditors in an IVA pursuant to section 260 could only take effect if it was achieved as a result of approval of an IVA given at a meeting summoned in accordance with the terms of the interim order and approval of an IVA purportedly given otherwise was of no effect. The only proper course was for the chairman/nominee to apply under section 262 formally to revoke the purported approval on the grounds that it was the product of a procedural irregularity and to seek a direction that a further meeting be summoned by the court. On the undertaking of the chairman/nominee to issue the appropriate application, the court would make a direction for the summoning of a further meeting and, for that purpose, extend the interim order to 23 October 2002. The nominee/chairman should bear personally the costs of: (i) the hearing; (ii) the application to be issued under section 262; and the further hearing.

Sandra Bristoll, "Schemes of arrangement: a question of class", *Insolvency Law & Practice*, Vol 18 No 6.

[Sandra Bristoll]

Michael Mulligan and John Tribe, "IVA time extensions under the Insolvency Act 1986: uncertainty or necessity?", *Insolvency Law & Practice*, Vol 18 No 6.

PARTNERSHIP

Dubai Aluminium v Salaam House of Lords (Lords Slynn, Nicholls, Hutton, Hobhouse and Millett). [2002] 3 WLR 1913.

"Any wrongful act" within the meaning of section 10 of the Partnership Act 1890 was not confined to common law torts but could include the equitable wrong of dishonest participation in a breach of trust.

One partner's wrongful act, although not authorised by his co-partner, could nevertheless be said to have been done "in the ordinary course of business of the firm" if, for the purposes of the firm's liability to third parties, it could fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business. Whether it could be so regarded was for the court to evaluate as a question of law based on an assessment of the primary facts. Drafting agreements for a proper purpose would be within the ordinary course of the business of a solicitors' firm and, on the assumed factual basis that A was acting in his capacity as a partner, his assistance in the fraudulent scheme by drafting the necessary agree-

ments was so closely connected with the acts which he was authorised to do that for the purpose of the firm's liability he could fairly and properly be regarded as having acted in the ordinary course of the firm's business. That assistance coupled with the dishonesty was sufficient to give rise to equitable liability on A's part, and accordingly, the defendant firms were vicariously liable for A's conduct.

Mullins v Laughton

Chancery Division (Neuberger J). The Times, 27 December 2002.

The doctrine of repudiatory breach did not apply to partnership agreements as it applied to other contracts. Accordingly, a partner's conduct amounting to a repudiatory breach of the partnership agreement, accepted by the innocent partner, did not bring about the automatic dissolution of the partnership. However, in the present case, the behaviour of the partners was such as to justify the dissolution of the partnership pursuant to section 35(d) and/or (f) of the Partnership Act 1890.

PRIVILEGE

Three Rivers District Council v Bank of England

Queen's Bench Division (Comm Ct, Tomlinson J). New Law Online, 13 December 2002.

The subject-matter of legal advice privilege was not restricted to communications between solicitor and client, including secondary evidence of such communications but also

embraced material brought into existence for the dominant purpose of obtaining legal advice, even though that material was not in itself a communication between solicitor and client. An internal confidential document, that was not a communication with a third party, which was produced or brought into existence with the dominant purpose that it or its contents was to be used to obtain legal advice was privileged from production. The purpose had to be that of the author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence. The line drawn by the law was not by reference to the question whether a communication was choate or inchoate but rather by the court posing to itself the question proposed by Jacobs J of the High Court of Australia in *Grant v Downs* [1976] CLR 674: "Does the purpose of supplying the material to the legal advisor account for the existence of the material?"

[Barry Isaacs]

PROCEDURE

Assicurazioni Generali SpA v Arab Insurance Group (BSC)

Court of Appeal (Ward and Clark LJ and Sir Christopher Staughton). The Times, 29 November 2002.

The approach to be adopted by the Court of Appeal hearing appeals under rule 52 of the Civil Procedure Rules where it was sought to reverse a factual decision of the lower court should

be the same whether it was conducted as a review or as a re-hearing.

Mamidoll-Jetoll Greek Petroleum Company SA v Okta Crude Oil Refinery AD

Queen's Bench Division (Comm Ct) (Aikens J). The Times, 27 December 2002.

Where one party made a formal offer of settlement to another pursuant to rule 36.21 of the Civil Procedure Rules, and it was rejected by that party but was more favourable to him than the eventual judgment of the court, the court would order the rejecting party to pay costs on the indemnity basis and/or interest on damages at a higher rate from the date of the rejection of the Part 36 offer unless it was unjust to do so. It would be unjust to do so where the party had a good reason for rejecting the offer, such as a reasonable belief in his own prospects of success in view of the law as it then stood, or where the conduct of the party making the offer meant that the rejecting party was in no position to assess its validity, for example, because of inadequate disclosure by the offering party.

Three Rivers District Council v Bank of England

Queen's Bench Division (Comm Ct, Tomlinson J). New Law Online, 13 December 2002.

The Secretary of State for Foreign and Commonwealth Affairs intervened to assert that certain passages of Appendix 8 to the

Bingham Report (a report produced by Bingham LJ following his inquiry into the collapse of BCCI) should not be disclosed either because of a statutory requirement or on grounds of public interest immunity. The Court allowed disclosure of Appendix 8 with certain passages redacted,

Appendix 8 giving a summarised account of the involvement of the British Intelligence Services in the affairs of BCCI until 5 July 1991.

The Court held that:

(1) The view had correctly been taken that the relevant statutory bar to disclosure ought not to be identified to the parties.

(2) The judge decided not to read the redacted passages which were covered by the statute, as no useful purpose would be served by doing so at the present time and might embarrass him in his capacity as trial judge. The prohibition on disclosure to the parties was absolute. If necessary to test the secretary of state's assertion, that reading could be undertaken by another judge.

(3) The appointment of special counsel was not something which had ever been followed in relation to the statute in question. The difficulty with that procedure was that the judge had no power to direct disclosure of the material to any special counsel who might be appointed.

(4) In relation to the passages covered by the PII certificates, PII was properly claimed in respect of the majority of the summaries and the summaries conveyed to the claimant the information of which justice required them to be aware.

(5) In relation to the redactions to para. 42, the secretary of state had made out a powerful case to the effect that revelation of the source(s) of these reports would be injurious to the public interest. Furthermore, it was not clear that the information contained in these reports would have been available to the Bank before the closure of BCCI. Preparation of useful summaries of these passages proved difficult without causing harm to the public interest which the assertion of PII was intended to avoid. The judge had made drafting suggestions and the summaries in their final form gave as full a description as possible whilst reducing to a manageable level the risk to the sources and the harm to the national interest.

**[Mark Phillips QC,
Barry Isaacs]**

RESTITUTION

Maersk Air Ltd v Expeditors International Limited and Jeremy Richard Thomas Queen's Bench Division at Birmingham (Mercantile Court) (HHJ Caroline Alton). Unreported, 17 December 2002.

A claim for restitution on the grounds of unjust enrichment would lie against a defendant where there was a payment by reason of a mistake of fact. There was a plain mistake in payment where an employee of the Claimant had fraudulently caused the Defendant to raise invoices to the Claimant purporting to show that haulage services had been provided when they had not. *Banque Financiere de la Cite v Park (Battersea) Ltd* [1999] 1 AC

221 considered. However, the defence of change of position in good faith was available to the Defendant where it had acted in good faith and in a commercially acceptable manner, without knowledge of the fraud. *Lipkin Gorman v Karpnale* [1991] 2 AC 548; and *Nihru Battery v Milestone Trading Ltd and Others* [2002] EWHC 1425 considered.

However, the defence was not available from the point in time where the Defendant, had been informed by an unconnected third party of the possible existence of the fraud and yet failed to take sufficient steps to investigate matters.

[Lexa Hilliard]

Commissioners of Customs and Excise v National Westminster Bank Plc

Chancery Division (Judge Rich QC sitting as a deputy Chancery Division judge). The Times, 2 December 2002.

An unsolicited payment into a creditor's bank account would not constitute payment of a debt unless it was accepted as such, since a creditor was under no legal duty to accept any payment, and a debtor could not force any payment of any kind upon his creditor without the latter's consent. Secondly, there was no general rule which gave a bank, by virtue of its holding a current account for the creditor, authorisation to receive the payment on the creditor's behalf so as to discharge the debt. In the instant case the creditor had not authorised the payment and therefore the commissioners were entitled

to recovery of the money paid by mistake from the bank.

Daniel Friedmann, "The objective principle and mistake and involuntariness in contract and restitution." (2002) 119 LQR 68.

Roland Fletcher, "Sorry: My Mistake", BLR Vol. 23 No. 12.

SECURITIES

Gerard McCormack, "The Floating Charge and the Law Commission Consultation Paper on Registration of Security Interests", *Insolvency Lawyer*. [2003] Issue 1.

SPORTS

Re Dennis Bergkamp, FA Disciplinary Commission Unreported, 19 December 2002.

Dennis Bergkamp was fined £5,000 for improper conduct and warned as to future conduct.

[Mark Phillips QC]

TORT

Marcq v Christie Manson & Woods Ltd Queen's Bench Division (Jack J). [2002] 4 All ER 1005.

Where an auctioneer had received goods for auction from a non-owner in good faith and without notice, he would be not liable in conversion to the true owner if, having failed to sell the goods, he had merely delivered them back to the non-owner. He would be liable only if there had been a sale in which he was sufficiently involved, followed by delivery to the purchaser. The taking of a lien by contract could

not affect that position since, in all cases, auctioneers had a right of lien at common law for their charges and remuneration. In any event, it was the exercise of powers by a bailee against his consignor that matter in conversion, not the taking of those powers. Nor, in the instant case, could the fact that the auctioneers had taken a right to refuse to permit a lot to be withdrawn before auction, by itself or when added to the other circumstances, turn an act that would not otherwise be a conversion into a conversion. It followed that auctioneers could not be liable in conversion if they had acted in good faith and without notice. The burden of proof, however, fell on the bailee to show that he had dealt with the goods consigned to him in good faith and without notice.

TRUST

TM Yeo & H Tjio, "The Quistclose Trust", (2002) 119 LQR 8.

BOOKWATCH

Oxford University Press have published "The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide". This new book is edited by Gabriel Moss QC, Professor Ian Fletcher and Stuart Isaacs QC. The Editors were also assisted by David Marks, Felicity Toube, Daniel Bayfield and Thomas Smith of 3/4 South Square.

[Gabriel Moss QC, Stuart Isaacs QC, Professor Ian Fletcher, David Marks, Felicity Toube, Daniel Bayfield, Tom Smith]

SEMINARS AND APPOINTMENTS

Glen Davis has been appointed to the Insolvency Rules Committee by the Lord Chancellor for two years.

[Glen Davis]

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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