

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 10 No 1 January 2004

Michael Crystal QC
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 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
 William Trower QC
 Martin Pascoe QC
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 Professor Ian Fletcher
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 David Allison
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 Tom Smith
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 Blair Leahy
 Stephen Robins
 Marcus Haywood

In this issue	
general news	1
case law	2 – 7
talks and seminars	7

After much interlocutory wrangling, the trial of Three Rivers DC & Ors and BCCI SA v Governor and Company of the Bank of England commenced in the High Court on 13 January this year. With a current time estimate of 12 months for the trial, Mark Phillips QC, Ben Valentin and Tom Smith (acting for the Bank of England), and Barry Isaacs (acting for the Liquidators of BCCI) have a busy year ahead.

On a retrospective note, 2003 produced some interesting cases arising from the provisions of the EC Regulation on Insolvency Proceedings. The Regulation will inevitably continue to feature before the Courts both here and abroad during 2004. In addition, the implementation of the corporate insolvency provisions of the Enterprise Act 2002 last September, and the coming into force of the individual insolvency provisions on 1 April this year, will ensure 2004 is a busy year as all concerned grapple with their application.

In the meantime, we wish our readers a happy New Year.

Blair Leahy

GENERAL NEWS

The coming into force of the Companies (Acquisition of Own Shares) (Treasury Shares) Regulations 2003 (SI 2003/1116) on 1 December 2003 introduced a degree of relaxation to the restrictions contained in Pt V of the Companies Act 1985 on companies' ability to purchase their own shares or engage in "share buybacks". The regulations introduced new sections 162A – 162G to the 1985 Act so that British companies are now able to purchase certain of their own shares out of distributable profits and instead of having to cancel them, they are now allowed to retain and hold them "in treasury" for the purposes of either a subsequent sale or transfer to an employee share scheme.

ADMINISTRATIVE LAW

R (on the application of Kent Pharmaceuticals Ltd) v Director of the Serious Fraud Office Divisional Court (Maurice Kay and Mackay JJ). [2003] EWHC 3002.

Kent Pharmaceuticals Ltd ("KP"), a generic drug manufacturer and supplier which, along with other generic manufacturers, is the subject of investigation by the SFO for alleged conspiracy to defraud the NHS and a defendant to civil proceedings brought by the Department of Health ("DoH") for breach of domestic and European competition law. KP sought a declaration that the decision of the Director of the SFO to disclose copies of documents seized from KP to the DoH was unlawful.

The Divisional Court held that the SFO had acted unfairly in disclosing to the DoH documents seized from KP.

[Stuart Isaacs QC]

COMPANY

Pepin Aslett, 'The Destruction of Commercial Documents', *Company Lawyer* Vol. 24, No. 12, 357.

Dr Saleem Shekh, "A modern regulatory framework for European Community Law", *Company Lawyer*, Vol 24, No 12, 362.

Avinue Ltd v Sunrule Ltd Court of Appeal (Arden LJ & Dyson LJ). The Times, 5 December 2003.

On the trial of a small claim in a county court a company was entitled to be represented by a layman, whether he was an officer or employee of the company or not. The company did not need the trial judge's permission for such representation.

CONFLICTS OF LAW

Erich Gasser GmbH v MISAT Srl Case C-116/02 European Court of Justice. The Times, 12 December 2003.

The rule in the Brussels Convention that the court first seised of a matter had initial jurisdiction prevailed over the rule that a court nominated by the parties in the event of a dispute had jurisdiction. The first rule was to be applied

even when legal proceedings in the country of the court first seised generally took an excessively long period of time.

HUMAN RIGHTS

Mond v United Kingdom (Application No 49606/99) European Court of Human Rights. [2003] BPIR 1347.

The applicant, M, argued that the UK Government had infringed his right to a determination of his civil rights under Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The complaint arose out of litigation in which M, in his capacity as a trustee in bankruptcy, had sued the Official Receiver alleging negligent misstatement by an Assistant Official Receiver (the "AOR"). The misstatement occurred because the AOR had incorrectly assured M when acting as trustee in bankruptcy that the estate had not waived the benefit of a legal claim in favour of the bankrupt, when in fact such a waiver had indeed incurred. M as a result of this misstatement had unsuccessfully defended declaratory litigation instigated by the bankrupt, thereby incurring a substantial liability in irrecoverable costs. The claim of M against the OR was dismissed by the Court of Appeal on the grounds that the acts in question were protected by absolute immunity as they formed part of the discharge

of public duties by the OR. In ruling the application inadmissible, the European Court found that although the case fell within the terms of Art 6 of the Convention, the UK Government could show that the protection offered by the application of this immunity from suit was proportionate to the legitimate goal of enabling the OR to discharge his public duties without fear of litigation. Although the applicant had suffered financial loss as a result of this immunity from suit enjoyed by the OR, there had, in the circumstances, been no breach of Art 6. The domestic courts had carried out an appropriate balancing exercise in weighing up the legitimate expectations of the applicant as against the need to protect this public official from suit.

INJUNCTIONS

Flightwise Travel Services Ltd v Gill Chancery Division (Neuberger J). The Times, 5 December 2003.

Applicants seeking asset-freezing orders should note that (1) the respondent had to be fully informed of the case against him well in advance of the with notice hearing. He must also be told of all the evidence and arguments raised by the applicant at the without notice hearing and, where appropriate, the observations the judge made when the injunction was obtained.

(2) The normal practice of the court was to require a sworn statement in support of an application for a freezing order. Although it was not a requirement in every case that an application for a freezing order be supported by a sworn statement, where an injunction is granted before an applicant has had an opportunity to prepare a sworn statement, it was important that the court required the applicant to confirm in the form of a sworn statement all the evidence on which he relied. (3) It was important to ensure that the freezing order was so framed as to result in minimum interference with the respondent's rights. (5) It was essential that the respondent was entitled to a proper opportunity to present his case at the with notice hearing. He therefore had to be supplied with all the evidence upon which the applicant was going to rely. (6) There was the well established principle that in no case should a freezing order be granted unless the applicant established an appropriately strong case against the respondent, including that the respondent owned the assets concerned, or had some interest in them, and that there was a real risk of dissipation. (7) It was for the applicant to make out his case for a freezing order. An order would not be granted simply because the respondent could not show any immediate and

obvious prejudice. Of course, once the court considered that there was a case for granting an injunction the fact that it would cause no or little harm to the respondent was a factor which the applicant could pray in aid. However, of itself, it could not be a reason for granting an injunction.

INSOLVENCY – CORPORATE

Look Chan Ho, "Pari passu distribution and post-petition disposition: a rationalisation of *Re Tain Construction*", *Insolvency Law & Practice*, Vol 19, No 5, 155.

Janet Ulph and Tom Allen, "Transactions at an Under-value, Purchasers and the Impact of the Human Rights Act 1998", *The Journal of Business Law*, January 2004, 1.

Hamish Anderson, "Administration Expenses", *Insolvency Law & Practice*, Vol 19, No 6, 206.

Charles Pugh, "EC Regulation – the first year", *Insolvency Law & Practice*, Vol 19, No 6, 213.

Re Antal International Ltd (in administration) Chancery Division (Laddie J). [2003] 2 BCLC 406.

An administration order was made by the English court in relation to a company which traded in a number of countries, including France. The company, and its auditors,

believed that it had a French subsidiary and so informed the administrators. The French subsidiary was referred to in the company's accounts by name and was alleged to have 12 employees. The administrators obtained advice concerning the position of the French subsidiary and 16 days after the commencement of the administration learned that there was in fact no French subsidiary and that the employees in France were in fact employees of the company. The question arose as to whether or not the contracts of employment of those employees had been adopted by the administrators within the meaning of section 19(6) of the Insolvency Act 1986. The administrators believed that they had not adopted the contracts of employment and immediately set in motion those requirements of French employment domestic law which had to be complied with to terminate employment. Meanwhile the company was placed in liquidation in France and a liquidator was appointed. The administrators sought direction from the court confirming that they had not adopted those contracts of employment and served notice of the application on the French liquidator and the 12 former employees. Laddie J held that in determining whether an administrator or receiver had adopted an employee's contract of

employment it was necessary to look at the facts and to decide whether there had been some conduct by the administrator or receiver which could legitimately be treated as an election to continue the contract of employment. In the present case there was no conduct by the administrators which could be said to amount to an election to treat the contracts of employment as continuing since the administrators at all times, once they knew of the existence of the contracts, made it clear that they elected not to continue the employment of the 12 employees.

[Lexa Hilliard]

Re Enigma Technique Limited; Wiseman and Grant v Brown Chancery Division (Peter Leaver QC sitting as a Deputy High Court Judge). Unreported, 17 December 2003.

B was the sole director of a company to which administrative receivers had been appointed by the bank. Since the date of their appointment B had issued three applications purportedly in the name of the company, which applications were all caught by the terms of the debenture deed and therefore which B had no authority to make without consent of the administrative receivers. The administrative receivers were concerned

about the substantial time and costs incurred in dealing with such applications, all of which had been dismissed to date as being without merit. The evidence was such that it was likely that B would continue to issue applications in the name of the company. The Court held that in the circumstances it was appropriate to grant a civil proceedings order substantially in the terms of the order made by the Court of Appeal in *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 113 preventing B from making any further applications or taking any steps in the name of the company without consent of the administrative receivers or permission of a judge of the High Court, designated for the purpose of hearing all such applications, and without providing a satisfactory indemnity as to the costs of any such applications for which consent was given or permission granted.

[Samantha Knights]

Ultraframe (UK) Limited v Fielding and others Court of Appeal (Waller, Longmore LLJ, Sir William Aldous). [2003] EWCA 1805.

The Court of Appeal dealt with issues as to legal and beneficial ownership of design rights in components of a conservatory roof system as between (a) the claimant as successor in title to the trustees in bankruptcy of D, who was the author of the designs, and

(2) certain companies of which D was 100% shareholder and director or de facto director and which exploited the designs. The issues arose as preliminary issues in complex proceedings involving claims to recover from the defendants the conservatory roof business, damages and other relief for infringement and breach of duty. The Court of Appeal held that D was the legal owner of the designs under section 215 of the Copyright, Designs and Patents Act 1988 because he did not make them as employee or pursuant to a commission, but that he held them on trust for his companies. In coming to its conclusion the Court found:

(1) As to employment, the judge was wrong (a) to give a special meaning to “contract of service” in section 215 (3) of the 1988 Act, when it should bear its ordinary meaning, and (b) to consider that, unless the company was a sham, a 100% shareholder who works for the company will be employed by the company if he receives sums which can be described as wages. In the present case D made the designs, not because he was under an obligation to do so under a contract of employment, but rather because he would benefit from so doing as shareholder.

(2) As to commission, section 215 (2) of the 1988 Act requires there to be a contract involving mutual

obligations before the relevant designs are produced. D did not make the designs pursuant to a pre-existing contractual obligation.

(3) As to trust, a director or de facto director who used company assets for the purpose of making the designs which would then be used in the company's business would normally hold them on trust for the company. The claimants could not rely on the *Duomatic* principle to claim the beneficial interest in the designs for himself, because that would involve an unlawful extraction of company assets (applying *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626 and *re Halt Garage (1964) Ltd* [1982] 3 All ER 1016), there was no formal act of ratification or assent (applying *D'Jan of London Ltd* [1994] 1 BCLC 561) and there was no reason to infer that D intended to do otherwise than that which his obligations demanded of him.

[Simon Mortimore QC]

INSOLVENCY – PERSONAL

Commissioners of Inland Revenue v Bland and Sargent

Chancery Division sitting in Newcastle (Lloyd J). [2003] BPIR 1274.

B had obtained an interim order on 8 March 2002 in order to put a proposal for an IVA to her creditors. The original proposal made no

offer of dividend to any creditors but merely provided for a fee to be paid to the supervisor. The debtor's liabilities were £1 million, of which the preferential debts amounted to £30,000. The debtor had assets of £30,000 but they were excluded from the arrangement. The Inland Revenue ("IR") indicated on 23 April 2002 that it would not support the arrangement because it was neither a proposal for a composition or scheme of arrangement within the meaning of Part VIII of the Insolvency Act 1986. Consequently, amendments were proposed by the debtor that allowed for a small dividend of 0.5p in the pound to be paid to all creditors. Had B entered bankruptcy, the evidence was that there would be no dividend at all for unsecured creditors. The IR challenged the arrangement under section 262 of the 1986 Act on the grounds that the original proposal was neither a proposal for a composition nor for a scheme of arrangement. It was also argued that if the original proposal fell outside the statutory binding effect of an IVA scheme it could not be saved by later modification. Held, allowing the application and setting aside the IVA: (1) the original proposal offered nothing to creditors, therefore it could not be a composition. Furthermore the proposal could not

be regarded as amounting to a scheme of arrangement as nothing was being offered which creditors could accept; there was no *quid pro quo* involved. Therefore the original proposal was outside the IVA scheme in Part VIII of the 1986 Act and was a nullity. (2) That being so, the position could not be retrieved by modifying the proposal after the nominee had reported favourably to the court but prior to the creditors' meeting. The whole procedure had become a nullity and would have to be re-started within the constraints imposed by the law. The court would not use its consequential powers under section 262 of the Act to retrieve the situation as the error in procedure was so fundamental.

Coulter v Chief Constable of Dorset Police.

Chancery Division (Patten J). The Times, 24 December 2003.

There was an equitable assignment of a chose in action held by one chief constable, upon his leaving office, in favour of the next chief constable, so that a statutory demand served by the new chief constable in respect of a judgment debt in favour of the previous one was validly served although there was no actual assignment of the judgment debt.

Owo-Samson v Barclays Bank Plc and Boyden (No 2) Chancery Division (Mr Registrar Jaques). [2003] BPIR 1393.

A bankruptcy order was made against Mr Owo-Samson on 2 June 1998. O applied to annul the bankruptcy order which application was dismissed in July 2002 by Registrar Baister. On 15 December 2002, His Honour Judge McGonigal confirmed the decision on appeal. With the permission of Chadwick LJ, O appealed further. The Court of Appeal allowed O's appeal and directed that the annulment application of O should be re-determined in the light of its judgment. Dismissing the application to annul, Registrar Jacques held that although, in the light of the subsequent evidence, the bankruptcy order ought not to have been made, the court retained a discretion whether or not to annul the bankruptcy order and a critical factor in exercising such discretion was the prospect, if the order was annulled, of the debtor being able to satisfy the petitioner and his other liabilities. On the basis of the evidence as to the debtor's assets and liabilities, it was clear that the debtor would not be able to satisfy the same and the bankruptcy order ought not to be annulled.

[Adam Goodison, David Allison]

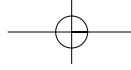
The Society of Lloyd's v Janet Anne Bowman Court of Appeal (Waller, Chadwick and Clarke LJJ). [2003] EWCA Civ 1886.

Where a judge of the High Court has decided that the applicant's counterclaim has no prospect of success and has refused permission to appeal from his decision on the ground that an appeal would have no prospect of success, a judge sitting in the bankruptcy court should be slow to hold that the requirement in rule 6.5(4)(a) of the Insolvency Rules 1986 can be satisfied. The decision of the first judge, however, does not preclude the bankruptcy judge from giving effect to his own, different, view because the bankruptcy judge cannot be required to ignore the possibility that the Court of Appeal may take a different view from the first judge. But, unless the bankruptcy judge feels confident that the Court of Appeal will take a different view and will give permission to appeal from the order of the first judge, the bankruptcy judge should normally refuse to set aside a statutory demand under rule 6.5(4)(a). If the bankruptcy judge knows that there is an application for permission to appeal from the first judge pending before the Court of Appeal, it is open to him (in a proper case) to give permission to appeal from his own order, with an indication that the Court of Appeal may wish to hear that appeal at

the same time as it hears the application for permission. In such a case he can postpone the presentation of a bankruptcy petition until after the hearing of the application for permission by an appropriate order under rule 6.5(6) of the Insolvency Rules.

Whitehead v Household Mortgage Corporation Plc Court of Appeal (Chadwick, Sedley and Scott Baker LJJ). [2003] BPIR 1482.

W and his wife jointly owned a property. It was mortgaged to HMC as security for loan of over £90,000. W proposed an IVA. For the purposes of the IVA, HMC valued its security on the property at £65,000, less than the outstanding indebtedness. It had voted against the proposals in respect of the unsecured balance; but, nevertheless, the IVA proceeded, and HMC received a dividend in accordance with its terms, £1,874 being a dividend of just over 5p in the pound, which it applied towards the arrears of interest on the mortgage account. In March 2000, a possession order against the property was made in favour of a second mortgagee. The second mortgagee sold the property for £137,000. The amount required to redeem the HMC mortgage as at the date of sale was just over £118,000. An issue arose as to whether HMC was entitled to apply the proceeds of sale towards the entirety of the



secured indebtedness, giving credit for the sum received under the IVA. The district judge dismissed an application by W and Mrs W for an account of the sum due from them to HMC on the security. The circuit judge dismissed their appeal, holding that it was an abuse of process for W and Mrs W to raise the issue having failed to make representations concerning the same for many years. On appeal it was held that on the express terms of the IVA, having claimed in W's IVA and accepted a dividend, HMC could not have sued W on his personal covenant to pay HMC. Similarly, HMC could not have sued Mrs W on her joint personal covenant. However, the Court would not imply a term into the IVA that by participating in the IVA and accepting the dividend under it, HMC agreed to abandon any part of its security. HMC had not agreed to treat its claim as unsecured insofar as it exceeded £65,000 and was therefore entitled to insist that its security be redeemed in the full amount.

PRIVILEGE

Andrew Henderson, "FSA Proceedings and Legal Professional Privilege Revisited in the Light of Three Rivers DC v Bank of England (No 5)", *Journal of International Banking Law and Regulation*, Vol 18, Issue 12, 488.

Savings & Investment Bank Ltd (in liquidation) v Fincken Court of Appeal (Rix LJ, Carnwath LJ). [2003] EWCA Civ 1630.

The philosophy underlying the "unambiguous impropriety" exception to the privileged nature of without prejudice discussions ran contrary to treating an admission as an impropriety, unless the privilege itself was abused. The public interest in the privilege rule was great and was not to be sacrificed save in truly exceptional circumstances. A mere inconsistency between an admission and a pleaded case or stated position, with the mere possibility that such a case or position if persisted in might lead to perjury, should not result in the admitting party losing the protection of privilege.

PROFESSIONAL NEGLIGENCE

Wade v Poppleton & Appleby

Chancery Division (David Richards J). Unreported, 19 December 2003.

Insolvency practitioners were engaged as advisers to two companies and to the directors personally with a view to seeking the rescue of the parent company. Shortly thereafter, they were appointed as administrative receivers. Following a three week trial, the claims of the companies and the directors for damages for negligence

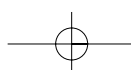
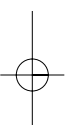
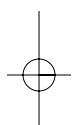
and for an account of profits arising for breach of fiduciary duty were dismissed. The judge held that the firm of insolvency practitioners owed no fiduciary obligation to decline appointment by the Bank as administrative receivers. Once the Bank had decided to appoint receivers, there was nothing further that the insolvency practitioners could do or were required to do. Their acceptance of the appointment did not affect or undermine the work which they had previously done or in any other way create a conflict with the performance of their duties. On the facts, the insolvency practitioners were not negligent.

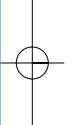
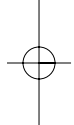
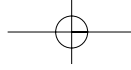
[Richard Sheldon QC, David Marks]

TALKS & SEMINARS

On 3 December 2003 members of chambers spoke at a one day conference in Coventry organised by Insolvency Network UK on various topics including the impact of the EC Regulation on Insolvency Proceedings; receivers, their duties and liabilities; administrations in the light of the decision in *Re Colt Telecom Group plc*; investigations, examinations and the Human Rights Act.

[Stuart Isaacs QC, Marion Simmons QC, Hilary Stonefrost, Samantha Knights]





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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