

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 10 No 4 April 2004

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The Court of Appeal has delivered an important judgment on the scope of legal advice privilege in *BCCI v Bank of England* (No 10). Legal advice privilege does not extend to all solicitor/client communications on matters within the ordinary business of the solicitor and referable to the relationship. Where a solicitor/client relationship is formed for the purpose of obtaining advice or assistance in relation to rights and liabilities, broad protection will be given to communications passing in the course of that relationship. The same principle does not apply when the dominant purpose is not the obtaining of advice and assistance in relation to rights and liabilities. Barry Isaacs appeared for the Liquidators; Ben Valentin appeared for the Bank.

The Liquidators of BCCI were also successful in their claim against Bank of India under section 213 of the Insolvency Act 1986. The Bank was found to have participated in a fraudulent scheme devised by BCCI to enable it to manipulate its accounts and has been ordered to pay US\$82.3 in compensation. Blair Leahy appeared for the Liquidators.

This edition of the Digest was compiled by Stephen Robins.

Blair Leahy

GENERAL NEWS

The Insolvency (Amendment) Rules 2004 (SI 2004/584), which came into force on 1 April 2004, have made a number of amendments to the Insolvency Rules 1986 (SI 1986/1925). The full text is available online at <http://www.legislation.hmso.gov.uk/si/si2004/20040584.htm>.

As a result of the draftsman's oversight, rule 28 of the Insolvency (Amendment) Rules 2004, which governs the contents of the proof of debt in bankruptcy proceedings, requires the bankrupt's creditor to state "the total amount of his claim ... as at the date on which the company went into liquidation" and "particulars of how and when the debt was incurred by the company". It is anticipated that these errors will be corrected by the Insolvency (Amendment No 2) Rules 2004, which are currently expected to come into force on 3 May 2004. The full text of the draft statutory instrument is available online at <http://www.insolvency.gov.uk/legislation/enterpriseact/insolvencyrules-n2-26march2004.doc>.

AGENCY

Cooper v Pure Fishing (UK) Ltd

CA (Peter Gibson and Tuckey LJ and Sir Martin Nourse).

[2004] EWCA Civ 375.

Regulation 17 of the Commercial Agents (Council Directive) Regulations 1993 entitles a commercial agent to compensation "after termination of the agency contract". In *Light v Ty Europe Ltd* [2003] EWCA Civ 1238, the Court of Appeal concluded that the word "termination" meant no more than "comes to an end" so an agent whose agency contract came to an end by effluxion of time was entitled to compensation. Regulation 18 provides that the compensation referred to in regulation 17 shall not be payable where the principal has terminated the agency contract because of default attributable to the commercial agent that would justify immediate termination. The question falling to be determined was whether the principal can be said to have

“terminated” an agency contract “because of default attributable to the commercial agent” simply by not renewing a contract which expires by effluxion of time. The Court of Appeal held that failure to renew a contract was not the same thing as termination of the contract by the principal. Read as a whole, the natural meaning of regulation 18 was that the principal has done something unilaterally to bring the contract to an end and that his reason for doing so is some default on the part of the agent which justifies summary termination. Failure to enter into a future contract cannot be characterized as termination.

BANKING

Credit Suisse (Monaco) SA v Attar & Attar

QBD Comm Court (Gross J).

[2004] EWHC 374 (Comm).

The first defendant presented an endorsed cheque to the claimant, a bank based in Monaco. The claimant credited the first defendant’s Monegasque account with the proceeds. The first and second defendants then spent the money. It became apparent that the cheque had been misappropriated. The claimant brought proceedings against the first and second defendants. It was held that the law of Monaco governed the receipt of the proceeds of the cheque. Liability for restitution under Monegasque law was strict, and there was no defence of change of position. Even if English law had applied, the defence of change of position would not assist the defendants as there was no causal link between the mistaken receipt of the proceeds and the change of position. Scottish

Equitable plc v Derby [2001] 3 All ER 818 applied. Further, the first defendant owed a duty of good faith to the claimant. He had blind-eye knowledge that the cheque had been the subject of a fraud. Accordingly, he breached the duty of good faith by presenting the cheque to the claimant.

COMPANY LAW

Vectone Entertainment Holding Ltd v South Entertainment Ltd

Ch D (R Sheldon QC).

[2004] EWHC 744 (Ch).

On an application under the Companies Act 1985 section 371 for the court to convene a meeting of the company, the court in the exercise of its discretion will allow a company to manage its affairs without being frustrated by the impracticability of calling or conducting a general meeting. Where the company is unable to manage its affairs properly as a result of a falling out amongst the shareholders, the court will take into account the ordinary rights of the majority shareholder, provided that no class or substantive rights of the minority shareholder would be overridden by the convening of a meeting. A quorum provision does not of itself confer such rights. An application under section 371, where the evidence is incomplete, is not the appropriate forum to deal with contentions that the proposed meeting would unfairly prejudice the minority shareholder.

[Richard Sheldon QC]

CONFLICT OF LAWS

Caterpillar Financial Services Corp v SNC Passion

QBD (Comm Court).

[2004] EWHC 569 (Comm).

[2004] All ER (D) 377 (Mar).

The claimant was a Delaware

company. The defendant was a French company. The claimant and the defendant entered into a loan agreement with an express choice of law clause specifying English law as the governing law of the agreement. The defendant contended that the agreement was illegal as a matter of French law and therefore void or cancellable by the defendant. The defendant’s case rested on Article 3(3) of the Rome Convention: “The fact that the parties have chosen a foreign law ... shall not, where all the other elements relevant to the situation at the time of the choice are concerned with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract ...” The defendant maintained that the express choice of law clause was invalid because “all the other elements relevant to the situation” pointed to France. It was held that Article 3(3) had no application to the dispute. The purpose of Article 3(3) was to prevent parties in a wholly domestic situation contracting out of provisions of law that would otherwise compulsorily apply to the transaction. In considering the relevant elements, it was obvious that “all the other elements relevant to the situation” did not concern France only. The claimant was a Delaware company, and the domicile of the lending banker was not an irrelevant consideration.

CONTRACT

Simms v Conlon & Harris

Ch D (David Richards J).

[2004] EWHC 585 (Ch).

Pursuant to clause 1.4 of a written agreement, the defendants agreed

with the claimant that they would “put forward proposals” to release the claimant from his debts in certain circumstances “such release to be effective no later than 30 September 2003”. The claimant brought proceedings for specific performance and/or damages. The defendants argued that clause 1.4 imposed no enforceable obligation upon them. It was held that an obligation to “put forward proposals” might well not be enforceable if it stood alone, but, in the context of the agreement as a whole, the obligation imposed on the defendants was to procure that the claimant was released by 30 September 2003 at the latest. However, specific performance was no longer available, as the claimant had repaid the debts himself. He would be entitled to damages, subject to the defence of equitable set-off. The defendants maintained that they had such a defence, and the right course in the circumstances was to stay enforcement of the judgment until the determination of the defendants’ claim against the claimant or until further order with liberty to the claimant to apply to lift the stay.

DIRECTORS’ DISQUALIFICATION

Cunningham v Secretary of State for Trade & Industry
Ch D (Lloyd J).

[2004] All ER (D) 438 (Mar).

The applicant had served as a director of two companies. The Secretary of State brought proceedings against the applicant for his disqualification as a company director. The applicant gave the Secretary of State an undertaking not to act as a director for two years. The applicant then applied

for permission to act as a director of two new companies. It was held that the applicant would be granted permission. On the evidence, the circumstances of the two new companies were very different from the circumstances of the two old companies. The applicant had a substantial need to continue to act as a director of the two new companies, and the two new companies had a substantial need for the applicant to remain as a director. Further, there was no risk to the public of the applicant defaulting in the same manner as he had previously defaulted. *Re Barings plc* [1999] 1 All ER 1017 and *Re Dawes & Henderson Ltd* [1999] 2 BCLC 317 considered.

INJUNCTIONS

Re a Company (No 533 of 2004)
Ch D (David Donaldson QC).
[2004] All ER (D) 268 (Mar).

The petitioner was a director of the company who wanted to resign. The company and the petitioner entered into an agreement whereby (a) the company agreed to pay the petitioner a sum of money and (b) the petitioner agreed to resign his directorship. The petitioner resigned his directorship, but the company failed to comply with the terms of the agreement. The company and the petitioner entered into negotiations, and a settlement deed was agreed. The company failed to comply with the terms of the deed, and the petitioner served a statutory demand for the debts due under the deed. The company applied for an injunction to restrain the presentation of a winding-up petition. The company alleged that the petitioner had wrongfully received various sums of money from the company and that he had been under a duty to disclose the

wrongdoing to the company. The company maintained that it would not have entered into the settlement deed if it had known of the wrongdoing. The company’s application was dismissed. It was held that the petitioner had not been under any duty to disclose any wrongdoing, as he was no longer a director when the settlement deed was entered into. In any event, the company had affirmed the settlement deed, as it had continued to make payments under the deed for a lengthy period after the discovery of the alleged wrongdoing.

Re R S M Industries Ltd;
Williams v Brinkmann & ors
Ch D (Charles Aldous QC).
[2004] All ER (D) 289 (Mar).

On the inter-partes hearing on an application for an interim injunction relating to a petition under section 459 of the Companies Act 1985, the respondents contended that the injunction should not be continued because the petitioner had failed to disclose material facts to the court. It was held that the non-disclosure was innocent and that the petitioner had not obtained any unfair advantage. An injunction would have been granted even if the facts in question had been disclosed. Applying *Brink’s Mat Ltd v Elcombe* [1988] 1 WLR 1351, the injunction should be continued in a modified form.

INSOLVENCY – CORPORATE

Re Arena Corporation Ltd
CA (Mance and Carnwath LJ
and Andrew Morritt VC).
[2004] EWCA Civ 371.

Upon the appeal of the company’s appeal against the making of a winding up order, the Court of

Appeal held that the winding up order had been rightly made. Regulation 7(2) of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 (SI 3022/2001) was not invalid as being so inconsistent with, as to be prohibited by, Council Directive 92/12/EEC. It followed that a defence on those grounds, if duly raised before the tribunal could not give rise to a bona fide dispute on substantial grounds so as to warrant either the dismissal or adjournment of the winding up petition. Moreover regulation 7(2) was not invalid as being ultra vires the enabling power contained in section 1(4) of the Finance (No 2) Act 1992. It followed that an assertion before the tribunal that the assessments were invalid on that ground could not succeed and could not give rise to a bona fide defence on substantial grounds to the claim of the commissioners. Decision of Lawrence Collins J [2003] All ER (D) 227 (Dec) affirmed.

[David Alexander]

**Re Cosslett (Contractors) Ltd
Ch D (Patten J).**

[2004] All ER (D) 241 (Mar).

In 1991, the company entered into a contract under seal with a local authority. In 1993, the company experienced financial difficulties and went into administration. One of the purposes of the administration was to achieve a more advantageous realization of the company's assets than would be possible on a winding up. The administrator commenced proceedings against a local authority. The proceedings were ultimately successful. However, as the proceedings had been protracted, the administrator sought a declaration as to whether the

claims of the company's ordinary unsecured creditors were time-barred. Patten J held that the ordinary unsecured creditors' claims were indeed time-barred, because an administration, unlike a liquidation, does not stop time from running for the purposes of the Limitation Act 1980.

[Gabriel Moss QC]

**Re Leyland Daf; Buchler v Talbot
HL (Lords Hoffmann, Nicholls,
Millett, Rodger and Walker).
[2004] UKHL 9.**

The expenses of a liquidation cannot be paid out of the assets subject to a crystallized floating charge. There are two distinct funds, which have not been pooled, which belong to different parties, which are actually or potentially administered by different office holders, and which are subject to different statutory regimes. Each fund must bear its own costs of administration, and neither is required to bear the costs of administering the other. In particular, the assets comprised in the crystallized floating charge are not required to bear the costs and expenses of the winding up. In re Barleycorn Enterprises Ltd [1970] Ch 465 overturned; In re Leyland Daf [2001] 1 BCLC 419 reversed.

**Morris v Bank of India
Ch D (Patten J).**

[2004] All ER (D) 378 (Mar).

The liquidators of BCCI succeeded in showing that the defendant had knowingly participated in BCCI's fraudulent trading, with the result that the defendant was liable to pay compensation under section 213 of the Insolvency Act 1986. There had to be some

nexus between the loss caused to creditors as a result of the fraudulent trading and the contribution that the knowing participator was required to make. Any award, though compensatory in nature, could only be a reasonable approximation to the damage that the defendant's conduct had caused or to which the defendant's conduct had contributed.

[Blair Leahy]

**Re Supporting Link Alliance Ltd
Ch D (Sir Andrew Morritt VC).
[2004] EWHC 523 (Ch).**

[2004] All ER (D) 396 (Mar).

The Secretary of State presented a petition under section 124A of the Insolvency Act 1986 that the company should be wound up on public interest grounds. The company's directors offered undertakings that the company would no longer carry on business in the manner of which complaint was made by the Secretary of State. The Vice-Chancellor held that the court does have the power to accept undertakings and, on that basis, to dismiss a petition to wind up a company presented to the court by the Secretary of State on public interest grounds. However, unless the Secretary of State was content that the petition be dismissed on the basis of the undertakings, the Court should be very slow to accept the undertakings in preference to making a winding-up order. In the instant case, the business of the company was founded and continued on the basis of deception. The Secretary of State was not willing to accept the undertakings and therefore a winding up order was made. Re Bamford Publishers Ltd (2 June 1977, unreported) applied.

The Designer Room Ltd**Ch D (Rimer J).****[2004] All ER (D) 411 (Mar).**

The joint administrators of the company sought to make dividend payments to preferential creditors prior to a petition for the compulsory winding up of the company. They argued that paragraph 13 of Schedule 1 of the Insolvency Act 1986 conferred on them the power to make such payments as were necessary to fulfill their functions. The application was dismissed. Paragraph 13 of Schedule 1 empowered an administrator to make such payments only if on the facts the payments could properly be regarded as necessary for or incidental to the performance of the administrator's functions. The court did not accept that such payments were necessary, distinguishing the case from those in which a voluntary liquidation is proposed.

[Lexa Hilliard]**Tombs v Moulinex SA****Ch D (Bernard Livesey QC).**

The company went into members' voluntary liquidation owing, inter alia, the sum of £15.5m to the respondent. The respondent agreed to subordinate its debt behind the company's other creditors. Following all known debts being paid, the company had an estimated surplus of £4.3m. Other than the respondent, the only parties with any possible remaining claim to the company's assets were the purchasers of products sold by the company, who may have had contingent claims arising from injury or damage caused by defective products. The respondent proposed that the liquidators make an immediate

distribution of a large part of the monies due. The company's liquidators applied under section 112 of the Insolvency Act 1986 for directions. It was held that the payment should be made to the respondent. The court had jurisdiction to authorise a distribution of a company's assets in a members' voluntary liquidation notwithstanding the existence or risk of future creditors emerging.

[Richard Fisher]

Sarah Paterson and David Marks, "Administration Orders and Disputed Creditors: To Resolve or Not to Resolve?" (2004) *Insolvency Intelligence* 40

[David Marks]**INSOLVENCY –
PERSONAL****Anderson v KAS Bank NV****Ch D (David Richards J).****[2004] EWHC 532 (Ch).****[2004] All ER (D) 304 (Mar).**

The bankrupt appealed against the bankruptcy order on a number of different grounds: a failure to serve the statutory demand; the existence of a substantial dispute as to the debt claimed; the existence of claims which exceed the debt; and the circumstances in which the judgment was delivered. The bankruptcy order was upheld. The court held that the petitioning creditor had, on the facts, done all that was reasonable to bring the demand to the bankrupt's attention. The district judge was entitled to take the view that the debt was not genuinely disputed. The evidence did not support the bankrupt's allegations relating to cross-claims. The fact that the bankrupt had not been given advance notice of the date on which the

judgment would be delivered was regrettable, but the bankrupt was not able to show that he had suffered any prejudice resulting from the circumstances in which the bankruptcy order was made.

[Richard Fisher]**Guinan v Caldwell****Associated Ltd****Ch D (Neuberger J).****[2003] EWHC 3348 (Ch).****[2004] All ER (D) 123 (Mar).**

The petitioner presented a bankruptcy petition alleging that the debtor was indebted as a result of words said during a telephone conversation on the grounds that the words gave rise to a binding oral contract. The debtor denied that the words relied on by the petitioner were used and denied that the conversation had the effect of giving rise to a binding contract. The district judge made a bankruptcy order. The debtor appealed. Neuberger J held that, in the circumstances of the case, the district judge should not have made a bankruptcy order. The court should have approached the issue by asking whether there was a real issue to be tried.

Samantha Knights, "Examinations, investigations and the right to a fair trial post *Saunders v UK*," *Criminal Bar Association Newsletter*, Issue 1, March 2004, pp 6-7.

[Samantha Knights]**INSOLVENCY –
CROSS-BORDER**

Cécile Dupoux and David Marks, "Chapter XI à la Française," *International Corporate Rescue*, Issue 2, pp 74-77.

[David Marks and Cecile Dupoux]

INSURANCE**North Atlantic Insurance Co Ltd v Nationwide General Insurance Co Ltd****CA (Waller, Tuckey and Jacob LJ). [2004] EWCA Civ 423.**

Each member of a long-tail re-insurance pool of which several members were now insolvent had a separate interest in reinsurances that had been taken out for the common account of the pool, notwithstanding the position of pool members who had fronted inwards risks and remained 100% liable on the resulting inwards claims. There was no trust of the reinsurance proceeds, and arrangements between pool members that would have deprived them of reinsurance proceeds would be contrary to the principle in *British Eagle*.

[Anthony Zacaroli, Lloyd Tamlyn, Glen Davis]

PARTNERSHIP**Re Burton Marsden Douglas (a firm); Marsden & Douglas v Guide Dogs for the Blind Association & ors****Ch D (Lloyd J). [2004] EWHC 593 (Ch).**

Mr Burton was a solicitor who carried on as a sole practitioner. He removed funds from client accounts on account of costs without rendering any bill to the clients. In 1999, he went into partnership with Mr Marsden and Mr Douglas. In 2001, the clients issued a claim form against Burton Marsden Douglas claiming a detailed assessment of the bill. Costs Judge Wright ordered that the trial of a preliminary issue as to whether Mr Marsden

and Mr Douglas could be liable to repay any element of overpayment. He held that they could indeed be liable to repay any element of overpayment. They appealed. On appeal, the cost judge's decision was reversed. There was no novation of Mr Burton's existing liabilities by which the partners in Burton Marsden Douglas became liable jointly and severally in place of Mr Burton himself alone. Section 71(3) of the Solicitors Act 1974 could not by itself create a liability to repay on the part of someone who would not otherwise be subject to that liability. Mr Burton alone would be liable.

PRIVILEGE**Three Rivers District Council v Bank of England****CA (Longmore and Thomas LJ and Lord Phillips MR).****The Times, 3 March 2004.**

The authorities showed that, where a solicitor/client relationship was formed for the purpose of obtaining advice or assistance in relation to rights and liabilities, broad protection would be given to communications passing between solicitor and client in the course of that relationship. The same principle did not apply to communications between solicitor and client when the dominant purpose was not the obtaining of advice and assistance in relation to legal rights and obligations. The fact that work done was within what might be the ordinary business of a solicitor did not necessarily mean that it attracted privilege. Communications between the Bank of England and its solicitors, who

were assisting in the obtaining, preparation and presentation of evidence and submissions to the Bingham Inquiry, did not attract privilege. If some such communications had been made in the context of seeking specific legal advice, then a statement to that effect could be made and all documents coming into existence during that part of the investigation necessary for that advice to be given would be privileged. The Court of Appeal said that, where litigation is not anticipated, it is not easy to see why any communications with a solicitor should be privileged, and suggested that the area be reviewed by the Law Commission.

[Barry Isaacs, Ben Valentin]

REAL PROPERTY**Cheltenham & Gloucester v Appleyard****CA (Lord Phillips MR, Neuberger and Kennedy LJ). [2004] EWCA Civ 291.**

The defendants purchased a property in 1978 with a loan from the Bradford & Bingley Building Society ("B&B"). The loan was secured by a mortgage in favour of B&B, which was registered as a first charge in the charges register. In 1988, a second charge was registered by the Bank of Credit & Commerce International ("BCCI") in respect of the debts of a company owned by the husband. In 1991, the defendants decided to refinance the indebtedness secured against the property by executing a mortgage in favour of the claimant. The claimant paid the monies to the defendants, and both B&B and BCCI were repaid. On the same day, however, provi-

sional liquidators were appointed in respect of BCCI. The liquidators of BCCI did not acknowledge that BCCI had been repaid. The claimant was therefore unable to register its charge. The charges in favour of B&B and BCCI remained registered. The claimant argued that it was subrogated to the rights of B&B under the first charge. The Court of Appeal held that the claimant was entitled to be subrogated to the rights of B&B under the first charge. Neuberger LJ summarized the law relating to equitable subrogation as follows: (1) equitable subrogation must be distinguished from contractual subrogation; (2) equitable subrogation is a remedy aimed at preventing unjust enrichment; (3) equitable subrogation is a flexible remedy which nonetheless must be applied in a principled fashion; (4) the classic case of equitable subrogation arises where a new lender who pays the borrower's indebtedness to a secured creditor fails to receive the security he expected to receive; (5) equitable subrogation can also apply to personal rights, so the lender may be subrogated to a personal remedy such as an undertaking; (6) the fact that a lender gets some security does not prevent him from claiming to be subrogated to another security; (7) a lender cannot claim subrogation if he obtains all the security which he bargained for; (8) the fact that the lender's failure to obtain the security he bargained for was attributable to his negligence is irrelevant; (9) the absence of a common intention on the part of the borrower and the lender that the lender should have security is

by no means fatal to a lender's subsequent claim for subrogation; (10) subrogation cannot be invoked to put the lender in a better position than that in which he would have been if he had obtained all the rights for which he bargained; (11) it is difficult, and may be impossible, for a lender who has obtained security to invoke subrogation where the security he has obtained gives him all the rights and remedies of security to which he claims to be subrogated; (12) the capital sum in respect of which a lender is subrogated cannot normally be greater than the amount of the secured debt that has been discharged; (13) normal equitable principles apply to subrogated rights.

Popowski v Popowski

Ch D (R Sheldon QC).

[2004] EWHC 668 (Ch).

The claimant claimed that a trust deed should be set aside on the grounds of presumed undue influence. The claimant and her husband purchased a council property under the "right to buy" scheme in 1985 for £13,800. The husband died shortly afterwards. The purchase price represented a 60% discount on the then market value by reason of their occupation of the property as council tenants for 30 years. The purchase price was funded by a mortgage. Under the trust deed, the claimant and her husband declared that the beneficial interest in the property was held 100% for the son who in return covenanted to be responsible for the mortgage payments and granted the claimant the right to occupy the property rent

free for life. It was held that, although the claimant, who was then 54, had placed trust and confidence in her son in relation to the transaction, the transaction had not seriously disadvantaged the claimant such as to raise the presumption of undue influence. The right to occupy the property rent free for life was a valuable right which had been enjoyed by the claimant for 19 years and which she could continue to enjoy. The mortgage payments had, and were being made by the son. Even if the presumption were to apply the son had given a satisfactory explanation such as to rebut the presumption.

[Richard Sheldon 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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