

3/4 DIGEST



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

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The implementation of the corporate insolvency provisions in the Enterprise Act 2002 has become a reality. A number of related statutory instruments were passed in the days immediately prior to 15 September 2003 and the DTI website remains essential reading in order to remain up to date. Several statutory instruments have already been produced in relation to the scope of the new prohibition on the appointment of administrative receivers (see below).

We are yet to see any cases arising from the new provisions. However, the limits of the EC Regulation on insolvency proceedings and the long-arm jurisdiction of the English courts have now been challenged abroad. ISA Daisytek SAS concerned a number of German companies and a French company placed into administration in England on the basis of the location of their centre of main interests. In early September, the French Court of Appeal in Versailles reversed a lower court's decision to place the French company into French insolvency proceedings as main proceedings for the purpose of the regulation despite the pre-existing English order. It was held that the existence of a certified copy of the decision was sufficient in France to require the Court to recognise the English proceedings as main proceedings. The French office holder was required to pay the costs of his wrongful appointment by the French court.

This edition of the Digest was compiled by Marcus Haywood.

Richard Fisher

GENERAL NEWS

Those parts of the Enterprise Act 2002 concerning corporate insolvency, the right to appoint an administrative receiver, the abolition of Crown preference and the amendment of a trustee in bankruptcy's power to commence certain types of proceedings without leave came into force on 15 September 2003. The remaining provisions of the Act which related to individual insolvency and the

reform of the Insolvency Service's financial regime will come into force on 1 April 2004.

The Insolvency Act 1986 (Amendment) (Administrative Receivership and Capital Markets Arrangements) Order 2003 SI 1468/2003 expands the definition of "capital market arrangement" in Schedule 2A to the act for the purpose of section 72B. The Insolvency Act 1986 (Amendment) (Administrative Receiver-

ship and Urban Regeneration Etc) Order 2003 SI 1832/2003 will insert new exceptions to the prohibition contained in section 72A against appointing an administrative receiver, being a new section 72DA concerning urban regeneration projects and a new section 72GA concerning companies holding certain appointments under the Water Industry Act 1991, protected railways companies (under section 59 of the Railways Act 1993) and a licence company within the meaning of section 26 of the Transport Act 2000.

The Companies (Acquisition of own Shares) (Treasury Shares) Regulations 2003 (SI 2003/1116) have been published which provide for certain companies to purchase their own shares without cancelling them as is normal under ss159-181 of the Companies Act 1985. Shares purchased out of distributable profits may be held "in treasury" for sale at a later date or transferred to an employee share scheme. The provisions are aimed at companies with listed shares. The provisions are expected to come into effect on 1 December 2003.

BANKING

**D P Mann & ors
v Coutts & Co**

**Q.B. Div (Commercial
Court) (Andrew Smith J).
16 September 2003.**

A claim for misrepresentation was brought against Coutts in respect of loss allegedly suffered as a result of describing an account as a "client account" and implying therefore that the monies were unavailable for set-off against indebtedness in another account held at the bank. The court held that, although the term 'client account' did not have an unambiguous meaning, the unqualified reference to an underwriting agency's 'client account' in a letter written by the defendant bank might reasonably have conveyed to the reader that the funds in the account were not subject to any right of set-off or charge. Since Coutts did on the facts of the particular case have such rights of set-off, the letter was potentially misleading. However, since the bank did not know that the letter might be relied on by the claimant underwriters it did not assume any responsibility to them in relation to those decisions. In addition, the claimants' own failure to properly to

investigate broke the chain of causation and prevented the claimants from arguing that any loss that they subsequently suffered resulted from the bank's letter.

COMPANY

**Bhullar v Bhullar;
Re Bhullar Bros Ltd**

**Court of Appeal
(Schiemann, Brooke, Parker
LJJ). [2003] 2 BCLC 241.**

Property acquired by the directors of a company in breach of their fiduciary duty to the company would be held on trust by the directors for the company.

Pey-Woan Lee, 'Serving Two Masters – the Dual Liabilities of Nominee Directors in Corporate Groups', *Journal of Business Law*, September 2003, page 449.

CONFLICT OF LAWS

**Peer International
Corporation v Termidor
Music Publishers Co Inc**

**Court of Appeal (Aldous,
Mance, Latham LJ).
The Times, 11 September
2003.**

There was no exception to the rule that English law would recognise a foreign governmental act affecting proprietary rights if that act was valid in the country

where the property right was situated. The decision of *Lorentzen v Lydden* [1942] KB 202 was wrongly decided.

CONTRACT

Shamil Bank of Bahrain E.C v Beximco Pharmaceutical Ltd. and Others

Q.B. Div. (Commercial Court) (Morison J).

1 August 2003.

In an application by the bank for summary judgment, it was held that, on a true construction of the following clause contained in a number of agreements between the parties: 'Subject to the principles of Glorious Sharia'a this Agreement shall be governed by and construed in accordance with the laws of England' those agreements were enforceable in so far as they complied with English law only. The defendants' interpretation of the clause (that the parties had chosen a proper law (English law) but subjected the agreements to a condition precedent that they were only to be enforceable insofar as consistent with the principles of Sharia law) was rejected by the Court on the basis that the parties could not have intended a secular English court to determine what the court regarded as highly controversial Sharia principles.

The Defendants have since obtained permission to appeal.

[Richard Hacker QC and Mark Arnold]

DAMAGES

Ali Reza-Delta Transport Co. Ltd v United Arab Shipping Co. S.A.G.

Court of Appeal (Gibson, Tuckey, and Nelson LLJ). [2003] 2 Ll. Rep. 450.

On proof of the tortious destruction of a chattel the owner is prima facie entitled to damages reflecting the market value of the chattel 'as is'. He is so entitled whether or not he intends to obtain a replacement. The market or the resale value is to be assessed on the evidence, there being no standard measure applicable to all circumstances.

FINANCIAL SERVICES

The Financial Services Commissioner v The Queen (on the application of a Gibraltar Company, X, Y and Z other respondents)

Gibraltar Court of Appeal. 19 September 2003.

On an application for judicial review and constitutional challenge of a decision by the Financial Services Commissioner of Gibraltar (FSC) to transmit information obtained by use of compulsory powers to

assist a foreign regulator, arguments based on the European Convention on Human Rights and the Gibraltar Constitution were rejected. The Gibraltar Court of Appeal also dismissed an argument that disclosure would be unlawful because it would circumvent the Gibraltar Evidence Ordinance. However, on the specific facts of the case, the decision of the FSC to disclose information was quashed.

[Glen Davis]

INJUNCTIONS

Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and Another

Privy Council (Lords Walker, Lourse, and Leggatt).

The Times, 25 September 2003.

The Privy Council had jurisdiction to grant an interlocutory injunction to preserve the subject matter of a pending appeal and to ensure that any order which it made on the eventual hearing of the appeal should not be rendered nugatory. The jurisdiction depended on the power of any superior court to supervise and protect its own procedures. The principles to be applied in determining whether to grant relief were those laid

down in *American Cyanamid Co v Ethicon Ltd* ((1975) AC 396) but with modifications appropriate to the public law element of the case.

INSOLVENCY – CORPORATE

Re Buildlead Ltd

**Ch Div (Companies Court)
(Evans Lombe J), 8 August
2003. [2003] EWHC 1981 (Ch).**

The Respondent had commenced proceedings for the removal of the liquidator of the company pursuant to section 108 of the Insolvency Act 1986. The liquidator sought security for its costs pursuant to r 4.120(3) of the Insolvency Rules 1986. The court held that the proper approach to the use of the powers conferred by r 4.120(3) of the Insolvency Rules 1986 was a merit-based approach rather than a security-based approach. If a security-based approach was adopted, the wide ambit of the power conferred by r 4.120(3) would be inconsistent with the conditions for ordering the giving of security for costs contained in CPR r 25.13. In the scheme of the Insolvency Rules generally, r 4.120(3) was best read as a power intended to be exercised by the court at the first filter stage. If, at that stage, the

court concluded that the case to remove the liquidator, though arguable was likely to fail, it would order the applicant to bring a sum of money into court or otherwise give security for the liquidator's costs as an alternative to dismissing the application forthwith.

Commissioners of Inland Revenue v Blueslate Ltd & Others

**Ch Div (Companies Court)
(Hart J). 23 September 2003.**

The commissioners applied for an order against the company and its joint liquidators to obtain access to certain documents of the company under sections 112 and 155 Insolvency Act 1986 or, alternatively, under CPR r 31.16. The commissioners contended that, inter alia, pre-action disclosure was necessary to ascertain whether or not they should commence misfeasance proceedings under section 212 of the 1986 Act against the company's directors and the liquidators.

The court held that the precise legal basis of the contemplated proceedings was not clear. An application under sections 112 and 155 of the 1986 Act would only be entertained where its purpose was a legitimate purpose of the winding-up.

To afford the commissioners voluntary disclosure in advance of the precise identification of the issues would militate against the efficient case management of potential proceedings. Neither was the court persuaded that at this point it was in the interest of the general body of creditors to make the order sought under section 155 of the 1986 Act. In the absence of a properly particularised claim, it was difficult to be satisfied whether the documents sought would fall within standard disclosure and whether the criteria in CPR r 31.16(d) would be satisfied.

[Andreas Gledhill]

Fraser & ors v Oystertec plc & ors

**Ch Div (Patents Court)
(Peter Prescott QC).
8 September 2003.**

An agreement entered into by a business according to which it might be peremptorily deprived of a valuable patent on the grounds of its insolvency, by unilateral action to be taken pursuant to that agreement, was null and void because it was contrary to public policy and founded on an attempt to contract out of the insolvency laws. However, on the facts, the claimants were refused the declaratory relief sought.

ISA Daisytek SAS
Court of Appeal of
Versailles. 4 September
2003.

Notwithstanding the making of an administration order in England in respect of a French company on 16 May 2003 as a main proceeding for the purpose of the EC Regulation on Insolvency Proceedings, on 26 May 2003 the Tribunal de Commerce of Pontoise made a French administration order in respect of the same company also as a main proceeding. The Court of Appeal in Versailles reversed that decision: articles 16 and 17 of the EC Regulation on Insolvency Proceedings required recognition in France, without any further formality, of the fact that the English court had opened a main proceeding on the 16 May 2003 on the basis that the company's centre of main interests was in England. The French court had no jurisdiction to open a main proceeding in respect of the same company.

The Respondents' arguments based on article 6 of the European Convention (claiming that there was a lack of proper notice to those running the Company when the administration order was obtained) and under article 26 of the EC Regulation were dismissed. The Company had

been represented by its director when it obtained the administration order in England and, even if there had been some procedural irregularity in Leeds, this was a matter which had to be raised in an application attacking the English administration order and could not be raised in France. The production of a certified copy of the administration order was sufficient in France. The French administrator, wrongfully appointed by the French court, was ordered to pay all the costs.

James Dolman & Co Ltd
v Pedley
Court of Appeal
(Schiemann, Rix, Arden LJ)
[2003] All ER (D) 171 (Sep).

There was no rule of practice that a petition would be struck out or dismissed merely because a company alleged that a debt was disputed, although the court would not allow a winding up petition to be used for deciding a substantial dispute raised on bona fide grounds. In the instant case, however, once the judge had reached the conclusion that there was no bona fide or substantial dispute in relation to the sum claimed by the defendant under the statutory demand,

it had been inconsistent to restrain the advertisement of the winding up petition until the conclusion of county court proceedings between the parties. Even if the county court proceedings had been resolved in favour of the claimant, that would not have affected the later demand for rent under the statutory demand.

Re Recover Ltd, Hornan
v Latif Group
Ch Div (Companies Court)
(Pumfrey J). [2003] 2 BCLC
186.

The liquidator's solicitor had formerly been a partner in the company's solicitors with conduct of the litigation on behalf of the company. Their bill was the largest proof accepted by the liquidator. The respondent sought removal of the solicitor for the liquidator. The court held that, although it retained a supervisory jurisdiction over solicitors which permitted it to take steps to ensure that a solicitor did not remain on the record in litigation, that jurisdiction would be exercised with caution. It was necessary to scrutinise the facts of the case and assess whether there had been a conflict of interest. On the evidence there was no such risk in the present case.

Robin Henry, "The EC Insolvency Proceedings Regulation secures a centre of main interest", [2003] Sweet and Maxwell Company Law Newsletter Issue 13.

David Marks, 'Insolvency Act 2000: The Practitioner's Exposure to the Cold Winds of the Moratorium.' *Insolvency Intelligence*, Vol. 16, No. 8, September 2003.

[David Marks]

INSOLVENCY – PERSONAL

**Grady v HM Prison Service
Court of Appeal (Thorpe,
Sedley LJ and Richards J).
[2003] BPIR 823.**

The appellant's proceeding against her former employer for unfair dismissal, wrongful dismissal and disability discrimination did not involve a 'hybrid claim' in which all elements vested in the trustee in bankruptcy, but rather they were three separate claims arising out of a single event. A claim in respect of unfair dismissal was personal (as opposed to proprietary) in that it invoked the right to be reinstated. It did not therefore vest in the trustee on behalf of the estate on bankruptcy. However, the fund produced by a successful claim resulting in an award might vest in the estate.

**Housiaux and another v
HM Customs and Excise
Court of Appeal (Thorpe,
Chadwick LJ and Morland J).
[2003] BPIR 858.**

The district judge could not be criticised for his decision to award costs against the debtor and his wife on a successful application for annulment where the statutory demand had been served at the debtor's premises and collected by the debtor's wife who had neglected to bring the matter to his attention. It was reasonable in the circumstances to assume that debtor and his wife could communicate about administration of the debtor's business affairs. Per curiam, when a court was asked to annul a bankruptcy order under section 282 of the Insolvency Act 1986 by consent, the court should not make such an order until it was satisfied on investigation of the facts that the bankruptcy order ought not to have been made.

**Popely v Popely
Ch Div (Bartley Jones QC).
The Times, 15 September
2003**

The rule permitting the court to set aside a statutory demand where a counterclaim exceeded the total of the demand, extended to the situation where the demand was based on a

costs order made in the proceedings in which the counterclaim was being pursued. Although some limits had to be implied when defining the term 'counterclaim' in rule 6.5(4)(a) of the Insolvency Rules 1986 it was clear that such a limitation should not be implied in the present case. Bankruptcy was not a form of execution. There was no doubt that rule 6.5(4)(a) permitted the court to set aside a demand based on costs orders where the counterclaim related to proceedings wholly separate from the proceedings in which the costs orders were incurred.

PARTNERSHIPS

Elspeth Deards, 'Limited Partnerships: Limited Reforms', *Journal of Business Law*, September 2003, page 435.

RECEIVERS

**Commissioner of the Inland
Revenue v Piacentini
Q.B. Div (Administrative
Court) (Lightman J).
[2003] EWHC 113 (Admin);
[2003] BPIR 812.**

A court appointed receiver was, like an out of court receiver acting in an agency capacity, not assessable to capital gains tax in respect of her realisations. Sections 75 and 77 of the Taxes

Management Act 1970 could have no effect on, or application to, a court appointed receiver as they were founded on the wrong premise, namely that an out of court receiver was assessable.

TALKS AND SEMINARS

On 1 September 2003 Richard Sheldon QC and Daniel Bayfield spoke to members of the R3 Association of Business Recovery Professionals in Newport on the Colt administration and recent developments in insolvency case-law.

**[Richard Sheldon QC,
Daniel Bayfield]**

Barry Isaacs gave a talk on legal advice privilege and third party disclosure to Norton Rose on 16 September 2003.

[Barry Isaacs]

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