

3/4 DIGEST



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

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The House of Lords has clarified the scope of legal advice privilege in the final stage of this particular interlocutory skirmish arising out of the proceedings brought by the liquidators of BCCI against the Bank of England. In *Three Rivers* [2004] UKHL 48 the Lords held that presentational advice sought from lawyers by those who believed themselves to be at risk of criticism by an inquiry was protected by legal privilege. The decision applies to all inquiries, tribunals and investigations. Barry Isaacs acted for the Liquidators of BCCI, Ben Valentin acted for the Bank of England.

Another outing to the House of Lords is already on the cards for a date between 26 and 28 April 2005, when their Lordships will hear the Crown's appeal in *Re Spectrum Plus Ltd*. The uncertainty surrounding the subject of fixed charges over book debts is therefore set to continue into the second half of 2005. Gabriel Moss QC and Jeremy Goldring are acting for National Westminster Bank Plc.

This edition of the Digest was compiled by Stephen Robins.

Blair Leahy

GENERAL NEWS

The Department of Trade and Industry has recently published insolvency statistics revealing 2,975 liquidations and 11,967 individual insolvencies in England and Wales (on a seasonally adjusted basis) over the third quarter of 2004. Though the figure for liquidations shows a decrease of 5.6 per cent on the previous quarter and a decrease of 12.0 per cent on the same period a year ago, the figure for individual insolvencies has increased by 6.2 per cent on the previous quarter and 31.1 per cent on the same period a year ago.

BANKING

Valse Holdings SA v Merrill Lynch International Bank Ltd

QBD Commercial Court (Morison J). [2004] EWHC 2471 (Comm).

The claimant owned a portfolio of investments and retained the defendant as its banker and financial adviser. The account was under "advisory" rather than "discretionary" management, meaning that the defendant advised on investments but was not authorised to trade without express instructions. The claimant issued proceedings against the defendant for, inter alia, negligent

mismanagement and financial advice. It contended, *inter alia*, that the defendant had breached its duty to explain the risks and consequences of the investments. Morison J held that the defendant was not in breach of its duty. The defendant was under an obligation to carry out the claimant's instructions, but the claimant was the master of the account and was free to accept or reject any advice given by the defendant.

COMPANY LAW

Re Abbey National plc

Ch D (Evans-Lombe J).

[2004] All ER (D) 125 (Nov).

Abbey National plc ("AN") applied for the court's sanction of a scheme of arrangement under section 425 of the Companies Act 1985. A number of shareholders objected to: (a) the procedure followed by the chairman at the shareholders' meeting and the way in which he dealt with proxy votes; and (b) the omission of various matters from the explanatory note. The court approved the scheme and held that, taking the scheme as a whole, an honest and intelligent shareholder, acting in his interests as such, might reasonably have approved the scheme. The procedure followed by the chairman of the shareholders' meeting was lawful, and he had exercised his discretion appropriately in relation to the proxy votes. Further, the matters that had been omitted from the explanatory note of the scheme were not suffi-

ciently serious to change the shareholders' views. *Re BTR plc* [2000] 1 BCLC 740 and *Re Waxed Papers Ltd* [1937] 2 All ER 481 considered.

COMPETITION

South Shropshire District Council and others v Black Country Reclamation Limited

Ch D (Deputy Master Behrens). Unreported, 10 November 2004.

The claimants applied, pursuant to CPR r. 38.6, to discontinue proceedings brought against the defendant for restraint of a rival market. The court rejected the claimants' argument that the defendant should pay the claimants' costs of the proceedings. The court was unconvinced that the claimants would have won at trial. In particular, there was a real possibility that the defendant would have succeeded in establishing that an application for planning permission or for a licence to hold a market did not amount to a sufficient threat or intention to hold a rival market. The defendant also had a properly arguable case that the claimants' conduct in seeking to protect its market rights was contrary to Chapters I and II of the Competition Act 1998. In the circumstances, the normal rule should apply and the claimants should pay the defendant's costs of defending the proceedings.

[Stuart Isaacs QC, Marcus Haywood]

CONFLICT OF LAWS

Beazley v Horizon Offshore Contractors Inc

QDB Commercial Court (HHJ Chambers QC). [2004] EWHC 2555 (Comm).

The claimant insured the defendant's barge under a marine towage policy. The policy provided for England as the choice of law and jurisdiction. The barge was damaged in a fire. The claimant issued proceedings in England for a declaration that no money was payable under the policy. The defendant issued proceedings against the claimant in Texas. The claimant applied in England for an anti-suit injunction to restrain the Texan proceedings. The defendant resisted the application. The defendant argued that: (a) the jurisdiction clause was non-exclusive; (b) under Texan law, the policy was governed by the law of Texas; (c) under Texan law, the defendant would also have a claim in tort, which would not be available in England; (d) the court should conduct a balancing exercise; and (e) the court should consider questions of comity. It was held that an anti-suit injunction would be granted. There was nothing ambiguous in the words of the policy. It made no allowance for proceedings anywhere other than in England. Where the parties to the litigation were the parties to a freely agreed jurisdiction clause, the court should not carry out any balancing exercise.

ENFORCEMENT**Fraser v Oystertec plc****Ch D (Terence****Mowschenson QC).****[2004] All ER (D) 253.**

The first defendant obtained an interim third party debt order for the purpose of enforcing an order against the second defendant. The interim third party debt order was served on Yorkshire Bank plc ("the Bank") with whom the second defendant maintained three bank accounts. The first defendant applied for a final third party debt order. The Bank contested the application on the grounds that: (a) the money standing to the credit of one of the accounts was held as specific security for the second defendant's liability under a guarantee in favour of a third party; (b) the agreement between the Bank and the second defendant amounted to a flawed asset arrangement which had contractual effect to prevent the second defendant obtaining the money; and (c) the Bank had a right of set off in respect of money due from the second defendant to the Bank under a loan facility. The court declined to exercise the discretion conferred by CPR r. 72.2 and dismissed the first defendant's application. Until the guarantee was discharged, the money in the first account would not be payable to the first defendant or to his order. The effect of the flawed asset arrangement was that money standing to the credit of the accounts did not constitute a debt "being due or accruing

due" within the meaning of CPR r. 72.2. Further, it would be unjust to make a final order because the accounts were subject to a contractual term permitting set off in relation to indebtedness on the facility subject only to the making of a demand, and the making of an interim order was an event which entitled the Bank to demand payment.

HUMAN RIGHTS**R (on the application of Kent Pharmaceuticals Ltd) v Serious Fraud Office****Court of Appeal (Kennedy, Chadwick and Dyson LJ).****[2004] EWCA Civ 1494.**

The appellant ("K") appealed against a decision refusing relief against a decision of the respondent ("the SFO") under section 3(5) of the Criminal Justice Act 1987 to disclose copies of documents seized from K to the Department of Health. K submitted that the SFO's decision under section 3(5) was not "in accordance with law" and therefore contravened Article 8(2) of the European Convention on Human Rights. It was held that Article 8(2) has not been breached. The decision had been made in accordance with the law.

[Stuart Isaacs QC]**INSOLVENCY – CORPORATE****In re Ballast plc****Ch D (Blackburne J).****[2004] EWHC 2356 (Ch).**

The three companies entered administration pursuant to the new regime introduced by

the Enterprise Act 2002. The administrators wanted the first two companies to move from administration to creditors' voluntary liquidation pursuant to paragraph 83 of Schedule B1 of the Insolvency Act 1986. They wanted the third company to move from administration to dissolution under paragraph 84. Therefore they sought orders under paragraphs 79 and 85 of Schedule B1. It was held that it was open to the administrators to have recourse to paragraphs 83 and 84 without first applying to the court for orders under paragraphs 79 and 85. The decision whether to send a notice under paragraph 83 rested entirely with the administrators. Whether it was appropriate to send such a notice was a matter for them and not for the court. The same considerations applied to the third company and the provisions of paragraph 84.

[Richard Fisher]**Re Carthium Group Limited****Ch D (Evans-Lombe J).****Unreported, 22 November 2004.**

Winding up petitions had been presented in Manchester, and administration applications were subsequently presented in London. The administration applications proposed a short period of administration to realise work in progress. The Court considered that this could equally well be undertaken by a liquidator.

The court had power under para 13(1)(f) of Schedule B1 of the Insolvency Act 1986

(the "Act") to make winding up orders on the petitions as an alternative to exercising its powers under paragraph 13(1)(e) to treat the administration applications as winding up petitions. The effect of exercising this power would be an earlier date for the commencement of the winding up, thus rendering relevant dispositions void (unless validated) under section 127 of the Act. Accordingly, the court transferred the eleven winding up petitions before it, abridged time, waived the requirement to advertise, and made compulsory winding up orders.

The court allowed the costs of a report prepared by the proposed administrator as costs in the petitions and therefore as an expense of the liquidations, but otherwise (following *Re W F Fearman Ltd* (No 2) (1988) 4 BCC 141) did not award the directors their costs of the administration applications.

[Adam Goodison, Lloyd Tamlyn, Glen Davis]

Re World Class Ltd

Ch D (Lindsay J). [2004] All ER (D) 79 (Nov).

The petitioning creditor presented a winding up petition against the company, and the company applied for an administration order. The petitioning creditor opposed the appointment of the company's proposed administrators and sought an order appointing the nominees of the petitioning creditor as the administrators. The petitioning creditor submitted that the other creditors

had expressed a preference for the nominees of the petitioning creditor and that there was a loss of confidence in the company's nominees. The court made an administration order and appointed the company's nominees as the administrators. There had been no evidence to show what information had been given to the other creditors to lead them to state a preference and accordingly no weight would be given to their views. Moreover, there were no grounds for a loss of confidence in the proposed administrators. There were no grounds for believing that the company's nominees would be unable to discharge their duty or act independently.

[Adam Goodison]

Re T&N Ltd

Ch D (David Richards J). [2004] EWHC 2361.

The Court gave the administrators of T&N Ltd ("T&N") and other companies directions arising out of a potential clash between English insolvency law principles and a reorganisation plan ("the plan") proposed for those companies and others in the US Bankruptcy Court under Chapter 11 to which the proponents of the plan wished to give effect in England through schemes of arrangement and/or voluntary arrangements. The administrators and certain English creditors, including the pension scheme, considered the terms of the plan to be unfair. Having regard to those considerations, the

Court gave the administrators liberty to oppose the plan at the confirmation hearing in the US Bankruptcy Court and directed them not to propose Schemes or CVAs implementing the plan in England without further order. In addition, following *Re Barings plc* (No 6) [2001] 2 BCLC 159, the Court directed the administrators not to convene creditors' meetings pursuant to demands or requisitions of proponents of the plan.

[Simon Mortimore QC]

Re Enron Teesside Operations Ltd

Ch D (Lindsay J). Unreported, 12 November 2004.

In an appropriate case, the Companies Court will abridge time, waive formal service, dispense with advertisement and make an immediate winding up order.

[Glen Davis]

Re Spirerose Ltd

Ch D (Lindsay J). [2004] All ER (D) 128 (Nov).

The petitioning creditor was a firm of solicitors. The petitioning creditor was instructed to act on behalf of a third party in relation to legal proceedings. The company provided a written guarantee to the petitioning creditor pursuant to which the company guaranteed the third party's debts to the petitioning creditor in respect of the cost of the legal services provided by the petitioning creditor to the third party. A demand was made under the guarantee, and the

company failed to pay. The petitioning creditor issued a winding-up petition against the company. The company claimed that the guarantee was a “contentious business agreement” within the meaning of sections 59 to 61 of the Solicitors Act 1974 and that the debt could not be enforced without the leave of the court. Alternatively, the company argued that the agreement was an agreement by a third party to pay solicitors’ fees within section 71 of the Solicitors Act 1974 and that no debt could be said to be due until a detailed assessment had taken place. The court rejected the company’s arguments and held that the agreement did not fall within either section 59 or section 71 of the Solicitors Act 1974. The company was not the “client” of the petitioning creditor, and the word “remuneration” in section 59 suggested payment for services rendered rather than liability for a debt already incurred. Therefore the agreement could not be called a “contentious business agreement”. Furthermore, a detailed assessment of the bills would not reduce the amount owing to below the sum of £750.

Re Transocean Equipment Manufacturing and Trading Ltd

Ch D (Etherton J).

[2004] All ER (D) 352 (Oct).

Two companies (“T Ltd” and “TE Ltd”) were wound up, and one insolvency practitioner was appointed as the liquidator of both companies.

The liquidator had grounds for believing that TE Ltd had been formed for the purpose of defrauding the creditors of T Ltd. The director of both companies had diverted money belonging to T Ltd to TE Ltd and the liquidator was concerned that the costs of investigating in detail whether the assets he collected were properly attributable to T Ltd or TE Ltd and whether the claims of particular creditors lay against T Ltd or TE Ltd would be substantial and would outweigh the benefits. Therefore he applied to the court for the approval of a pooling agreement between T Ltd and TE Ltd. He submitted that the pooling agreement was a practical solution to the problem. The court held that it had jurisdiction to grant the necessary approval and that it was appropriate to grant the relief sought.

R J Mokal, “The Harm Done by Administrative Receivership”, (2004) 1(5) *International Corporate Rescue*, 248-256.

**INSOLVENCY –
CROSS-BORDER**

Fourie v Le Roux

Ch D (Blackburne J).

[2004] EWHC 2557 (Ch).

The South African court sent a letter of request to the English court in respect of various statutory and non-statutory claims by the foreign liquidators of a South African company against an English company (“F”) and its director (“R”).

The foreign liquidators obtained a freezing order against F and

R and applied for the freezing order to be continued. At the hearing of the application, F and R submitted, inter alia, that the English court had no jurisdiction to entertain the statutory claims because the letter of request from the South African court failed to mention the statutory claims. It was held that the English court did not have jurisdiction in relation to the statutory claims. The English court, as the requested court, had a choice whether to apply, in relation to the matters specified in the request, either the insolvency law of the requesting county or the insolvency law of England applicable by either court in relation to comparable matters falling within the jurisdiction of that court. Inherent in the existence of this choice was that the request must state what it is that the requesting court is asking the English court to do. Only then can the English court decide whether to act and if so whether to do so by applying the provisions of the insolvency law of the requesting state or the insolvency law of England. The request from the South African court did not do this. However, the English court did have jurisdiction in respect of the non-statutory claims, and the court was satisfied that the claims were strongly arguable. Further, the evidence showed a real risk of the dissipation of the assets. Therefore the freezing injunction would be continued.

[Stuart Isaacs QC, Jeremy Goldring]

INSOLVENCY – PERSONAL

Ram v Ram

**Court of Appeal (Potter,
Buxton and Carnwath LJ).**
[2004] EWCA Civ 1452.

Mr Ram (“the husband”) disposed of his interest in a property. He was subsequently adjudged bankrupt and a trustee in bankruptcy was appointed. Mrs Ram (“the wife”) brought proceedings against the husband under section 423 of the Insolvency Act 1986 for an order that the disposition be set aside. The judge found that the transaction was a transfer at an undervalue intended to defraud creditors. He held that section 423 required the court: (a) to restore the position to what it would have been if the transaction had not been entered into; and (b) to protect the interests of the persons who were the victims of the transaction. He made an order vesting the husband’s share in the property in the trustee in bankruptcy on the grounds that the wife would thereby be put back in the position in which she would have been had the transaction not occurred, which was that she was able to make a claim against the surplus. The wife appealed. She argued that the appropriate order would be one re-vesting the husband’s interest in the husband himself. She submitted that section 423 provided an autonomous jurisdiction outside bankruptcy and that the judge had effectively shut her out from the fruits of her

application under section 423. The wife also contended that her rights or prospective rights in matrimonial proceedings against the husband were property rights which were protected under Article 1 of the European Convention on Human Rights. She submitted that section 423 should be construed so as to be compatible with the Convention. Her appeal was dismissed. It was held that the judge had been entitled to make an order vesting the husband’s share of the property in the trustee in bankruptcy. If the husband had not disposed of his interest in the property, it would have devolved to the trustee in the normal way and the wife would have had an interest in the surplus. The judge’s construction of section 423 did not breach the wife’s rights under the Convention. *Chohan v Saggar* [2994] 1 BCLC 706 applied.

Davidson v Stanley

**Ch D (Blackburne J). [2004]
All ER (D) 441 (Oct).**

The petitioning creditor presented a bankruptcy petition against the debtor, and the debtor applied for an interim order pursuant to section 252 of the Insolvency Act 1986. The petitioning creditor opposed the debtor’s application. The debtor’s application was dismissed. The court held that the debtor’s proposals for a voluntary arrangement were not serious or viable. The court was concerned about the debtor’s failure to make full and frank disclosure of his

financial affairs in previous proceedings. Further, the debtor had been found to be dishonest and indifferent to his obligations to the court. In addition, the debtor’s nominee had failed to submit any representations to the court.

PRIVILEGE

Three Rivers District Council v Governor and Company of the Bank of England

**House of Lords (Lords
Scott, Rodger, Carswell and
Brown and Baroness Hale).**
[2004] UKHL 48.

The House of Lords held that the communications between the Bank of England and its solicitors relating to the content and preparation of a statement submitted to the Bingham Inquiry qualified for legal professional privilege. The “relevant legal context” was the Bingham Inquiry and the question whether the Bank had properly discharged its public law duties under the Banking Acts. Such communications would be privileged provided that they were directly related to the performance by the solicitor of his professional duty as the legal adviser of his client. Lord Brown stated as a general principle that the process by which a client seeks and obtains his lawyer’s assistance in the presentation of his case for the purpose of any formal inquiry – whether concerned with public law or private law issues, whether adversarial or inquisitorial in form, whether held in public or in private, whether

or not directly affecting his rights and liabilities – would attract legal advice privilege. *Balabel v Air India* (1988) 2 WLR 1036 approved.

[Barry Isaacs, Ben Valentin]

PROCEDURE

Blackburn Chemicals Ltd v BIM Kemi AB

Court of Appeal (Kennedy, May and Longmore LJ).

10 November 2004 [2004]

EWCA Civ 1490.

The defendant pleaded, *inter alia*, that the agreement between the claimant and the defendant was void for illegality by reason of the competition provisions of Article 81 of the EC Treaty. Langley J ordered that all further proceedings in respect of the plea of illegality would be stayed until after the trial of all other issues. The defendant was subsequently awarded judgment on its counterclaim, and the judgment on the counterclaim was upheld on appeal. In advance of the determination of the quantum of the defendant's counterclaim, the claimant attempted to raise the issue of illegality. The defendant argued that the claimant was estopped from raising such an argument. The defendant argued that the counterclaim had been determined in the defendant's favour, subject to quantification, so as to preclude the claimant from subsequently raising a defence that the agreement was void for illegality. The defendant submitted that the judgment on the counterclaim finally deter-

mined the cause of action, thereby rejecting defences which the claimant had advanced and precluding the claimant from later relying on defences which could have been advanced but which were not. Cooke J held that the defendant was not estopped. The claimant appealed. The Court of Appeal dismissed the appeal. The defendant's argument failed because Langley J had ordered a stay of the illegality issue. The issue had been shelved. The rule in *Henderson v Henderson* (1843) 3 Hare 100 could not preclude a party from raising an issue where the proceedings relating to the particular issue had been stayed pending the trial of the other allegations.

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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