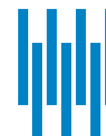
3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 10 No 6 June 2004

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Richard Adkins QC
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The recent decision of the Court of Appeal in Re Spectrum Plus Limited has provoked considerable interest and comment, the Court declining to follow the Privy Council's decision in Brumark [2002] 1 AC 710. Lord Phillips MR held that Sir Andrew Morritt VC, who decided the case at first instance, had been wrong to conclude that a standard form debenture purporting to create a fixed charge over the company's book debts, modelled on that in Siebe Gorman v. Barclays Bank [1979] 2 Lloyds Reps 142, created only a floating charge over those debts. Instead, the debenture created a fixed charge, while Siebe Gorman (contrary to the VC's conclusion) was correctly decided. Gabriel Moss QC and Jeremy Goldring appeared for National Westminster Bank plc.

This edition of the Digest was compiled by Stephen Robins.

Blair Leahy

GENERAL NEWS

Company law consultation

The Department of Trade and Industry has published a consultation document entitled "Company Law: Flexibility and Accessibility" seeking views on specific proposals to reform and restate company law. The document can be found online at http://www.dti.gov.uk/cld/pdfs/powerscondoc_final.pdf. The consultation closes on 24 September 2004.

Insolvency statistics

The Department of Trade and Industry has published the statistics showing insolvencies in the first quarter 2004. The statistics show there were 3,155 company insolvencies in England and Wales in the first quarter of 2004 on a seasonally adjusted basis. This was a decrease of 4.6% on the previous quarter and a decrease of 14.3% on the same period a year ago. There were 10,294 individual insolvencies in England and Wales in the first quarter of 2004 on a seasonally adjusted basis. This was a decrease of 0.5% on the previous quarter, but an increase of 26.8% on the same period a year ago.

COMPANY LAW

Re Hill & Tyler Ltd

[2004] EWHC 1261 (Ch).
Ch D (Richard Sheldon QC).

The company gave financial assistance within the meaning of section 151 of the Companies Act 1985 ("CA 1985") and attempted to comply with the "whitewash" procedure set out in sections 155 to 158 CA 1985 including the making of the requisite statutory declaration ("the declaration"). The

company went into administration, and the administrators applied to the court for directions as to whether the arrangements constituted unlawful financial assistance on the grounds that the declaration was defective in that it contained a number of errors. It was held that there was sufficient compliance with the statutory requirements to treat the declaration as valid and that the prohibition on financial assistance did not apply. It would have been sufficiently clear to a reasonably intelligent reader that the defects relied on by the administrators were errors. It would be going too far to say that any inaccuracy, however minor, would render a declaration invalid.
[Richard Sheldon QC]

European School of Economics (International) Ltd v D'Anna

Ch D (HHJ Rich QC). [2004] All ER (D) 462 (May).
The defendant was appointed as the claimant's company secretary. The defendant held a meeting at which she purported to appoint directors and issue shares to herself. The company applied for a declaration that the defendant had never been a director of the claimant and that she had no authority to act as such. The application was allowed. It was held that the defendant had never been a director and that she had no authority to appoint directors or issue shares.

CONFLICT OF LAWS

Ellis v Bamford and others

Royal Court of Jersey (Sir Philip Bailhache, Bailiff and Jurats). 4 June 2004.
In an application to strike out or stay proceedings commenced in Jersey on grounds of forum non conveniens in favour of proceedings commenced in Switzerland, applying the principles set out in Spliada Martime Corporation v Cansulex Ltd [1987] AC 460, the applicants had to show that Switzerland was clearly the more appropriate forum for the trial of the action. In the present case the applicants had failed to discharge this burden not least because the action involved issues of Jersey law which could more satisfactorily and fairly be resolved by the Jersey court. Even if the applicants had managed to discharge the burden of showing that Switzerland was a more appropriate forum then the court would in any event have refused a stay of the Jersey proceedings as a matter of discretion.
[Michael Crystal QC, Tom Smith]

DISQUALIFICATION OF DIRECTORS

Re Uno plc and World of Leather plc

[2004] EWHC 933 (Ch). Ch D (Blackburne J).
The Secretary of State for Trade and Industry sought disqualification orders against five former directors of a company on the grounds that the directors had continued trading and/or taking deposits from customers at a time when the company had been insolvent. Blackburne J refused to disqualify the directors. He held that the directors had made great efforts to save the company. A director would not be at risk of a finding of unfitness merely because he knowingly allowed the company to trade while insolvent. An additional ingredient was required to show unfitness, namely that the director knew or ought to have know that there was no reasonable prospect of avoiding insolvency. Here the directors took professional advice, and they were not reckless. Their conduct did not cross the threshold of unfitness so as to merit disqualification.

INSOLVENCY – CORPORATE

Daltel Europe Ltd v Makki

Ch D (David Richards J). [2004] All ER (D) 546 (Mar).
Mr Makki was the director and sole shareholder of Daltel Europe Ltd ("Daltel"). Daltel purchased airtime from British Telecommunications plc ("BT") and became indebted to BT as a result. Daltel sold the airtime on to telecommunications suppliers, and the proceeds of the sale were paid into Mr Makki's bank account in Beirut. The company failed to pay the sums due to BT. The company was wound up. The liquidators obtained a freezing injunction

against Mr Makki on the basis that there were no genuine commercial reasons for the payments to his bank account. The liquidators then applied for an order for the private examination of Mr Makki under section 236 of the Insolvency Act 1986. Pursuant to section 236, the court had a discretion as to whether to order an examination, which involved a balancing act between the requirements of the liquidator to obtain information against the possible oppression to the person sought to be examined. In the present case, the court was satisfied that there was a real and pressing need for the private examination of Mr Makki.

[David Alexander]

Re West End Networks Ltd

[2004] UKHL 24.
House of Lords (Lords Bingham, Hoffmann, Hope, Phillips and Brown).

The question falling for determination was whether a VAT credit due to an insolvent company could be set off under rule 4.90 of the Insolvency Rules 1986 ("IR 1986") against the Crown's subrogated claim in respect of payments made to employees under the Employment Rights Act 1996. The House of Lords held that the VAT credit could be set off against the subrogated claim. Lord Hoffmann held that it was not necessary for the purposes of rule 4.90 that the debt should have been due and payable before the commencement of the winding up. It was sufficient that there should have been an obligation arising out of the terms of a contract or statute by which a debt sounding in money would become payable upon the occurrence of some future event or events. The term "mutual debts" did not in itself require anything more than commensurable cross-obligations between the same people in the same capacity. The phrase "mutual dealings" was to be construed in an extended sense so as to mean dealings which give rise to commensurable cross-claims and so as include, for example, the commission of a tort or the imposition of a statutory obligation. The requisite mutuality existed because in private law the Crown through its various emanations was the beneficial owner of all central funds.

Inland Revenue v Wimbledon Football Club

[2004] EWCA Civ 655.
Court of Appeal (Lord Woolf CJ, Mance and Neuberger LJJ).

The defendant ("the Company") held one share in The Football League Ltd ("the Share"). The Company went into administration and the administrators caused the Company to enter into an agreement for the sale of the share ("the Agreement"). It was a term of the Agreement that the purchaser would discharge in full the debts owed to certain non-preferential creditors ("the Football Creditors"). The fact that the purchaser was to pay off the Football Creditors did not result in any reduction in the consideration to be paid to the Company. The Company submitted a proposal for a company voluntary arrangement ("CVA") to its creditors. The proposal involved the payment of a dividend to the Inland Revenue. Nothing would be paid to the non-preferential creditors. A creditors' meeting approved the proposals, but the Inland Revenue applied under section 6 of the Insolvency Act 1986 ("IA 1986") for an order to revoke or suspend the CVA on the grounds that the full payment of the Football Creditors infringed section 4(4) IA 1986. The Judge dismissed the application, and the Inland Revenue appealed. The appeal was dismissed. The Court of Appeal held that section 4(4) only applied in relation to a "proposal … under which" non-preferential creditors would be repaid without the preferential creditors being paid in full. Section 4(4) does not preclude the approval "as a result of which" non-preferential creditors would be repaid without the preferential creditors being paid in full. The Agreement did not form part of the "proposal". The proposal invited the creditors to

consider how the proceeds of the Agreement were to be distributed. The creditors were not being invited to approve the Agreement itself. It would be unfortunate if third party monies which did not belong to the Company beneficially could be caught by section 4(4).

Ian Fletcher, "UK Corporate Rescue: Recent Developments," (2004) 5 European Business Organization Law Review (The Hague, TMC Asser Press) pp.119-151.
[Ian Fletcher]

Ian Fletcher, "The Challenge of Change: First Experiences of Life under the EC Regulation on Insolvency Proceedings in the UK," (2003) Annual Review of Insolvency Law (Canada: Thomson, Carswell) pp. 431-455.
[Ian Fletcher]

INSOLVENCY – PERSONAL

Hosking v Michaelides

[2004] All ER (D) 147 (May). Ch D (Paul Morgan QC).
On the application of the trustee in bankruptcy for the possession and sale of a residential property, it was held that: (a) the bankrupt's wife did not have a beneficial interest in the property; and (b) the wife's physical and mental circumstances constituted "exceptional circumstances" within the meaning of section 335A of the Insolvency Act 1986 which justified the deferral of the taking effect of the order for six months.
[Lucy Frazer]

Khan v Trident Safeguards Ltd

[2004] EWCA Civ 624. Court of Appeal. (Arden, Buxton and Wall LJJ)
Mr Khan brought proceedings before an employment tribunal against his former employer ("Trident") for: (a) unfair dismissal; and (b) racial discrimination and victimisation. Mr Khan's claims were dismissed. Mr Khan was adjudged bankrupt. He then attempted to appeal to the Employment Appeals Tribunal ("the EAT"). The EAT dismissed his appeals on the grounds that Mr Khan's causes of action had vested in his trustee in bankruptcy and that Mr Khan accordingly had no standing to prosecute the appeals. Mr Khan appealed to the Court of Appeal. Trident conceded in the light of Grady v HM Prison Service [2003] 3 All ER 745 that the EAT did have jurisdiction to entertain Mr Khan's unfair dismissal claim. Trident contended that different considerations applied to the appeals relating to racial discrimination and victimisation because: (a) Mr Khan was essentially claiming monetary compensation; and (b) the claim was a "hybrid" claim within Ord v Upton [2000] Ch 352 which accordingly vested in the trustee in bankruptcy. Arden and Buxton LJJ (Wall LJ dissenting) held that Mr Khan could save his claims for racial discrimination and victimisation from being "hybrid" claims by amending his claims so as to limit them to a declaration and compensation for injured feelings and by disclaiming any desire to seek any remedy that rendered his claim "hybrid".

Popely v Popely

[2004] EWCA Civ 463. Court of Appeal (Ward, Jonathan Parker LJJ and Moses J).
The appellant ("R") had obtained a costs order against the respondent ("J") in ongoing proceedings in which J claimed damages against R for breach of an agreement. R served a statutory demand on J in respect of the liability arising under the costs order. J applied to set aside the statutory demand. The district judge dismissed the application. J appealed. The deputy judge allowed the appeal. R appealed. R contended that the phrase "cross-demand" in rule 6.5(4) of the Insolvency Rules 1986 could not encompass the "demand" made against R in the proceedings because this would subvert the costs order. The Court of Appeal dismissed the appeal. It was held that the meaning of the phrase "cross-demand" could not change according to whether the judgement or order on which the statutory demand was based was obtained in the same proceedings as those in which the claim relied on as the cross-demand was

being advanced. The setting aside of the statutory demand would not subvert the costs order.

[John Briggs]

Tanner v Everitt

[2004] EWHC 1130 (Ch). Ch D (Mann J).

Two debtors submitted proposals for individual voluntary arrangements ("IVAs") to their creditors. The creditors approved the proposals. The IVAs did not contain any express power for the variation of their terms. Notwithstanding the absence of such a term, the debtors proposed certain variations to their creditors, including the appointment of a new supervisor, and a large number of creditors approved the variations. Many years later, the new supervisor applied to the Court for directions concerning the validity of his appointment and the other variations. The debtors issued a cross-application for a declaration that the IVAs were invalid on various grounds. In respect of the supervisor's application, it was held that: (1) the variations bound only those creditors who voted in favour; (2) contractual assent could not be inferred from silence; (3) there was insufficient evidence of the necessary positive assumption required to found an estoppel by convention; (4) the supervisor had not been validly appointed but the Court would appoint him as such. In respect of the debtors' cross-application, it was held that: (1) there was nothing wrong with the nominee preparing the proposals as long as the debtor was content to sign them and make them his own; (2) the mere presence of defects in the proposals did not mean that the IVAs would fail; (3) a debtor could not take advantage of defects in his own proposal; (4) the creditors' debts were not statute-barred because the IVAs contained an implied term that the limitation period should cease to run for the duration of the IVAs.

INSURANCE

First National Tricity Finance Ltd v Ellis

The Times, 31 May 2004. Court of Appeal (Jonathan Parker, Longmore, Maurice Kay LJJ).

The company provided extended warranties to its customers. The customers obtained credit facilities from First National Tricity Finance Ltd ("FNTN"). Pursuant to section 75 of the Consumer Credit Act 1974, FNTF was jointly and severally liable with the company to compensate the customer for any breach of contract by the company. The company went into administration. FNTF was left holding the extended warranty "baby". The administrators informed FNTF that the company had taken out insurance in relation to its liability under the extended warranty contracts. The administrators were not willing to disclose details. FNTF applied for information in the possession of the respondents for the purpose of ascertaining whether any rights against the company's insurers had vested in the customers under the Third Parties (Rights Against Insurers) Act 1930 ("the Act"). The administrators contended that: (a) the Act applied only to tortious liabilities or to liabilities arising in tort and contract concurrently; and (b) even if the liability was covered by the Act, either no rights against any insurers had yet been transferred or it was impossible to know whether any such rights had been son transferred with the result that there was no information "reasonably … required … for the purpose of ascertaining whether any rights have been transferred to and vested" in the customers. In respect of the first submission, the Court of Appeal held that the Act applied to contractual liabilities, whether in debt or for damages. Tarbuck v Avon Insurance [2002] QB 571 and T&N v Royal Sun Alliance [2003] EWHC 1016 overruled. In respect of the second submission, the Court of Appeal held that the question of the date of transfer to the third party of the rights of the insured against the insurer should be regarded as conclusively determined in favour of the view that the transfer takes place on the event of insolvency. The rights so trans-

ferred will often be contingent or unquantified, but the third party will "reasonably … require" information about the existence or non-existence of insurance and the identity of the insurer. Therefore section 2 of the Act will usually enable a third party claimant to obtain disclosure of documentation before the establishment of the insured's liability to that third party. Nigel Upchurch Associates v The Aldridge Estates Investment Co [1993] 1 Lloyd's Rep 535 and Woolwich Building Society v Taylor [1994] CLC 516 should no longer be treated as authoritative.
[Gabriel Moss QC, Barry Isaacs]

PROCEDURE

Customs & Excise Commissioners v Turnstem Ltd

[2004] All ER (D) 269 (May). Ch D (Jarvis QC).

Customs & Excise ("HMC&E") brought proceedings for VAT evasion. HMC&E then applied for summary judgment. The second defendant applied for the disclosure of documents, arguing that disclosure was essential for him to defend the summary judgment application. The application was dismissed. It was wholly inappropriate to embark on a wholesale disclosure exercise. It was established that an application for summary judgment should not become a mini-trial and disclosure would only be ordered in exceptional circumstances. Given the voluminous documentation, any disclosure order would be incapable of being dealt with in the short time frame.
[Daniel Bayfield]

Texuna International Ltd v Cairn Energy Ltd

[2004] EWHC 1102. QBD Commercial Court (Gross J).

Where a party to proceedings was resident in a country not contracted to the Brussels or Lugano Conventions, an order for security for costs under CPR r. 25.1 could reflect the additional costs of enforcement in that country when compared to enforcement in a contracting state. In certain non-contracting jurisdictions, the additional obstacles to enforcement of a judgment could be such to justify an order for security in the full amount of the estimated costs, whereas in other jurisdictions the obstacles would be less substantial or minimal. There can be no inflexible assumption that enforcement elsewhere will carry with it extra obstacles or burdens.

REAL PROPERTY

Kyriakides v Pippas

Ch D (G Moss QC). [2004] All ER (D) 362 (Mar).

Mr Kyriakides wanted to exercise his right to buy his council property. As he was unable to pay a deposit, his daughter agreed to add her name to the purchase to enable them to obtain a 100 per cent mortgage. The transfer was registered in their joint names, but Mr Kyriakides paid the mortgage by direct debit from his bank account. Mr Kyriakides died intestate. After his death, his daughter procured the transfer of the property into her sole name. The widow of Mr Kyriakides brought proceedings against her daughter asserting that the late Mr Kyriakides had been the true beneficial owner of the property and that the property had passed to the claimant under the law of intestacy. The defendant denied the claim. She contended, inter alia, that the property was a gift to her from Mr Kyriakides, in the form of a dowry, and that a joint beneficial interest had existed in the property so that it passed to her on the death of Mr Kyriakides. The claimant's claim was allowed. On the evidence before the court, Mr Kyriakides had been the purchaser and owner of the entire beneficial interest in the property. The defendant had only been a quasi-surety for the mortgage and a nominee on the title. Therefore the claimant should be registered as the sole proprietor of the property.
[Gabriel Moss QC]

Patel v Legal Services Commission

Ch D (R Sheldon QC). [2004] EWHC 743 (Ch).

Legal aid was granted to Mr Patel to pursue proceedings in connection with a boundary

dispute concerning a small strip of land on his property. Mr Patel was successful in recovering the strip of land. The Legal Services Commission claimed that the statutory charge in its favour conferred by the Legal Services Act section 16(6) extended to the whole of the property. It was held that the statutory charge was limited to the strip of land in question and the enhanced value to the property as a result of the recovery or preservation of the strip. On the facts the value of the strip of land and the enhanced value to the property was nominal. The charge did not extend to the property as a whole because Mr Patel's interest in the property as a whole or his right to its possession was not in issue or questioned in the proceedings.
[Richard Sheldon QC]

SECURITIES

Re Spectrum Plus Ltd
[2004] EWCA Civ 670. Court of Appeal (Lord Phillips of Worth Matravers MR, Jonathan Parker and Jacob LJJ).
The First Respondent ("S") opened an account with National Westminster Bank plc ("the Bank") with an overdraft facility of £250,000. S granted the Bank a debenture requiring S to pay the proceeds of the book debts into an account with the Bank. S went into voluntary liquidation and appointed the Second and Third Respondents as liquidators. The liquidators collected book debts to the value of £113,484 but refused to account for them to the Bank. The Bank applied for relief under section 112 of the Insolvency Act 1986. The Customs and Excise Commissioners, Commissioners of Inland Revenue and Secretary of State for Trade and Industry were joined as the Fourth, Fifth and Sixth Respondents respectively (together "the Crown"). The Vice-Chancellor held that the decision in Siebe Gorman & Co Ltd v Barclays Bank Ltd [1979] 2 Lloyds Reps 142 was wrongly decided and that a charge over book debts in a debenture in substantially the same form as the debenture in the Siebe Gorman case was only effective as a floating charge. The Bank appealed. The Court of Appeal reversed the decision of the Vice-Chancellor and held that debentures in the form approved by Slade J in Siebe Gorman took effect as fixed charges. Lord Phillips MR rested his conclusion on four main grounds. First, the Court of Appeal was bound by its own decision in Re New Bullas Trading Ltd [1994] 1 BCLC 485 notwithstanding the disapproval of the decision by the Privy Council in Agnew v Commissioner of the Inland Revenue [2001] 2 AC 710. Second, the fact that the debenture required the proceeds of book debts to be paid into an account at the chargee bank was of critical importance because the title to those proceeds passed absolutely to the chargee bank and the customer's right to withdraw the money was merely contractual. Third, the account with the chargee bank was essentially a loan account, and the receipt of the proceeds of sale simply discharged part of the debt to the bank represented by the overdraft. Fourth, even if Slade J had been wrong, the form of debenture considered in Siebe Gorman could have taken effect as a fixed charge as a result of customary usage.
[Gabriel Moss QC and Jeremy Goldring]

TALKS AND SEMINARS

Stephen Robins gave a talk entitled "The Scope of Corporate Moratoriums" to R3 members in Huddersfield on 20 April 2004.
[Stephen Robins]

Richard Adkins QC gave a talk entitled "Financial Aspects of Corporate Moratoriums" to R3 members in London on 11 May 2004.
[Richard Adkins QC]

Glen Davies gave a talk entitled "Recent Developments In Corporate Insolvency" at the ILA Regional Seminar in Bristol on 20 May 2004.
[Glen Davies]

Robin Dicker QC, Fidelis Oditah QC and Ron DeKoven participated in the University of Cambridge Centre for Corporate and Commercial Law Conference on 22 May 2004. The Conference was entitled "The Future of Corporate Rescue: How is Practice Evolving?".
[Robin Dicker QC, Fidelis Oditah QC, Ron DeKoven]

Gabriel Moss QC and Mark Phillips QC spoke at the 19th R3 Annual Conference in Monte Carlo (3 to 6 June 2004).
[Gabriel Moss QC, Mark Phillips 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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