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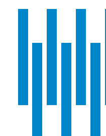

a monthly review of relevant news, cases and articles Vol 9 No 3 March 2003

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Lord Alexander of Weedon QC
Christopher Brougham QC
Gabriel Moss QC
Simon Mortimore QC
Stuart Isaacs QC
Marion Simmons QC
Richard Adkins QC
Richard Sheldon QC
Richard Hacker QC
Robin St. J Knowles QC
Mark Phillips QC
Robin Dicker QC
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Barry Isaacs
Ben Valentin
Felicity Toube
Jeremy Goldring
Samantha Knights
Lucy Frazer
David Allison
Daniel Bayfield
Tom Smith
Richard Fisher
Blair Leahy
Stephen Robins

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In Flightline Ltd v Edwards, the Court of Appeal considered whether the payment of monies into a joint account so as to obtain the consensual discharge of a freezing order provided the claiming party with security for their claim. The nature of the claim to these monies was important following the appointment of provisional liquidators over Swissair. The appeal against the decision of Neuberger J, who had held that Flightline were a secured creditor, was allowed. Gabriel Moss QC and Jeremy Goldring acted for Flightline, Martin Pascoe QC and Lucy Frazer acted for the provisional liquidators.

Chambers is delighted to welcome Stephen Robins as a tenant following the successful completion of his pupillage.

Richard Fisher

GENERAL NEWS

The Department of Trade and Industry is carrying out a consultation on the proposals to extend the forthcoming amendments to Part II of the Insolvency Act 1986, concerning the streamlined administration procedure, to insolvent partnerships. Details of how to respond may be found at www.insolvency.gov.uk. The deadline for responses is 31 March 2003.

The Lord Chancellor's Department and the Department of Trade and Industry have released the insolvency statistics for the fourth quarter of 2002. The figures show increases in the number of company and individual insolvencies on the previous quarter and substantial increases on the same period a year ago. The number of winding up petitions has risen by 21 per cent in comparison with the same quarter of 2001, whilst the number of creditor's bankruptcy petitions has leapt by 32 per cent.

ARBITRATION

Shalson v DF Keane Ltd

Ch Div (Blackburne J). Lawtel, 21 February 2003.

The service of statutory demands did not initiate 'legal proceedings' as defined by section 82(1) of the Arbitration Act 1996 and accordingly the possibility of a referral to arbitration did not warrant a 'stay' of the statutory demands under section 9(1) of the Act.

BANKING

Nomura International plc v Credit Suisse First Boston International

QBD (Commercial Court) (Langley J). [2002] EWHC 160 (Comm). Lawtel, 13 February 2003.

An ISDA agreement between the claimant and the defendant provided that the occurrence of a credit event would entitle the claimant to deliver non-contingent bonds to the defendant. A credit event occurred and the claimant

attempted delivery of bonds that gave the bondholder the option of giving up his right to repayment in return for shares. The defendant refused to accept the bonds, claiming that they were contingent. Langley J held that the bonds were non-contingent. He said that the payment obligation under a bond is subject to a contingency when the holder may be deprived of the full benefit of it by some external event over which he has no control but not by a provision exercisable at the bond-holder's option and designed to protect his own interests.

Papamichael v National Westminster Bank plc

QBD (Commercial Court) (HHJ Chambers QC). [2003] EWHC 164 (Comm). Lawtel, 14 February 2003.

The claimant paid drachmas to the bank in the mistaken belief that they would be converted into dollars to be held in her name for a fixed term on the expiration of which they would be repaid with accrued interest. However, her husband instructed the bank to pay the monies into his own account. The bank took some of the dollars from the husband's account in order to satisfy his indebtedness to the bank. The claimant brought proceedings against the bank. HHJ Chambers QC held that the bank could not rely on the defence of change of position because (1) the bank's change of position had not been caused by the mistake and (2) the bank had changed its position in bad faith, as it had wilfully and recklessly failed to make such inquiries as an honest and reasonable man would have made. Therefore the claimant's restitutionary claim against the bank succeeded. Alternatively, a constructive trust arose of the dollars as a result of the husband's fraud and breach of fiduciary duty, and the bank was liable by reason of dishonest assistance in a breach of trust and, to the extent that it received the dollars, for knowing receipt.

Nigel Clayton, 'The FSA and Articles 1 and 6 of the ECHR,' (2003) 24 Company Lawyer 41.

Professor Robert Pennington, 'The interchangeability of fixed and floating charges,' (2003) 24 Company Lawyer 60.

COMPANY

BWE International Ltd v Phillip Jones

CA (Dame Elizabeth Butler-Sloss P, Thorpe and Arden LJJ). Lawtel, 18 February 2003.

A purported share transfer notice did not state the price of the shares but instead set out a formula by which the price could be determined by way of a number of calculations and adjustments. The Court of Appeal held that on a true construction of the articles of association the price had to be fixed and certain at the date of the transfer notice. The word 'specify' as contained in the terms of the articles was to be defined as setting out the price in detail, wholly and explicitly. Therefore the purported transfer notice did constitute a valid transfer notice under the articles of association.

Union Music Ltd v Watson

CA (Peter Gibson, Buxton and May LJJ). Lawtel, 31 January 2003.

The Court of Appeal held that the judge was wrong not to exercise his discretion to make an order under section 371 of the Companies Act 1985 to break the deadlock in the board. The thinking behind section 371 was that a company should be able to get on with managing its affairs and should not be frustrated by the impracticability of calling a general meeting. The court ought to take into account the right of a majority share-holder to remove or appoint directors. Group Ltd v Harman [1994] 1 WLR 893 and Ross v Telford and Linkside Development Co Ltd [1998] 1 BCLC 82 distinguished.

Ross Grantham, 'Can Directors Compete with the Company?' (2003) 66 MLR 109.

CONFLICT OF LAWS

Anton Durbeck GMBH v Den Norske Bank ASA

CA (Lord Phillips MR, Brooke, Laws LJJ). Lawtel, 3 February 2003. The Times, 6 February 2003.

Where the decision to arrest a vessel in Panama was made by the London branch of the respondent mortgagee bank, the English court had jurisdiction over the action. London was not the most convenient forum, but London should be available as an alternative jurisdiction. Appeal allowed. Leave to appeal to the House of Lords granted.

DAMAGES

Habton Farms v Nimmo

CA (Auld, Clarke and Jonathan Parker LJJ). [2003] EWCA Civ 68. New Law Online, 6 February 2003. The Times, 7 March 2003.

The defendant agreed to purchase a racehorse from the claimant, seemingly as an agent but in fact without his principal's authority. The purchase price was not paid. The racehorse fell ill and died. The claimant brought proceedings alleging that the defendant had breached his warranty of authority and claiming the purchase price in full. It was held that the agent had no actual, implied or ostensible authority and was liable for breach of warranty of authority. The Court of Appeal held (Jonathan Parker LJ dissenting in part) that the measure of damages was not the difference between the contract price and the market value of the chattel at the relevant time. Rather, the question was whether the claimant's decision not to sell the horse to another buyer had arisen out of the transaction. On the facts, it was only as a result of the defendant's breach of warranty that the claimant was still pursuing a non-existent contract and seeking to effect delivery under it in return for the price. The appropriate measure of damages was the purchase price in full.

DIRECTORS DISQUALIFICATION

David Walker v Secretary of State for Trade and Industry

Ch Div (Peter Smith J). [2003] EWHC (Ch) 175. Lawtel, 18 February 2003.

The appellants' failure to take advice on the company's VAT liability after they had become aware that it was insolvent did not amount to such a high standard of incompetence that it rendered them unfit to be involved in the management of a company. The appellants had acted in good faith in the interests of the company and its creditors. They had had no means of knowing that VAT treatment would be dealt with differently if the sales had proceeded in the administrative receivership or the liquidation.

INSOLVENCY – CORPORATE

HM Customs & Excise v Allan

Ch Div (HHJ Gilliland QC). Lawtel, 17 February 2003.

Where an interested person seeks to review a block transfer of a liquidator's appointment made under paragraph 1.6 of the Practice Direction on Insolvency Proceedings, the Court must consider the applicant's objections and any new evidence in order to decide whether it ought to have made the order. HHJ Gilliland QC held that the Court must ask whether the applicant's objection is one that a reasonable creditor could entertain and whether the convening of a creditors' meeting would have served any useful purpose. If the Court is satisfied that a creditors' meeting would have been unlikely to serve any useful purpose, the original block transfer order will continue in force.

Re Independent Insurance Co Ltd

Ch Div (Ferris J). [2003] EWHC 51 (Ch). New Law Online, 24 January 2003. Lawtel, 24 January 2003.

Two partners in an accountancy firm were appointed joint provisional liquidators ("JPLs") of the company. They applied to the court to fix their remuneration under r 4.30 of the Insolvency Rules 1986. Ferris J held that the

JPLs were entitled to use their staff to carry out various document management tasks, rather than engaging agency staff which would have been likely to be significantly cheaper, although it was possible to envisage other cases where a large part of the work could be carried out by the staff of the insolvent company. Further, the firm's hourly charging rates were reasonable. Having regard to the size and difficulty of the task, no discount should be made from normal hourly rates. Ferris J also held that the JPLs were entitled to charge for taxation advice provided by the firm's tax partners, as the tax issues in the liquidation were difficult and important and the JPLs were justified in seeking taxation advice of the highest calibre. However, a separate charge for secretarial services in the sum of £20,000 was provisionally disallowed pending a fuller explanation of the reason why it was considered that the secretarial services in question should be included in the claim for remuneration rather than being left to be borne as part of the firm's overheads. Finally, in a substantial insolvency which continued for a long time the office holders needed to receive remuneration on account from time to time and the JPLs would be authorised to draw on a monthly basis 80 per cent of their estimated remuneration. The JPLs had established a "track record" which satisfied the court that their estimates could be trusted.

Re Marini Ltd; Cohen v Dickenson

Ch Div (HHJ Richard Seymour QC). Unreported, 3 March 2003.

The three directors of the company in liquidation (being also its three sole shareholders) caused the company to pay a dividend on £120,000. At the date of the dividend, the sole relevant accounts for the purposes of section 270 Companies Act 1985 ("the Act") were its last annual accounts. Those accounts disclosed profits available for distribution of only £52,000. The liquidator claimed repayment of the entire £120,000. The respondents (who had honestly and reasonably relied on the company's auditors in paying the dividend) invoked section 727 of the Act, and contended in any event that their liability was limited to the amount by which the dividend exceeded the available profits in the relevant accounts. It was held: (1) the respondents' liability was limited to the excess (Precision Dippings Ltd v Precision Dippings Marketing Ltd [1985] 1 Ch 447 (CA) distinguished); but (2) the court would not exercise its discretion under section 727 in the respondents' favour at the expense of unsecured creditors. They were consequently liable to repay £68,000 in accordance with the proportions received by each.

[Andreas Gledhill]

Secretary of State for Trade and Industry v Frid

Ch Div (David Mackie QC). The Independent, 3 February 2003.

A debt owed by the Crown to a company in liquidation could not be set off against money due to the Crown for payments made after the liquidation: a liability which was only contingent at the date of liquidation could not be set off.

Sandra Bristoll, 'Schemes of Arrangement: a Question of Class,' (2002) 18 Insolvency Law and Practice 185.

[Sandra Bristoll]

David Milman, 'Enterprise Act 2002,' [2003] Insolvency Lawyer 43.

David Milman, 'The Administration Moratorium: a Fresh Twist to the Tale,' [2003] Insolvency Lawyer 60.

Gabriel Moss QC, 'Centre of Main Interests and Individuals: Two Early Cases,' (2003) 13 Insolvency Intelligence 13.

[Gabriel Moss QC]

Gabriel Moss QC and Tom Smith, 'Cross-Border and Insurance Insolvency,' [2003] Insolvency Lawyer 43.

[Gabriel Moss QC and Tom Smith]

Marion Simmons QC, 'What proceedings are barred by administration orders?' (2003) 16 Insolvency Intelligence 9. **[Marion Simmons QC]**

INSOLVENCY – PERSONAL

Grady v Prison Service

EAT (Judge McMullen). The Times, 24 February 2003.

A person made bankrupt since lodging a notice of appeal lacked standing in the Employment Appeal Tribunal to appeal the striking out of her various claims in an employment tribunal, including a claim for unfair dismissal. Judge McMullen referred to Heath v Tang [1993] 1 WLR 1421, identifying a distinction between cases personal to the bankrupt, the right of action being unaffected by the bankruptcy, and all other claims, where the right vested in the trustee in bankruptcy. The wrongful dismissal, breach of contract and disability claims vested in the trustee, even though the disability claim was hybrid in nature.

Re Grieves

Ch Div (Mr L Henderson QC). Lawtel, 11 February 2003.

A debtor appealing from a bankruptcy order made in his absence submitted that the decision to make the order was unjust due to the fact that he had not been notified of the further hearing date. It was held that there had been a procedural irregularity, as the debtor had not been notified of the adjourned hearing despite calling the registrar's clerk a week earlier explaining his non-attendance at the previous adjourned hearing. There was no evidence on the court file to indicate that the debtor had been informed of the hearing. It was essential that anyone involved in litigation should know when a hearing was to take place, especially in the bankruptcy field. The failure to inform was serious. It was not just and right to make the bankruptcy order in the debtor's absence.

INTERIM RELIEF

Flightline Ltd v Edwards

CA (Ward, Laws and Jonathan Parker LJJ). [2002] EWCA Civ 63. New Law Online, 5 February 2003. The Times, 13 February 2003.

Flightline obtained an order freezing Swissair's assets in England and Wales up to the value of £4.2m. In February 2002 Swissair was expecting to receive from IATA a payment in excess of £4.2m. Orders were made by consent for the £4.2m to be paid into an account in the joint names of the parties' solicitors and for the freezing order to be discharged on the basis on an undertaking by Swissair not to withdraw, dispose of or deal with the moneys in the joint account up to a limit of £3,325,000 pending further order or consent of both firms. Provisional liquidators of Swissair were appointed and it was compulsorily wound up. Flightline applied for leave to continue its action under section 130(2) of the Insolvency Act 1986. Neuberger J ([2002] 1 WLR 2535) concluded that Flightline had a charge over the moneys in the joint account to secure any judgment it might obtain up to a maximum of £3.325m and he accordingly granted Flightline leave pursuant to section 130(2). The liquidators appealed arguing that the effect of what took place in relation to the setting up of the joint account was not to create a charge. Allowing the appeal, the Court of Appeal held that a freezing order did not create a security right over the assets from time to time subject to it because it did not impose an obligation on the part of the respondent to satisfy any judgment debt out of those assets. In order for an equitable charge to be created over a specific fund, it is necessary to find not merely a restriction on disposal but also an obligation on the debtor to pay the debt out of the fund. Palmer v Carey [1926] AC 703 and Swiss Bank Corp v Lloyds Bank Ltd [1982] AC 584 approved. A freezing order prevented the misapplication of assets but did not without more create a security right. The consent orders did not achieve anything more than the continuation of

interim protection of a freezing nature and a provision to the effect that, if Flightline was successful in the action, it was entitled to be paid out of the joint account could not be implied. The judge was wrong to conclude that the consent orders conferred a security right on Flightline and was therefore wrong to grant leave to continue the action. **[Gabriel Moss QC, Martin Pascoe QC, Jeremy Goldring, Lucy Frazer)**

Parker v CS Structured Credit Fund Ltd & Elegant Hotels Ltd

Ch Div (Mr Gabriel Moss QC). New Law Online, 12 February 2003.

The claimant applied for the disclosure of documents, contending that CPR r. 25.1(i)(g) created a free standing jurisdiction to order the disclosure of information irrespective of whether the applicant had sufficient material to seek a freezing injunction. The application was dismissed. It was held that CPR r. 25.1(i)(g) did not create a free standing jurisdiction to order the disclosure of information that might in some remote sense be relevant to a possible application for a freezing injunction. CPR r 25.1(i)(g) dealt with a situation where there was either an application for a freezing injunction on foot or one where it was at least likely that there would be such an application. The provision assumed there was credible material upon which an application might be based. There would have to be a strong case made out by the claimant on credible evidence if the court was to be persuaded to take such a course. Here there was no such evidence and there was no reason why the court should take the risk of hardship to the defendants. **[Gabriel Moss QC]**

Sheila Myers v Design Inc (International) Ltd

Ch Div (Lightman J). [2003] EWHC (Ch) 103. Lawtel, 31 January 2003.

The claimant contended that CPR r. 25.1(1)(l) enabled the court to order a defendant to pay into court a debt of £900,000. Lightman J held that a debt is a chose in action. It is not itself a specified fund, and it does not give rise to the existence of a specified fund in which the claimant had a proprietary interest. Therefore the debt did not constitute a 'specified fund' within the meaning of that rule. An alternative course for the claimant was to apply for a freezing order under CPR 25.1(1)(f)(ii).

PARTNERSHIP

Bank of Scotland v Henry Butcher & Co

CA (Aldous, Chadwick and Munby LJJ). [2003] EWCA Civ 67. Lawtel, 13 February 2003, The Times, 20 February 2003.

Where a contract entered into by a partnership for the purpose of its business requires an act to be done, that act (when done) is itself to be regarded as done for the purpose of the partnership business for the purposes of section 5 of the Partnership Act 1890, notwithstanding that (absent the contract) the act would have been outside the usual business of the partnership. Once a partnership has treated a particular transaction as part of its business then, whether or not that transaction is part of the regular business of the partnership, the transaction becomes part of the partnership business with the consequence that the partnership is bound not merely by the transaction but also by any other liabilities connected with or entered into with reference to or part of the transaction. Sandilands v Marsh (1819) 2 B & Ad 673 followed. Decision of Michel Kallipetis QC (Bank of Scotland v Henry Butcher & Co [2001] 2 All ER (Comm) 691) upheld. Munby LJ stressed the importance of complying with Practice Direction (Court of Appeal: Citation of Authority) [1995] 1 WLR 1096, Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 and paragraphs 5.6(7), 5.8 and 15.11 of the Practice Direction supplementing CPR Part 52.
[Anthony Zacaroli]

PROCEDURE

Dexter Ltd v Vlieland-Boddy

CA (Peter Gibson, Clarke and Scott Baker LJJ). [2003] EWCA Civ 14. New Law Online, 24 January 2003.

Where new proceedings involved allegations similar to those relied on in a previous action, the mere fact that matters could have been litigated in earlier proceedings did not make subsequent proceedings necessarily an abuse of process. Rather, it was for the defendant to prove that the new proceedings were abusive. Johnson v Gore Wood and Co [2001] 2 WLR 72 applied.

PROFESSIONAL NEGLIGENCE

Equitable Life Assurance Society v Ernst & Young

Queen's Bench Division (Commercial Court) (Langley J). [2002] EWHC 112. New Law Online, 10 February 2003. The Times, 24 February 2003.

The claimant alleged that the defendant had been negligent in the carrying out audits, contending that the claimant's statutory accounts ought to have included substantial technical provisions in relation to guaranteed annuity options. The claimant calculated quantum either as the loss of not selling the business and assets or as the loss suffered by declaring bonuses that would not otherwise have been declared. The defendant applied to strike out the claim. Langley J held that a fall in the value of the claimant's assets was not a consequence falling within the scope of an auditor's duty. South Australia Asset Management Corporation v York Montague Ltd [1997] AC 191 followed. However, the loss sustained by the claimant by declaring bonuses that would not otherwise have been declared was arguably a consequence falling within an auditor's duty. But the pleaded bonus declaration schemes were fanciful in approach and amount. Nevertheless, the claimant ought to be given an opportunity to consider the bonus declaration claims and decide whether or not it wished to present them differently.

TRUSTS

Re Barr's Settlement Trusts

Ch Div (Lightman J). [2003] EWHC (Ch) 114. Lawtel, 6 February 2003. (2003) 1 All ER 763.

The application raised unresolved questions as to the ambit and application of the rule in Hastings-Bass [1975] Ch 25, which requires that a trustee when exercising a power shall take into account all relevant considerations and refrain from taking into account any irrelevant considerations, and opens his decision to challenge if he fails to do so. Lightman J held as follows. Firstly, it must be shown that the unconsidered relevant consideration would or might have affected the trustee's decision. Secondly, it must be shown that the trustee in making his decision has failed to consider what he was under a duty to consider. If the trustee has in accordance with his duty identified the relevant considerations and used all proper case and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and his decision cannot be impugned merely because in fact that information turns out to be partial or incorrect. Thirdly, a successful challenge made to a decision under the rule should in principle result in the decision being held voidable and not void.

Hulbert v Avens

Ch Div (HHJ Richard Seymour QC). The Times, 7 February 2003.

While a cause of action for breach of trust arose at the moment that a trustee paid away money to a third party in breach of trust, equitable compensation for that breach of trust should be assessed on the basis of the loss suffered by the trust fund, or beneficiaries in the case of a trust which was at an end by the time that the action had been brought, as at the date of the judgment, not as at the date of the breach.

VOLUNTARY ARRANGEMENTS

Phillips v Stanley

Ch Div (Mr L Henderson QC). Lawtel, 7 February 2003.

Where debtors had failed to comply with certain obligations under a voluntary arrangement, a deputy district judge had erred in granting declara tions to the effect that all obligations had been complied with. Those failures occurred during the currency of the arrangement and therefore it could not be said that a mere effluxion of time rendered those failures irrelevant or immaterial.

TALKS AND SEMINARS

Marion Simmons QC gave a talk to the Disciplinary Conference 2002 entitled 'What the Law Says: A Legal Update'. **[Marion Simmons QC]**

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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