

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 10 No 8 August 2004

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The High Court (Lewison J), in *Re AA Mutual International Insurance Co Ltd*, recently made what is believed to be the first appointment of UK administrators since the implementation of EC Directive 2001/17/EC relating to the reorganisation and winding up of insurance undertakings and first appointment of administrators to an insurance company under the new Schedule B1 to the Insolvency Act 1986. Glen Davis acted for the company

The Court of Appeal has also recently granted leave to appeal to the House of Lords in the case of *Re Spectrum Plus Ltd* (reported in the July 2004 edition of the digest).

The Digest is taking a much needed summer break and wishes its readers well until its return in October.

This Edition of the Digest was compiled by Hannah Thornley.

Blair Leahy

GENERAL NEWS

Cross-Border Co-operation

The American Law Institute and International Insolvency Institute (“III”) have issued guidelines applicable to court to court communications in cross-border cases. The guidelines have been adopted and used amongst NAFTA countries but the III is hoping to achieve their wider adoption and use. Gabriel Moss QC is co-chair of the committee of the III dealing with the guidelines. Readers can pick up copies of the guidelines from Chambers in English or French.

[Gabriel Moss QC]

Bankruptcy Database

From 1 July 2004 an on-line database, developed by the Insolvency Service, allows access to information to identify bankrupts on the Insolvency Services Website at <http://www.insolvency.gov.uk/eiir/>. The

database, also known as the ‘Individual Insolvency Register’, contains details of current bankruptcies; bankruptcies which have ended in the last three months; current IVAs; fast track voluntary arrangements (FTVA); and current BROs.

Postal Re-Direction Orders

Plans to introduce specific changes to re-direct a bankrupt’s post were set out on 2 July by the Insolvency Service. The changes are aimed at the minority of bankrupts who wilfully fail to co-operate with either the trustee or the official receiver in a bankruptcy. It is intended to consult and consider whether postal-redirection orders are still appropriate and, if so, whether they can be implemented in ways that are fully compatible with the European Convention on Human Rights. The key proposal is to consider the introduction of a specific

rule to cover postal re-direction applications to ensure that the court can balance the rights of the bankrupt against the duties owed by the bankrupt under the insolvency legislation. The consultation process will close on 10th September 2004. Glen Davis and Lucy Frazer sit on the Insolvency Courts Users Committee, which has submitted a response to the consultation.

[Glen Davis, Lucy Frazer]

Officeholder's remuneration

In the last edition of the Digest, it was noted that the Practice Statement on "office holders" remuneration applications was about to be signed. An update on this position is that the Practice Statement was signed at the end of July by Chief Registrar Baister and is effective from 1 October 2004. Stephen Atherton has advised on the drafting of the Practice Statement.

[Stephen Atherton]

AGENCY

Rolls-Royce Power Engineering plc v Ricardo Consulting Engineers Ltd [2004] 2 All ER (Comm) 129. QBD (Judge Seymour QC sitting as a deputy judge of the High Court).

The second claimant was a wholly owned subsidiary of the first claimant and acted as its agent in respect of a number of activities. The defendant was engaged to take on work by an agreement entered into by the subsidiary and the defendant. The subsidiary's business was then transferred to the parent.

The court held that the subsidiary did not enter the contract as a principal and was unable to recover any of the losses suffered by the parent company as a result of the contract. Although in a trust relationship a trustee is able to recover damages on behalf of beneficiaries of a trust, the defendant did not know, or had no reason to know that at the time of entering the contract, that the parent had any direct interest in that contract. The general rule is that only parties to a contract can recover for losses under that contract and the rule in *Dunlop v Lambert* will only be applied to award damages to a third party where it was in the actual contemplation of the parties that an identified third party, or a third party member of an identified class, might suffer damage if there was a breach of contract. The parent was not identified individually or as a member of a class at the time of contracting, therefore the rule in *Dunlop v Lambert* would not be applied.

Tan Cheng-Han, "Undisclosed Principals and Contract", [2004] 120 LQR 480.

COMPANY

EIC Services Ltd v Barber [2004] EWCA Civ 1069. Court of Appeal (Peter Gibson & Sedley LJ, Newman J).

In the absence of an ordinary resolution or other authorisation from the members of a company, the issue of bonus shares by a bonus issue resolution was void for mistake. In

the absence of shareholders' approval, the company directors could not issue bonus shares other than as nil paid.

For section 35A(1) of the Companies Act 1985 to validate the bonus issue it was necessary to find that the shareholders receiving the shares were persons dealing with the company in good faith and that the reasons why the bonus issue would otherwise have been invalid were limitations under company's constitution on the power of the board of directors to bind the company. A bonus issue made by a single resolution applicable to all shareholders could not be binding in part under section 35A(1), but void in part depending on the circumstances of individual shareholders. It did not follow from the fact that the legislature had dealt specifically with transactions between a director and a company that an inference could be drawn about the applicability of section 35A to shareholders who in that capacity dealt with the company.

Malcolm Hurley, "Branches and Places of Business", Tax Journal (2004) No. 750, 15.

Charles Mitchell, "Shareholders' Claims for Reflective Loss", [2004] 120 LQR 457.

John Lowry, "Eliminating Obstacles to Freedom of Establishment: The competitive edge of UK Company law", [2004] CLJ Vol.63, part 2, 331.

Dr Hans C. Hirt, "Ratification of breaches of Directors' duties: the implications of the reform proposal regarding the availability of derivative actions", *The Company Lawyer* (2004) Vol.25, No.7, 213.

DIRECTORS DISQUALIFICATION

In the matter of Queens Moathouses plc

**[2004] EWHC 1730. Ch D
(The Hon. Sir Donald Rattee).**

The court held that Mr Bairstow, a director of Queens Moat Houses plc ("QMH"), was not entitled to deny responsibility for the falsity of the accounting statements issued by QMH for the relevant periods simply on the basis of his reliance on the other directors to whom the preparation of those statements had been delegated, or on the auditors who had issued a clean certificate.

In this case third parties and shareholders of QMH were 'seriously misled' by irresponsible statements as to QMH's financial position in 1991 and 1992 to which Mr Bairstow was a party. This was enough to amount to a disqualification order of 6 years being imposed on Mr Bairstow.

EC REGULATION ON INSOLVENCY PROCEEDINGS

Financial Services Authority v Dobb White & Co.

[2004] BPIR 479.

**Ch D (Gabriel Moss QC
sitting as a deputy judge
of the High Court).**

The Financial Services authority petitioned for the winding up of a partnership and for the

bankruptcy of two of the partners. The insolvency element was fulfilled and the centre of main interests was within the jurisdiction. However, there were allegations that the partnership was carrying on unauthorised investment business. Despite this complaint, the EC Regulation on insolvency proceedings ("Insolvency Regulation") still applied. A consultation of the guidance to the Insolvency Regulation in the Virgos-Schmidt report led to the conclusion that only authorised collective investment undertakings were excluded by the Insolvency Regulation. The orders were granted on the basis of an urgent need to protect investors.

[Gabriel Moss QC]

INSOLVENCY – CORPORATE

Rubin v Gunner (sub. nom. Re The Rod Gunner Organisation Ltd)

[2004] 2 BCLC 110.

Ch D (Etherton J).

The liquidator of a Company applied for a declaration under section 214 of the Insolvency Act 1986 that the respondents, who were former directors of a production company called the Rod Gunner Organisation Ltd (the "Company"), were liable to make a contribution to the Company's assets. The Company went into creditors' voluntary liquidation in 1999 having traded at a loss since its inception in 1996. Mr Rubin was appointed liquidator. During the life of the company the respondents had entered into funding agreements with an individual investor ("JS").

JS paid instalments to the Company and gave assurances that he would raise substantial funds in order to make a significant capital contribution to the Company in addition to the instalments he was already making. The Court held: (1) Although the Company was insolvent from April 1998, the respondents had had a genuine and reasonable belief during the period prior to October 1998 that JS would provide sufficient funding. (2) However, after that date the First Respondent should have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, the last payment by JS to the Company having been made in September 1998. The conditions of section 214(2) had been satisfied but the respondents were not in a position to satisfy the court of the matters in section 214(3). Accordingly, Mr Rubin was entitled to a declaration in respect of the period from 15 October 1998 that G were liable to make such a contribution to the assets of the Company as the court thought proper.

Secretary of State for Trade and Industry v Frid (sub. nom. Re West End Networks Ltd (in liquidation))

**[2004] 2 BCLC 1. House of
Lords (Lords Nicholls,
Hoffmann, Hope, Phillips
and Brown).**

The secretary of state appealed against the decision that a VAT credit due to an insolvent company was not to be set

off under the Insolvency Rules 1986 r.4.90 against the Crown's subrogated claim in respect of payments made to employees under the Employment Rights Act 1996. West End Networks (the "Company") had gone into creditors' voluntary liquidation in 1999. The Company's assets included a credit of £7,185.77 with Customs for overpaid VAT. Its liabilities included compensatory notice pay and redundancy payments due to former employees under the Employment Rights Act 1996.

It was not necessary for the purposes of r.4.90 that the mutual debts should have been due and payable before the date of insolvency so long as they resulted in quantified money claims by the time the claim to set off was made. It was sufficient that there should have been an obligation arising out of the terms of a contract or statute by which a monetary debt would become payable on the occurrence of some future event. Therefore the VAT credit and the contingent liability of the secretary of state under the 1996 Act which existed before the insolvency date but fell due for payment and was paid after the insolvency date were "mutual debts" for the purposes of r.4.90. The term "mutual debts" did not require anything more than commensurable cross-obligations between the same people in the same capacity. The words "or other mutual dealings" broadened rather than restricted the ambit of the words "mutual credits" and

"mutual debts". All that was necessary was that there should have been dealings (in an extended sense which included the commission of a tort or the imposition of a statutory obligation) which gave rise to commensurable cross-claims. There was mutuality between a claim against Customs and a claim by the secretary of state on behalf of the National Insurance Fund.

Anderson and others v Kroll Ltd and others (No 2) (sub. nom. Re Trident Fashions plc (in administration) (No 2)) [2004] 2 BCLC 35.

Ch D (Lewison J).

Trident Fashions plc (the "Company") was placed into administration on 17 September 2003. The joint administrators proposed a company voluntary arrangement ("CVA") to the Company's creditors, which proposal was approved at a meeting of creditors on 1 December 2003. The applicants were a group of creditors who wished to challenge the CVA under section 6 of the Insolvency Act 1986 on the basis of an alleged 'material irregularity', namely, the administrators' failure to inform the creditors meeting of an offer by one of the applicants to purchase the company for £650,000 because they decided that the offer was too low for the purchase of the entire business. The administrators had instead only disclosed one offer to take over several

leases of £500,000.

The rules which dictated what information must be specified in a proposal for a CVA were rules 1.10(1)(b) and 2.33(2), which required an insolvency practitioner to specify 'such matters as he considered appropriate' for ensuring that members and creditors were able to reach an informed decision and to enable them to decide whether or not to vote for the requisite proposal. The two rules clearly give the administrator a measure of judgment or margin of appreciation as to what information he presents to the meeting. The test of material irregularity poses the question whether no reasonable insolvency practitioner would have come to the decision made. The administrators should have given the creditors the option of which offer to pursue. Their failure to mention the other offer amounted to a misrepresentation and was therefore an irregularity. However, in assessing whether that irregularity was 'material' within the meaning of section 6 of the Act, the question for determination by the court was whether there was a substantial chance that the creditors would not have approved the CVA, had the offer been disclosed. In the circumstances of the case, the disclosure of H's offer would not have affected the approval of the CVA by the creditors and, accordingly, there was no material irregularity.

**Quarter Master UK Limited
(In Liquidation) v Pyke &
Others**

[2004] All ER (D) 257 (Jul).

**Ch D (Paul Morgan QC
sitting as a deputy judge
of the High Court).**

Quartermaster UK Limited ("UK") sought an account of profits from two of its directors, the first and second Defendants (the "Directors"), for breach of fiduciary duty. In 1994 the Directors had formed a company called Affinity Limited ("Affinity"), the third defendant in the action of which they were the sole directors and shareholders. Affinity carried on a funds transfer business in the brewers trade. In 1995 the Directors formed UK. UK carried on a group buying business including alcohol and food items to be sold in pubs. A supply agreement was entered into by Affinity as agent for UK with Carlsberg-Tetley Brewing Limited ("Carlsberg Tetley") in or around January 2000. UK and two related companies were placed into creditors' voluntary liquidation in January 2002. Affinity was itself placed in creditors' voluntary liquidation in October 2003.

The liquidator claimed that the Directors were in breach of duty in their capacity as directors of UK due to their carrying on of the business of UK by Affinity once UK had entered liquidation.

It was held that a clear conflict of interest existed between the Directors in their position as directors of both UK and Affinity. It was irre-

levant that UK was unable to take advantage of the Carlsberg-Tetley agreement. The Directors and Affinity must account for the profits received by them.

[Jeremy Goldring]

**Harish Bhanderi v HM
Commissioners of Customs
and Excise (sub. nom. In the
matter of Turnstem Limited)**

[2004] EWHC 1765.

Ch D (Lawrence Collins J).

Turnstem Ltd ("Turnstem") was an English company that carried on business in England of trading in alcohol in bond. The sole director and shareholder was Mr Bhanderi. An application was made to rescind a winding up order on the basis that the evidence to refute alleged excise duty evasion being carried out by Turnstem had not been properly considered and that Turnstem and Mr Bhanderi were refused the opportunity of appealing the decision of customs as to Turnstem's liability by the provisional liquidator who was alleged to be partial in his decision to withdraw the appeals.

The winding up petition was based on the Duty Suspended Movements of Excise Goods Regulations 2001, clause 7(2) assessments (the "Assessments") by Customs against Turnstem regarding 27 consignments of alcohol which Turnstem had acquired in bond in England between 5 October 2001 and 26 February 2002 and had purported to sell and ship duty free. Despite several attempts by Mr Bhanderi to appeal the Assessments,

Customs and the provisional liquidator were of the opinion that only the provisional liquidator had the power to prosecute or withdraw the appeals and the appeals were withdrawn.

There is an unfettered discretion to rescind a winding up order under rule 7.47 of the Insolvency Rules 1986 (the "Rules"). However, the discretion is only likely to be exercised where there has been a change of circumstances, or the discovery of fresh evidence. In the present case: (1) There had been no change in the relevant circumstances and the validity of the DSMEG Regulation is no longer in question after the decision in *Re The Arena Corporation Ltd* [2004] EWHC 3032 (Ch), [2004] BPIR 543; (2) The evidence of the report of the provisional liquidator was that Turnstem was hopelessly insolvent and had creditors in excess of £1.5m; (3) There was no fresh evidence which would alter the basis on which the winding up order was made; (4) There were no exceptional circumstances in this case, and the allegations of partiality and conflict of interest against the provisional liquidator were unfounded.

**In the matter of SSSL
Realisations (2002) Limited
[2004] EWHC Ch 1760.**

Ch D (Lloyd J).

On an application for directions by the liquidators of both SSSL Realisations (2002) Limited ("SSSL") and its parent company Save Group Plc ("Group"), Lloyd J was required to

determine a number of issues relating to the enforceability in insolvency of a deed of indemnity which included inter alia a non-competition clause. Group and SSSL were both parties to the deed of indemnity along with AIG Europe (UK) Limited ("AIG"). AIG was a creditor in both liquidations. Group was by far SSSL's most significant creditor. If enforceable, the terms of the deed of indemnity prevented Group from proving in SSSL's liquidation which would benefit not only AIG but all of SSSL's other creditors who were not party to the deed of indemnity.

Lloyd J held that:

(a) on its true construction, the deed of indemnity prevented Group from proving in SSSL's liquidation for any of its debt until AIG had received full payment and that Group would hold any sums it received in breach of this obligation on trust for AIG (and be required to pay the same over to AIG). This would not, however, constitute a charge nor constitute an agreement contrary to the *pari passu* principle in Group's liquidation nor otherwise contrary to public policy;

(b) the deed of indemnity did not constitute onerous property capable of being disclaimed under section 178 of the Insolvency Act 1986 (approving the principles set out in *Re Transmetro Corporation Limited* (1999) 17 ACLC 1314);

(c) were Group to act in breach of the deed of indemnity, damages would not be

payable as an expense of either Group's or Stations' liquidation as "costs and expenses which are ... incurred by ... the liquidator in ... realising or getting in any of the assets of the company." This would be to give too wide a reading to the wording of Rule 4.218(a) of the Insolvency Rules 1986; and

(d) the court would not in circumstances where the obligation created on Group would be capable of being enforced by way of injunction direct the Group liquidator to nevertheless prove in the SSSL Liquidation.

[Simon Mortimer QC, Sandra Bristol, Richard Fisher]

INSOLVENCY – CROSS-BORDER

Re Impex Services Worldwide Ltd

[2004] BPIR 564 (Isle of Man. High Court of Justice Ch D) (His Honour Deemster Doyle).

A provisional liquidator had been appointed by the English Court over a company incorporated under English law. The provisional liquidator by letter of request asked for the assistance of the Manx High Court regarding the production and examination of documents in the possession of certain parties who were based in the Isle of Man. Although there was no jurisdiction under the statute law of the Isle, such assistance could be provided according to common law at the request of a friendly court. The court considered the position in English law with regard to international comity before

section 426 of the Insolvency Act 1986 came into force.

Samantha Knights, "Pooling Arrangements in Cross-Border Insolvencies", [2004] *International Corporate Rescue* Volume 1, Issue 4, 194.

[Samantha Knights]

INSOLVENCY – PERSONAL

Harper v Buchler

[2004] BPIR 724. (Ch Div) (Deputy Registrar Barnett).

Mr Harper was made bankrupt on 28 February 1995. His estate was solvent but consisted largely of property, the sale of which would extinguish all his liabilities. Mr Harper was making an application for annulment of the bankruptcy on the basis that a third party was willing to pay off all his debts. It was unclear as to whether statutory interest should be paid in addition to the total of the debt, therefore Mr Harper applied for directions under section 363 of the Insolvency Act 1986 (the "1986 Act"). Statutory interest was held not to be a bankruptcy debt for the purposes of section 363 of the 1986 Act, and therefore it was not necessary for Mr Harper to show payment of statutory interest in addition to the bankruptcy debts in order to gain an annulment of the bankruptcy.

[David Allison]

Re Ravichandran

[2004] BPIR 814. (Ch Div) (Registrar Nicholls).

Mr Ravichandran was made bankrupt on 16 February

2001. As his bankruptcy was drawing to a close he applied for an interim order to permit a proposal for an individual voluntary arrangement (“IVA”) to be put to his creditors. The interim order was made on 13 February 2004, the bankruptcy was discharged on 16 February 2004 and information was sent to creditors and a meeting was called to consider the IVA on 2 March 2004. The Court held that it was not possible for Mr Ravichandran to enter into a valid IVA. On discharge from bankruptcy, the rights of creditors were converted from personal claims against the debtor into rights against his estate. On discharge he had ceased to be a debtor for the purposes of entering an IVA under the Insolvency Act 1986.

Michael Yee Fun Chu v Price [2004] BPIR 603. CA (Simon Brown, Laws and Arden LJ).

A bankruptcy order was made against Michael Yee Cam Chu. Subsequently a district judge ordered amendment of the order to include six aliases. This amendment was successfully appealed before a deputy judge. The trustee in bankruptcy (the “Trustee”) appealed against that decision. Allowing the appeal, the Court held that where A holds himself out as B when seeking credit, the creditor can gain a bankruptcy order against B or A. Accordingly, the fact that the original bankruptcy order did not include the references to the aliases, even though the creditor was aware of a dispute as to the name of the bank-

rupt, was not fatal to the case. The order of the district judge permitting the amendment of the bankruptcy order by including reference to the aliases was therefore restored.

Ahmad v Inland Revenue Commissioners

[2004] All ER (D) 435 (Jul). (Ch Div) (Evans-Lombe J).

The Inland Revenue served a statutory demand on the bankrupt. His application to set that statutory demand aside was dismissed and the bankrupt appealed against that decision. Shortly after the application to set aside the statutory demand was dismissed, but before the appeal against that decision was heard, the Revenue presented a bankruptcy petition against him based on the debt in the statutory demand. He was adjudged bankrupt as a consequence in September 2002. His subsequent application to annul the bankruptcy order was dismissed. In August 2003, the bankrupt issued an appellant’s notice out of time to appeal the decision not to annul the bankruptcy order. In February 2004, he applied to the registrar for an extension of time for his appellant’s notice, but that application was dismissed. The bankrupt then appealed against the registrar’s decision.

The appeal was based on the ground, inter alia, that the petition upon which he was made bankrupt ought not to have been presented while his appeal was outstanding.

The Appeal was dismissed. Since at the time the bankruptcy petition was presented there had been an order dismissing the bankrupt’s application to set aside the statutory demand, there had been no outstanding application in respect of the petition debt. Consequently, the registrar had been correct in not interpreting section 267(2)(d) of the Insolvency Act so as to include appeals of that nature. Moreover, the registrar had had a discretion whether or not to extend time and in circumstances such as the instant case, where the bankrupt was substantially insolvent, the decision not to do so was, in light of existing case authority, a proper one. *Re Noble (a bankrupt)* [1965] 2 All ER 522 considered.

[Blair Leahy]

PROPRIETARY ESTOPPEL

Murphy v Burrows and Burrows

[2004] EWHC 1900. Ch D (Richard Sheldon QC sitting as a deputy judge of the High Court).

Mr Murphy claimed that he was entitled to a Timber Yard that formed part of the estate of a Mr Falkner due to representations that Mr Falkner had made to Mr Murphy during his lifetime that the Timber Yard would one day become Mr Murphy’s. Mr Falkner died in 1997. The defendants were the executors and principle beneficiaries of the will. The Court held that it was clear from the judgment of the Court of Appeal in *Gillett v*

Holt [2001] Ch. 210 that whilst there must be a consideration of whether or not the essential elements of estoppel are made out, the matter must also be looked at "in the round" as part of a broader enquiry as to whether the overarching requirement of unconscionability was satisfied. Although assurances were made by Mr Falkner that were capable of amounting to an estoppel, when looking at the matter "in the round" and giving regard to "the fundamental principle that equity is concerned to prevent unconscionable conduct", the conduct of Mr Falkner in making the two wills in question was not unconscionable on the facts.

[Richard Sheldon QC]

ARBITRATIONS

Stuart Isaacs QC acted as Sole Arbitrator in an ICC arbitration involving a dispute between Bahamian and Singaporean parties relating to an escrow agreement which was used by a third party to perpetrate an alleged fraud on the Claimant. The Respondent was the escrow agent for the Claimant in its business dealings with the third party and was unwittingly used as a conduit for the alleged fraud. The issues in the arbitration included the interpretation of the escrow agreement, potential illegality, and the application of exclusion of liability, indemnity and release provisions.

[Stuart Isaacs QC]

TALKS AND SEMINARS

Gabriel Moss QC will be speaking on the EC Regulation on Insolvency Proceedings on 8 Oct 2004 at the joint Insol Europe and Insol International Conference in Prague, which will take place between 7th and 9th October 2004.

[Gabriel Moss QC]

Stephen Robins gave talks on "Cross-Border Insolvency and the EC Regulation" to the law firms McCullough Robertson and Dibbs Barker Gosling in Brisbane.

[Stephen Robins]

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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