

# 3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 9 No 6 June 2003

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In the recent decision of *Wight v Eckhardt Marine GMBH*, the Privy Council held that the effect of a scheme of arrangement in a particular jurisdiction (in this case, Bangladesh) post-dating the liquidation of a bank in its country of incorporation (in this case, the Cayman Islands) was a matter for the proper law of the liabilities in question. Such a scheme could discharge a liability so that a debt which, at the time of liquidation, would have been provable may subsequently cease to be provable. Richard Sheldon QC appeared on behalf of the liquidators of the bank, BCCI Overseas.

Meanwhile, the decision of the Court of Appeal in *Berry Trade Ltd v Moussavi* reaffirmed the importance of maintaining privilege in respect of without prejudice negotiations. Antony Zacaroli successfully challenged the decision at first instance permitting the contents of without prejudice discussions to be adduced in evidence on the grounds that there was a disparity between one of the party's pleaded case and the stance taken in the negotiations.

This edition of the digest was compiled by Stephen Robins.

**Richard Fisher**

## GENERAL NEWS

The Lord Chancellor's Department has published the latest statistics for company winding up petitions and creditors' and debtors' bankruptcy petitions presented in the High Court and county courts of England and Wales during the first quarter of 2003. The figures show that whilst the number of winding up petitions presented has fallen by 27 per cent on the same quarter of 2002, the number of creditors' bankruptcy petitions has risen by more than 13 per cent and the number of debtors' bankruptcy petitions has risen by 8 per cent. The Government has announced a crackdown on disqualified company directors and undischarged bankrupts who deliberately disobey their disqualification orders. The latest figures show that around 1,600 directors were disqua-

lified last year, and 1,775 new disqualification proceedings were issued.

## ARBITRATION

David Altaras, "Security for Costs," *Arbitration*, Volume 69, Number 2 (May 2003), page 81.

Michael O'Reilly, "Rethinking Costs in Commercial Arbitration," *Arbitration*, Volume 69, Number 2 (May 2003), page 130.

## BANKING

**Linklaters v HSBC Bank and Banco Popular Espanol [2003] EWHC 1113 (Comm). QB Div (Commercial Court) (Gross J). 22 May 2003.**

A bank which has negligently paid out on a stolen cheque whilst acting as agent for collection for a collecting

bank will be entitled to a complete indemnity from the collecting bank for its liability in conversion to the true owner of the cheque. In the alternative, the negligent paying bank acting as collecting agent will be entitled to damages for breach on an implied warranty of genuineness. So held Gross J in Part 20 proceedings between the two banks. *Middle Temple v Lloyds Bank* (1999) *Lloyds Rep* 50 followed.

**[Fidelis Oditah QC]**

**Royal Bank of Scotland v Fielding**

**[2003] EWHC 986 (Ch).**

**Ch Div (Hart J) 2 May 2003.**

**The Times, 16 May 2003.**

Under the terms of a mandate signed by the defendant and her husband, the defendant was liable to the bank for a substantial debt of over £3 million on a joint account held with her husband even though she was ignorant as to her indebtedness. Hart J accepted that the defendant had been, for the most part, completely ignorant of her indebtedness on the joint account and had believed that the family fortunes were founded on a multi-million pound fortune held on behalf of her and her children by a Jersey Trust. However, a mandate in the form relied on by the bank had been signed by the defendant and she was prima facie liable to the bank for all sums debited to the joint account. It could not be

inferred that some abuse of confidence might or must have taken place. *Royal Bank of Scotland v Etridge (No.2)* (2001) 3 WLR 1021 considered.

**COMPANY**

**Commissioners of the Inland Revenue v Richmond & Jones [2003] EWCA 999 (Ch).**

**Ch Div (Etherton J).**

**9 May 2003.**

The Commissioners of Inland Revenue applied under section 212 of the Insolvency Act 1986 against the former directors of Modus Vivendi Ltd seeking payment of £6m for misfeasance or breach of duty in declaring a dividend of £6m in favour of Copperbeck Ltd. Etherton J held that the dividend was unlawful as it exceeded profits available for the purpose, contrary to section 270 of the Companies Act 1985, because it was calculated on the basis of interim accounts that had failed to make provision for corporation tax and other liabilities. The test as to whether an alleged liability ought to have been included in the interim accounts was whether the liability was "likely to be incurred". It could not be said that the respondents had acted reasonably or honestly in authorising the dividend and so could not be relieved of their liability under section 727 of the Companies Act 1985.

**[Hillary Stonefrost]**

Dame Mary Arden, "Choice of corporate form – the private company under the final report of the Company Law Review Steering Group," *The Company Lawyer*, Volume 24 (June 2003).

V. Edwards, "The European Company – Essential Tool or Eviscerated Dream?" *Common Market Law Review*, Volume 40, Number 2 (April 2003) p. 443.

Robert Goddard, "Modernising Company Law: the Government's White Paper," *Modern Law Review*, Volume 66, Number 3 (May 2003), p. 402.

Michael Lower, "What's on offer? A consideration of the legal forms available for use by small and medium sized enterprises in the United Kingdom," *The Company Lawyer*, Volume 24 (June 2003).

**CONTRACT**

**Beta Investments v Transmedia Europe**

**Ch Div (Justin Fenwick QC).**

**12 May 2003. Lawtel, 4 June 2003.**

An agreement providing that the parties use their best endeavours to reach a settlement of their disputes was legally binding, but only to the extent that the parties were obliged to use their best endeavours. It did not oblige the parties to achieve any or any specific form of settlement.

## EQUITY AND TRUSTS

### Green v Green

**[2003] UKPC 39. Privy Council (Lords Nicholls, Steyn, Hope, Millett and Rodger). 20 May 2003.**

The principles set out in *Gissing v Gissing* (1971) AC 886 and *Grant v Edwards* (1986) All ER 426 should be applied in determining whether, in the absence of an express agreement, one occupant has a beneficial interest in properties registered in the other occupant's name. Further, according to the rule in *Watt v Thomas* (1947) AC 484, where a decision either way may seem equally open, the decision of the trial judge is of paramount importance. The question is whether it has been shown that his judgment on the facts was affected by material inconsistencies or inaccuracies or that he failed to appreciate the weight of the evidence or otherwise went plainly wrong. So held the Privy Council in upholding the decision of the trial judge that the appellant was entitled to a beneficial interest in various properties that had been acquired by the parties during the period of their relationship and put in the respondent's name alone. The trial judge had seen and heard the witnesses and was entitled, having assessed the evidence that both parties gave from the witness box, to infer that there was a common intention from the

outset that the beneficial interest in the properties was to be shared.

Gabriel Moss, "The Standard of Liability for Knowing Receipt," *Insolvency Intelligence*, Volume 16, Number 5 (May 2003).

**[Gabriel Moss QC]**

## GUARANTEE AND INDEMNITY

Ronald Fletcher, "To Guarantee or Not to Guarantee? That is the Question," *Business Law Review*, Volume 24, Number 5 (May 2003), page 118.

Duncan Webb, "When is a promise not a promise?" *The New Zealand Law Journal*, May 2003, page 157.

## INSOLVENCY – CORPORATE

### Re a Company (No 8036 of 2002)

**Chancery Division (Sir Andrew Morritt VC). 8 May 2003. [2003] All ER (D) 95 (May).**

The respondent company assembled and supplied personal computers. An agreement was entered into between the administrators of the respondent and the applicant company for the purchase by the applicant of the business and assets of the respondent. The purchase price was to be paid in instalments. The applicant paid the price due on completion but made no further payments. The respondent served a

statutory demand on the applicant in respect of the balance of the purchase price which remained due. The applicant applied for an injunction restraining the respondent from presenting a winding up petition based on the amount claimed in the statutory demand on the grounds that it had a genuine and substantial cross-claim which exceeded or equalled the amount of the outstanding debt. Two grounds were relied upon by the applicant, namely (i) the respondent's breach of an implied term of the agreement in respect of the support provided with regard to extended warranty claims and (ii) a claim in restitution of the cost of providing that support, based on requests made by the administrators to the applicant to provide that support.

The application would be dismissed. There was no basis for the implication of the term contended for by the applicant. Moreover, the facts of the case did not come within the propositions upon which the applicant relied in the restitution claim and there was a lack of evidence to support the contention that the applicant provided services at the request of the administrators. Accordingly, in the circumstances the court was not satisfied that the cross-claim was serious and one of substance. *Re Bayoil SA* [1999] 1 All ER 374 applied.

**[Daniel Bayfield]**

**OT Computers v First National Tricity Finance [2003] EWHC 1010 (Ch). Chancery Division (Pumfrey J). 9 May 2003.**

The claimant company, which had set up trusts in anticipation of insolvency proceedings to safeguard customers' and suppliers' monies, remained the beneficial owners of the fund to the extent to which it had not effectively, by its declaration of trust, created beneficial interests in the fund in favour of the beneficiaries. Pumfrey J held that this was not a case analogous to *Barclays Bank v Quistclose* (1970) AC 567. There was no suggestion here that funds had been advanced to OT for a specific purpose. Rather, insofar as the customers were concerned, OT had declared itself trustee of certain funds to which it had been entitled in favour of the persons who had originally transferred those funds to OT. Insofar as suppliers were concerned, OT had declared itself trustee of certain of its funds for suppliers who had during the relevant periods granted OT credit in respect of supplies made by them to OT. As regards the customers trust, the customers were identified by receipts and there was no difficulty about identification of the beneficiaries. In relation to the suppliers trust, it had never been properly constituted as the requirements for certainty of beneficiaries had

not been met. Therefore OT beneficially owned the sums held in the suppliers trust account.

**[Richard Adkins QC, William Trower QC, Adam Goodison]**

**In re Salvage Association [2003] EWHC 1028 (Ch). Ch Div (Blackburne J). 9 May 2003.**

The court has jurisdiction to make an administration order in relation to an association incorporated by Royal Charter as a legal person within Article 3 of the EC Regulation on Insolvency Proceedings, and the association will be able to enter into a company voluntary arrangement under Part I of the Insolvency Act 1986. So held Blackburne J on the hearing of a administration petition brought by the Salvage Association for the purpose of approving a voluntary arrangement or a more advantageous realisation of its assets than would be effected on a winding up. Section 8(7) of the Insolvency Act 1986 stated that a 'company' in section 8(1) included a company in relation to which an administration order could be made by virtue of Article 3 of the EC Regulation on Insolvency Proceedings, and Lloyd J in *Re BRAC Rent-A-Car International Inc* (2003) 2 All ER 201 held that the jurisdiction to open insolvency proceedings conferred by Article 3 of the regulation was not limited in the case of legal

persons to those incorporated within the EU. Therefore there was jurisdiction to make an administration order in this case.

**[Gabriel Moss QC]**

Paul Fleming, "Sharing the Spoils of a Preference Action: Save a Slice for the Secured Creditors," *Insolvency Intelligence*, Volume 16, Number 5 (May 2003)

**INSOLVENCY – INTERNATIONAL**

**Wight v Eckhardt Marine GMBH**

**[2003] UKPC 37. Privy Council (Lords Hoffmann, Nolan, Hobhouse, Scott and Walker). 14 May 2003.**

The effect of a scheme of arrangement in Bangladesh (where the bank, incorporated in the Cayman Islands, had a branch) on the liabilities of a bank in liquidation in its country of incorporation was governed by the proper law of those liabilities; in this case the law of Bangladesh. A winding up order is not the equivalent of a judgment against the company. The winding up leaves the debts of creditors untouched and only affects the way in which they can be enforced. By analogy with the hindsight principle in estimating the value of contingent debts, the principle of *pari passu* distribution according the values of the debt at the date of the winding up does not necessarily lead to the

conclusion that someone who was a creditor at that date must be allowed to participate in the distribution even when he is no longer a creditor. A winding up order has no effect on the situs or proper law of the debt. Even though the debt might have been provable as at the date of the winding up order, if it is subsequently discharged under its proper law (in this case as a result of the Bangladeshi scheme which ring-fenced the assets and liabilities of the local branch), it thereupon ceases to be provable. The creditor's proof was therefore correctly rejected by the liquidators of BCCI Overseas.

**[Richard Sheldon QC]**

Jennifer Bierly-Seipp and Uwe Pirl, "German Insolvency Proceedings under the Insolvency Code of 1999," *Insolvency Law and Practice*, Volume 19, Number 2.

Clare Campbell and Yiannis Sakkas, "Transnational insolvencies and the impact of the EC Regulation on Insolvency Proceedings," *Insolvency Law and Practice*, Volume 19, Number 2.

Michael Haravon, "English Administration Order Binding in France," *Insolvency Intelligence*, Volume 16, Number 5 (May 2003).

## **INSOLVENCY – PERSONAL**

**Timi Owo Samson v Barclays Bank**

**Court of Appeal (Ward LJ, Carnwath LJ and Newman J). 21 May 2003. *The Times*, 27 May 2003.**

When valuing security held by a creditor who has served a statutory demand or presented a bankruptcy petition, the Court should ignore the projected costs of enforcing the security. So held the Court of Appeal applying Rule 6.5 (4)(c) of the Insolvency Rules 1986, section 271 (1)(a) of the Insolvency Act 1986 and *Platts v Western Trust & Savings Ltd* [1996] BPIR 339.

**[Adam Goodison and David Allison]**

**Woodland-Ferrari v UCL Group Retirement Benefits Scheme**

**[2003] Ch 115. Chancery Division (Ferris J).**

In 1992 a trustee of a pension scheme was removed from office. In 1993 he was made bankrupt, and in 1996 he was discharged. In 2001, the Pensions Ombudsman found that he had committed breaches of trust and was liable to make up the shortfall in assets caused by the breaches. A statutory demand for the amount of the shortfall was served on him. He applied to set aside the demand on the ground that his liability for breach of trust constituted

a bankruptcy debt within section 281(1) of the Insolvency Act from which his discharge from bankruptcy had released him. On behalf of the scheme it was argued that his liability in respect of the debt had been incurred in respect of "fraud or fraudulent breach of trust" and therefore by virtue of section 281(3) he had not been released from it by his discharge. Ferris J held that dishonesty was an essential ingredient of fraudulent breach of trust. Although the ombudsman had found wilful default this was not precisely the same thing as fraudulent breach of trust. Accordingly, the statutory demand would be set aside.

**[Mark Arnold and Andreas Gledhill]**

Steven Frieze, "The Matrimonial Home: Being Equitable," *Insolvency Intelligence*, Volume 16, Number 5 (May 2003).

## **INSURANCE**

**Brotherton v Aseguradora Colseguros SA**

**[2003] EWCA Civ 705. Court of Appeal (Ward LJ, Buxton LJ, Mance LJ). 22 May 2003.**

The materiality of a particular circumstance had to be judged when the risk had been placed and by reference to the impact that it would then have had on the mind of a prudent insurer. Where claimant reinsurers had

sought to avoid a reinsurance contract for non-disclosure of allegations of impropriety it was not a defence to show that the allegations had been unfounded. The sound philosophical basis of the duty of disclosure in an insurance context is that a true and fair agreement for the transfer of risk on an appropriate basis depends on equality of information.

## **PARTNERSHIP**

### **Taylor v Grier**

#### **Chancery Division**

#### **Newcastle-Upon-Tyne**

#### **District Registry (HH Judge Behrens). 12 May 2003.**

#### **Lawtel, 20 May 2003**

Where one member of a firm ceases to be a partner and the other partners carry on the business of the firm with its capital or assets without any final settlement of accounts between the firm and the outgoing partner, section 42 of the Partnership Act 1890 provides that an outgoing partner will be entitled, in the absence of any agreement to the contrary, to elect to receive either such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets or interest at the rate of five per cent per annum on the amount of his share of the partnership assets. The issue to be determined was the meaning of the words "his share of the partnership assets" and the

quantification of the share. HHJ Behrens QC held that the section envisaged a three-stage approach. First, the court must determine the value of the outgoing partner's share at the date of the dissolution by valuing the assets (including the goodwill) as at the date of the dissolution and applying the rules in section 39 and 44 of the Act. Secondly, the court must determine what revenue profits have been made since dissolution. Thirdly, the court must determine the extent to which such revenue profits are attributable to the use of the outgoing partner's share of the partnership assets.

## **PROCEDURE**

### **Berry Trade Ltd v Moussavi**

#### **[2003] EWCA Civ 715.**

#### **Court of Appeal (Peter Gibson LJ, Tuckey LJ, Nelson J). 22 May 2003.**

The claimants and the defendant attempted to negotiate a settlement at five "without prejudice" meetings. The claimants applied for permission to adduce in evidence the statements allegedly made by defendant in the meetings, which, according to the claimants, demonstrated that his defence was dishonest. The judge held that the standard of proof was to establish a serious and substantial risk of perjury, which only the content of the negotiations would readily reveal. He found that there was a disparity between the

defendant's pleaded case and the account put forward in the negotiations. Therefore, only the content of the negotiations would readily reveal that the pleaded case had to be false. The defendant appealed. The Court of Appeal held that the test used by the judge was too low a test and one which would seriously erode the without prejudice rule. The judge should have looked for nothing less than unambiguous impropriety. Although there seemed to be an inconsistency between the without prejudice discussions and the pleadings, a mere inconsistency was not sufficient to amount to unambiguous impropriety. In any event, it could not be said that the evidence of what the defendant was alleged to have said was unambiguously clear. The notes relied on by the claimants were not transcripts but merely brief notes and needed interpreting in order to arrive at the sense contended for. This was not the sort of case where the court should be prepared to admit the evidence of without prejudice statements within the exception from the without prejudice rule for unambiguous impropriety. To allow such admissions in evidence flew in the face of the public policy justification for the without prejudice rule.

**[Antony Zaccaroli]**

**Niru Battery  
Manufacturing Co v  
Milestone Trading Ltd  
Queen's Bench Division  
Commercial Court  
(Moore-Bick J). 8 May 2003.  
Lawtel, 2 June 2003.**

Where judgment had been entered against two defendants jointly and severally and one had satisfied the full amount of the judgment it was entitled to be subrogated to the rights of the claimant under the judgment so as to enable it to recover from the other defendant the whole amount it had paid in satisfaction of the claim. If subrogation were refused, one defendant would be enriched at the expense of the other defendant. That enrichment would be unjust. *Banque Financiere de la Cite v Parc (Battersea) Ltd* (1998) 2 WLR 475 applied. A wrongdoer was not precluded from obtaining relief by way of subrogation, except in those cases in which the courts would ordinarily decline to entertain a claim on grounds of public policy.

Richard Moorhead, "Access or Aggravation? Litigants in Person, McKenzie Friends and Lay Representation," *Civil Justice Quarterly*, April 2003, p. 133.

**TORT  
Marcq v Christie, Manson  
& Woods Ltd  
[2003] EWCA Civ 731.  
Court of Appeal (Peter  
Gibson LJ, Tuckey LJ,  
Keene LJ). 23 May 2003.**

Where an auctioneer receives goods from an apparent owner in good faith and without notice that they were stolen and returns them unsold, the auctioneer will not be liable to the true owner in conversion or bailment. In so far as the true owner claims against the auctioneer in conversion, there will be insufficient encroachment on the owner's rights as owner to amount to conversion. Possession of goods by an agent on the instructions of their apparent owner for the purpose of carrying out ministerial acts such as storage or carriage will not amount to conversion. Auctioneers will fall within that principle even though they are not simply entrusted with the goods but are also asked to sell them. For an auctioneer to be liable there must be a sale in which he was sufficiently involved, followed by delivery to the buyer. An auctioneer who receives goods from their apparent owner and simply re-delivers them when they

are unsold will not be liable in conversion, provided that he has acted in good faith and without knowledge of any adverse claim to the goods. Nor will the auctioneers be liable in bailment where they are unaware of the true owner's interest in the goods. An agent who receives goods from someone who was their apparent owner and later returns them to him will not owe any duty to the true owner to investigate title in the absence of anything to put them on enquiry.

**TALKS AND SEMINARS**

In May 2003, various members of chambers spoke at a Central Law Training Conference, Insolvency Law Update Conference 2003.

**[Jeremy Goldring,  
Samantha Knights, Tom  
Smith, Richard Fisher]**

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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