

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 10 No 5 May 2004

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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
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The EC Regulation continues to provide some interesting cases for the domestic courts of member states. Most recently, the Irish High Court has refused to recognise insolvency proceedings commenced by an Italian Court in respect of Eurofood IFSC (part of the Parmalat group) as main proceedings under the EC Regulation on Insolvency Proceedings. The Court held that main proceedings had been opened in Ireland before the Italian proceedings commenced as a result of the appointment of a provisional liquidator over the company by the Irish Court, and that the company's centre of main interests was in Ireland not Italy. Kelly J said that, had it been necessary, he would also have refused to recognise the order of the Italian Court under Article 26 of the Regulation because no notice of the Italian hearing opening the main proceedings had been given to the company's creditors and only one working day's notice to its Irish provisional liquidator in breach of those parties' fundamental rights to a fair hearing under the European Convention on Human Rights.

This edition of the Digest was compiled by Marcus Haywood.

Blair Leahy

GENERAL NEWS

UNCITRAL

In March, Desmond Flynn, Inspector General of the UK's Insolvency Service, unveiled the British Government's intention to introduce the UNCITRAL Model Law on Cross Border Insolvency into UK law. The aim according to the Insolvency Service is to introduce the Model Law by 31 March 2005. However, much would depend upon consultations with interested parties and subsequent debates in both Houses of Parliament. Section 14 of the Insolvency Act 2000 contains the power to enact the UNCITRAL provisions as a standalone clause inside the UK insolvency legislation.

The Insolvency Proceedings (Fees) Order 2004

The Insolvency Proceedings (Fees) Order 2004 came into force on 1 April 2004. It seeks to simplify the fee structure applicable in relation to insolvency proceedings under the Insolvency Act 1986 by reducing the types of fees payable.

COMPANY

Re Telewest Communications plc Ch D (David Richards J). [2004] EWHC 924 (Ch).

Telewest applied for leave to convene a meeting of creditors for the purposes of considering a scheme of arrangement pursuant to section 425 of the CA 1985.

The relevant creditors were principally bondholders who held unsecured bonds denominated in sterling and US dollars. In order to determine the number of new shares to be transferred to each scheme claimant, it was necessary to express all claims covered by the scheme in a single currency. For that purpose the scheme provided for sterling claims to be converted into US dollars at a rate being the average of the closing mid-point spot rates for the conversion of sterling into US dollars, as reported by Bloomberg LP for each trading day in the period commencing 1 October and ending on the last practicable date before posting the explanatory statement for the scheme. The bondholder committee, who represented holders of US dollar denominated bonds, supported the applications. Certain holders of sterling bonds opposed the application, arguing that the adoption of the average exchange rate, as against a spot rate on the date on which scheme claims were valued, produced seriously unfavourable treatment of the sterling bondholders as against the dollar bondholders. They invited the court to allow the scheme to be put to creditors only on the basis of the currency conversion proposed by them, alternatively, if the scheme were to proceed in its current

form, that there should be two classes.

The court held that it was not appropriate at the preliminary hearing for directions to investigate the merits of the scheme unless it could be shown that no court acting reasonably would sanction the scheme even if the requisite majorities were obtained. This was not such a case. As regards the class issue, it was established that rights, not interests, were the governing factor in the composition of classes and that it was the extent to which the relevant rights were dissimilar which would determine the composition of classes in any particular case. Currency conversion on the date a company went into liquidation was an integral part of achieving a *pari passu* distribution in a liquidation and, by analogy, a departure in a scheme from currency conversion at the date of valuation of claims created a dissimilarity of rights where the scheme was proposed as an alternative to liquidation. However, on the facts of the present case the dissimilarity of rights was not sufficiently material. There was a great deal more which united the bondholders than divided them. The scheme appeared to be a single arrangement with all bondholders rather than separate but linked arrangements with the sterling and dollar bondholders. The

sterling and dollar bondholders did not constitute separate classes for the purpose of the scheme.

**[Richard Sheldon QC,
Robin Dicker QC]**

**Nam Tai Electronics v David Hague and others
British Virgin Islands,
Court of Appeal (Saunders,
Alleyne SC, Gordon QC).
Unreported, 26 April 2004.**

The only substantial asset in the insolvent company Tele Art was its holding of a significant number of shares in Nam Tai. Nam Tai was the owner of a substantial judgment debt against Tele Art. Nam Tai amended its Articles of Association to allow it to redeem shares in itself from the ownership of Tele Art. After a winding up order had been made against Tele Art, Nam Tai purported to exercise that right of redemption. It purported to pay for the redeemed shares by cancelling the judgment debt owed to it by Tele Art. The court held that the amendment by Nam Tai of its Articles of Association to allow redemption by Nam Tai of its shares from the ownership of Tele Art was lawful. However, the rights created under that amendment were rights in personam to those shares; they did not create an equitable charge. For a company to create a lien over its own shares securing

monies owed to it by a shareholder would require clear and unambiguous language. As such, the debt owed by Nam Tai to Tele Art, being the price of the redeemed shares could not be offset against the judgment debt owed to Name Tai in Tele Art's liquidation. A company being wound up could not set off obligations post dating the winding up against obligations pre-existing the winding up.

[Richard Hacker QC]

Vectone Entertainment Holding Ltd v South Entertainment Ltd

Ch D (Richard Sheldon QC). [2004] EWHC 744 (Ch).

The claimant sought orders to convene an extraordinary general meeting of the company pursuant to the CA 1985 section 371 in its capacity as the majority shareholder. It did so on the basis that a minority shareholder was frustrating its proper governance by refusing or failing to attend the company meetings. The Court held (1) that there was nothing in the nature of a class right or substantive right conferred on the minority shareholder by the shareholders agreement, which would be overridden by the court in granting the relief sought under s.371 of the Act thus the claimant would be entitled to the relief sought; and (2) in cases such as this,

where the facts were in dispute, and the evidence was incomplete, an application under s.371 of the Act was not the appropriate forum to adjudicate on these issues.

[Richard Sheldon QC]

Re Aberdeen Preferred Income Trust plc

Ch D (Etherton J). [2004] EWHC 199 (Ch).

The crucial issue, when deciding whether or not to sanction the proposed scheme of arrangement, was whether an honest, intelligent and properly informed shareholder might reasonably approve the scheme notwithstanding that there had been no investigation of the potential claims against third parties and, following the sale, the potential claims would not be investigated or pursued. However, it was not necessary for the court to decide whether or not to give sanction on this basis as the parties were able to propose a practical mechanism to allow the sale of Aberdeen's shares to take place in accordance with the provisions of the scheme whilst retaining any potential benefit of the potential claims for creditors and shareholders. As a precondition of the coming into effect of the scheme, Aberdeen would incorporate a new wholly owned subsidiary, whose object would be the bringing of the potential claims against

the potential defendants. The benefit of the claims (after liquidation costs and expenses) would be held on trust by the subsidiary for Aberdeen's creditors and shareholders.

FINANCIAL SERVICES

R. (on the application of West) v Lloyds of London

CA (Brooke, Mummery, Dyson LLJ). [2004] EWCA Civ 506.

W applied for judicial review of four decisions of the Business Conduct Committee (BCC) of Lloyd's of London to approve four minority buy-outs of his memberships in four syndicates at Lloyd's. The Court held that the BCC was not open to judicial review. The decisions under challenge were concerned solely with the commercial relationship between W and the relevant managing agents, and this was governed by the contracts into which he had chosen to enter. Those decisions were of a private nature and not within the scope of public law.

GUARANTEES

Marubeni Hong Kong and South China Ltd v Government of Mongolia

QBD (Commercial Court) (Creswell J). [2004] EWHC 472 (Comm).

Rescheduling arrangements (which were entered into by the Mongolian buyers and the claimant without the

knowledge or consent of the government of Mongolia as guarantor) amounted to not insubstantial variations of the agreement between the Mongolian buyers and the claimant to which the guarantee related and prejudiced the position of the Mongolian government as guarantor. Applying the rule in *Holme v Brunskill* (1878) 3 QBD 495 the judge held that these material variations of the agreement between the Mongolian buyers and the claimant resulted in the discharge of the entirety of the Mongolian government's obligations under the guarantee letter signed by the Minister of Finance.

Atlas Ltd and others

v Brightview Ltd

Ch D (Jonathan Crow).

[2004] All ER (D) 95 (Apr).

An application was brought under section 459 of the CA 1985 on the basis that the company's business was being conducted in manner which was unfairly prejudicial to the interests of its members. The applicant was not a registered shareholder. The court held that it was arguable that the 'interests' of a nominee shareholder under section 459 were capable of including the economic and contractual interests of the beneficial owners of shares. Therefore the claim by JGR Ltd could not be struck out simply on the basis that it was a nominee shareholder.

INSOLVENCY –

CORPORATE

Re Dobb White & Co

Ch D (Lewison J).

Unreported, 8 April 2004.

The liquidator sought the sanction of the court pursuant to section 168(3) IA 1986 for a co-operation agreement between himself and the US appointed Receiver of a Bahamian incorporated company. The two legal entities were understood to have been involved in a worldwide "pyramid scheme" fraud. As such there was scope for potential dispute between the two office-holders as to which assets they had jurisdiction over. The agreement was aimed at avoiding potential disputes by the pooling of fraud assets located anywhere in the world outside the US, with any subsequent disagreement as to the correct appointment to be resolved by arbitration followed by further sanction of the court. A similar application was to be made to the US court for approval of the agreement. The English court granted the application for sanction being in the best interests of creditors.

[Samantha Knights]

Re Transbus International Ltd

Ch D (Lawrence Collins J).

[2004] EWHC 932 (Ch).

Administrators had power under the Schedule B1 of the IA 1986 to sell assets of the company prior to the approval

by creditors of the administrator's proposals and without making an application to the court. Para 68(2) of the Schedule required the administrators to act in accordance with directions of the court 'if the court gives [them]'. There would be many cases where the administrators were justified in not laying proposals before a meeting of creditors.

[Antony Zacaroli]

Secretary of State for Trade and Industry v Allso

Ch D (Evans Lombe J).

[2004] EWHC 862 (Ch).

The appellant's shareholding in R Ltd entitled him to oppose the petition against that company under section 124A of IA 1986 on public interest and just and equitable grounds. However, it did not entitle him to oppose applications against other companies of which R Ltd was beneficially entitled to the whole issued share capital. There was no reason why a contributory, having an interest to oppose the petition, should not be permitted by the court to appear on the petition and file evidence in opposition. However, where the company did not oppose such an application, the court would be astute to enquire why that was the case. Further, the petitioner in the case of petitions brought under section 124A should not be put to the cost of a contested petition where the

only opposition was from a contributory who could not demonstrate that the company was solvent.

Re Millennium Advanced Technology Ltd

Ch D (Michael Briggs QC). [2004] EWHC 711 (Ch).

A local authority brought a petition to wind up the company under section 122 and 124A of the IA 1986. The Court held that the local authority did not have locus under section 124A to bring the petition. A desire on the part of the creditor, essentially collateral to his status as such, to achieve some public interest in clearing the streets of companies misappropriating public monies did not justify a winding up petition. Parliament had identified the Secretary of State in section 124A of the Act as the guardian of the public interest. It could have included local authorities within the class of qualifying petitioners as guardians of the local public interest, but it had not. It would be an abuse for any person to pursue his perception of the public interest by a winding up petition, rather than by bringing the matters complained of to the attention of the Secretary of State. However, the court did have jurisdiction to make an order to wind up the company under section 122(1)(g) on the ground that it was just and equitable to do so.

Eurofood IFSC Limited Irish High Court (Kelly J). Unreported, 23 March 2004.

Upon a petition for the winding up of an Irish registered company, a provisional liquidator was appointed by the court (pending the hearing of the winding up petition) in order to prevent the company's centre of main interests being moved by its parent. Following that decision the Italian Court opened main proceedings under the Article 3 of the EC Regulation in relation to the same company. The Irish Court held that:

(1) The appointment of a provisional liquidator brought about the opening of main proceedings in Ireland under the Regulation as a judgment in relation to the opening of proceedings includes one appointing a liquidator (article 2(e) of the Regulation).

(2) For the purposes of the Regulation, in respect of Ireland, the definition of a liquidator includes a provisional liquidator (annex c).

(3) The time of the opening of proceedings is defined as the time at which the judgment becomes effective, whether it is a final judgment or not (article 2(f)). On the basis of section 220(2) of the Irish Companies Act 1963 and the concept referred to as "relation-back", the insolvency proceedings would have been opened on the date of the petition and not

the subsequent date of the winding up order.

(4) The company's centre of main interests was in Ireland as its registered office was located there and there was no proof that the centre of main interests was located elsewhere. The most important factor in establishing the location of a company's centre of main interests is where third party creditors would view the company to be located.

(5) There was no requirement in the Regulation that, when opening insolvency proceedings, a court must declare that it finds that the company's centre of main interests is or is not within its jurisdiction and the failure of a court to do this does not prevent main proceedings from being held to be opened if it is implicit from the judgment that the centre of main interests was found to be in that Member State.

(6) The Irish court would not recognise the main proceedings commenced at a later date by the Italian Court in respect of the same company. The Italian Court had no jurisdiction to open main proceedings as, under recital 22 and article 16 of the Regulation, the Italian Court should have recognised the Irish proceedings and declined to make the requested order. It would, in any event, having considered article 26, have refused to recognise the

Italian proceedings, as to do so would be manifestly contrary to Ireland's public policy. The company's creditors had not been given notice of the Italian hearing and the Irish provisional liquidator had been given only one working day's notice of the hearing and this was in breach of those parties' fundamental rights to a fair hearing under the European Convention on Human Rights.

PARTNERSHIP

Bathurst v Scarborough

CA (Rix and Jacob LJ).

[2004] EWCA Civ 411.

The effect of section 21 of the Partnership Act 1890 was that, subject to contrary intention, property bought with partnership money was deemed to have been bought for the partnership. If property was partnership property, then there was a strong presumption that the right of survivorship was not intended to apply. However, partners might nevertheless agree to vary the normal rule of partnership property in favour of their own autonomous consent to their being beneficial joint tenants with the standard consequences of that arrangement. The presumption of the law of partnership was still subject to the ultimately primary rule of the autonomy of the parties.

UNDUE INFLUENCE

Pesticcio v Huet and others

CA (Pill, Mummery and Jacob LJ). **[2004] EWCA Civ 372.**

A transaction might be set aside by the court for undue influence, even though the actions and conduct of the person who benefited from it could not be criticised as wrongful.

Although undue influence was sometimes described as an 'equitable wrong' or even as a species of equitable fraud, the basis of the court's intervention was not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction was not satisfactorily explained by ordinary motives. Aspects of the instant case demonstrated the need for a wider understanding, both in and outside the legal profession, of the circumstances in which the court will intervene to protect the dependant and the vulnerable in dealings with their property.

ARBITRATIONS

In April, Stuart Isaacs QC acted as a party-appointed arbitrator in an international commercial arbitration under

the Chartered Institute of Arbitration Rules of a computer software dispute. **[Stuart Isaacs QC]**

TALKS AND SEMINARS

Jeremy Goldring, Samantha Knights and Richard Fisher spoke at the Insolvency Update Conference organised by Central Law Training on 19th of May 2004 .

[Jeremy Goldring, Samantha Knights, Richard Fisher]

Robin Dicker QC, Fidelis Oditah QC and Ron DeKoven will be participating in the University of Cambridge, Centre for Corporate and Commercial Law Conference on 22 May 2004. The Conference is 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 will be speaking at the 19th R3 Annual Conference in Monte Carlo taking place between 3rd and 6th June 2004.

[Gabriel Moss QC, Mark Phillips QC]

Marion Simmons QC recently visited Beijing, China as a guest of the British Council in Beijing where she lectured at the Peking University and

at the Peoples University on "The Independence of the Judiciary and the Rule of Law". She also lectured to members of the All China Law Association (the equivalent to the Law Society in England) on the "Enforcement of Chinese Judgments and Chinese Arbitration Awards by the English Courts". During her visit to Beijing she had an informative meeting with the person responsible for the regulation in China of lawyers including foreign lawyers at the Ministry of Justice, Department of Lawyers and Public Notary. She also had meetings with the judge of the Supreme Court of the Peoples Republic of China who is the Vice-President of the All China Women Judges Association and with the European Co-Director of the EU-China Legal and Judicial Co-Operation Programme. She attended the opening session of the Sino-British Judicial Seminar (organised jointly by the Supreme Court of the Peoples Republic of China and the Great Britain China Council) and observed a criminal trial in the Beijing 2nd Intermediary Court.

[Marion Simmons 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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