

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 10 No 9 October 2004

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The BCCI saga continues to keep the courts occupied.

In *BCCI v Bank of India*, Patten J ordered the Bank of India to pay in excess of US\$80 million in compensation under section 213 of the Insolvency Act 1986. Permission to appeal was granted to BOI by a single Lord Justice. The Court of Appeal has now refused to set aside that permission to appeal. BOI's appeal will therefore be heard in January 2005. Gabriel Moss QC and Hilary Stonefrost are acting for BOI; Blair Leahy acts for the liquidators of BCCI.

Meanwhile, the trial of *Three Rivers DC and BCCI SA v the Governor and Company of Bank of England* continues. This litigation commenced in January of this year with an anticipated trial window of only 12 months. However, the trial is still in its preliminary stages, with opening speeches in full flow. Mark Phillips QC, Ben Valentin and Tom Smith are acting for the Bank of England; Barry Isaacs is acting for the liquidators of BCCI.

The Digest is delighted to announce that Fidelis Oditah QC has also taken silk in Nigeria. He was made a Senior Advocate of Nigeria at a swearing in ceremony on 13 September 2004 in Lagos.

This edition of the Digest was compiled by Simon Fuller.

Blair Leahy

GENERAL NEWS

Arbitration

Fidelis Oditah QC was recently appointed to the Court of the London Court of International Arbitration and to the Advisory Board of the Swiss Permanent Organisation of Arbitration.

INSOL Prague

Gabriel Moss QC, David Marks, Glen Davis and Marcus Haywood represented chambers at the INSOL International and INSOL Europe Joint Regional and Annual Conference in Prague this month.

[Gabriel Moss QC, David Marks, Glen Davis, Marcus Haywood]

ARBITRATION

Tame Shipping Ltd v Easy Navigation Ltd

Commercial Court (Moore-Bick J). [2004] EWHC 1862 (Comm).

A party to arbitration proceedings who challenged an arbitration award on grounds of material irregularity pursuant to section 68 of the Arbitration Act 1996 was permitted to rely on the reasons provided by the arbitrator notwithstanding that they were published on express or implied terms that no use should be made of them whatsoever. The court held that excluding the reasons from the evidence

before it might cause substantial injustice. On the facts there had not been a serious irregularity and, even had there been, the arbitrator had reached the correct decision on the substantive matters of fact and law such that the award would not be overturned.

Hew Dundas, "Confidentiality in Arbitration", (2004) 70 *Amicus Curiae* 3, 229.

Graham Morrow, "Removal of Arbitrators", (2004) 70 *Amicus Curiae* 3, 236.

BANKING

Saudi Arabian Monetary Agency v Dresdner Bank AG

Court of Appeal (Mummery, Chadwick and Longmore LJJ). [2004] EWCA Civ 1074.

Whenever a bank seeks to rely on an equitable right of set-off against a customer, the critical issue is the nature of the underlying contract to which they are both each a party. If that agreement is silent on the right of set-off then the principle established in *Bhogal v Punjab National Bank* [1988] 2 All E.R. 296 applies. Accordingly, the bank is not entitled to refuse payment of money deposited with it on the basis that one of its other debtors has an equitable interest in the money. It makes no difference whether the customer holds the sums in the account for its own benefit or as nominee or trustee for another.

Financial Institutions Services Ltd v Negril Holdings Ltd

Privy Council (Lords Bingham, Scott and Walker, Sir Andrew Leggatt, and Dame Sian Elias). [2004] UKPC 40.

A bank, F, provided financial advice and borrowing facilities to N. The relationship between the officers of F and N deteriorated. Subsequently F permitted N to increase its level of borrowing but treated the advances as unauthorised and charged high rates of penal interest. N issued proceedings claiming that there was a special relationship between the parties based on reliance, trust and confidence and that operating the accounts in that manner was oppressive. The Privy Council accepted that F had entered a special relationship with N and that charging penal interest on sums it had permitted N to withdraw was unconscionable. F was, however, entitled to charge reasonable commercial interest and add any unpaid interest to N's overdrawn account each month.

CONFLICTS OF LAW

DSM Anti-Infectives BV v Smithkline Beecham plc

Court of Appeal (Peter Gibson, Tuckey & Longmore LJJ). [2004] All ER (D) 66 (Sep).

S and D entered a settlement agreement which contained an exclusive jurisdiction clause requiring all proceedings in connection with the agreement to be commenced in England. A member of S Group commenced proceed-

ings against several members of D group in the United States. D challenged the jurisdiction of the US court and issued proceedings in England. S applied for a stay of the English proceedings on the basis that the United States was the appropriate forum. At first instance the court declined to order a stay. The Court of Appeal upheld the decision: (1) there would need to be a "special reason" before the court would refuse to give effect to an exclusive jurisdiction clause; (2) in some circumstances an excessive delay in commencing proceedings may be sufficient to constitute a special reason, but a delay of three months was not excessive; (3) the inherent risk of inconsistent decisions should be taken into account but, on the facts, the risk was remote.

Mahme Trust and others v Lloyds TSB Bank plc Chancery Division (Morritt VC). The Times, 25 August, 2004.

As a general rule, where proceedings were brought in relation to the same issue in two countries both of which were a party to the Brussels or Lugano Convention, it was not possible to obtain a stay of the proceedings in the country first seised of the action based on *forum non conveniens*. The claimant had an unfettered choice of venue, unless there were special provisions restricting its choice. On the facts, the English court did not have jurisdiction to grant a stay of proceedings

brought in this jurisdiction, notwithstanding that Switzerland was a manifestly more appropriate forum.

Adrian Briggs, "Anti-Suit Injunctions and Utopian Ideals", (2004) 120 LQR, 529

Campbell McLachlan, "International Litigation and the Reworking of the Conflict of Laws", (2004) 120 LQR, 580.

INJUNCTIONS

Fourie and another v Le Roux

Chancery Division

(John Jarvis QC sitting as a Deputy High Court Judge). [2004] All ER (D) 16 (Oct).

L and FI commenced proceedings in South Africa against HEE and another pursuant to which they obtained an order for possession of certain plant and equipment. F was appointed as provisional liquidator of HEE and, suspecting that the order had been obtained by fraud, applied to the South African court for an order nisi which was granted and later made absolute. Following an application by F, the South African court issued a letter of request asking the English court to grant a freezing order against L, FI and the other respondents. The English court granted the freezing order and the respondents applied to have it discharged on the basis that, inter alia, the court did not have jurisdiction to make such an order. Held, the freezing order should be discharged immediately:

(1) section 25 of the Civil Jurisdiction and Judgments

Act 1982 merely provides the English court with jurisdiction to order interim relief based on foreign proceedings. It does not affect the way in which the court exercises its discretion. The foreign proceedings did not need to directly correspond with an equivalent English action, but there was no claim being made in South Africa that would have led an English court to grant a freezing order.

(2) section 426 of the IA 1986 did not enable a foreign insolvency practitioner to claim relief which the English court would not ordinarily grant. In this respect the party seeking the order must have commenced or be about to commence substantive proceedings that would result in a judgment and, if successful, substantive relief. The potential causes of action that could be brought by F were unformulated at the time the freezing order was made and had not been commenced more than three months later. Where proceedings have yet to be brought at the time of making an application for a freezing order, they must be commenced within a period of days as opposed to months.

[Stuart Isaacs QC, Jeremy Goldring]

CIVIL PROCEDURE

New Zealand Meat Board and others v Paramount Export Ltd (in liquidation)

Privy Council (Lords Nicholls, Hoffmann, Hutton, Scott and Walker).

[2004] UKPC 45.

Extreme caution must be exercised when considering

whether to allow a party to withdraw an earlier concession. The critical issue was whether it would cause the other party to suffer prejudice by virtue of the timing of the withdrawal. On the facts, the majority were satisfied that the other party would not have adduced its evidence differently. The court was concerned not to allow the perceived miscarriage of justice that would follow from requiring a publicly funded party to make payments that it was not legally required to make by virtue only of the fact that their legal representative should not have made the concession.

Stephen Pitel, "A Modern Approach to Enforcing Foreign Judgments", [2004] LMCLQ 288.

COMPANY

Item Software (UK) Ltd v Kouroush Fassihi

Court of Appeal (Mummery LJ, Arden LJ and Holman J). [2004] EWCA Civ 1244.

The fiduciary duty owed by a director (F) to act in good faith in the best interests of the company imposed a requirement to disclose his own misconduct. F was the sales and marketing director of a company (IS). On the facts it was not improper for F to divert a distribution agreement to a new company for his own benefit, since the customer had refused to renew the agreement with IS. However, F had breached the fiduciary duty of loyalty by negotiating with the customer before the distribution agree-

ment had terminated. There was no basis for F to maintain that it was not in the interests of IS to know about this breach of duty. S was entitled to recover damages arising from F's non-disclosure.

Freedland & Deakin, "When Do Employees have a Contractual Duty to Report Wrongdoing?", (2004) 33 ILJ 3, 278.

Jonathon Mukwiri, "Using section 459 as an Instrument of Oppression", (2004) 25 Co Law 9, 282.

Noonan & Watson, "Director's Tortious Liability – Standard Chartered Bank and the Restoration of Sanity", [2004] JBL 539.

CONTRACT

Kenneth Christopher Murray v Leisureplay plc Chancery Division (Stanley Burton J). [2004] All ER (D) 30 (Aug).

A service agreement between a company and a director (M) required the company to give a three year notice period to the director provided that certain conditions had been satisfied, failing which 12 months notice was required. In breach of this provision the company terminated M's service agreement on less than two months notice. M brought proceedings to recover the full amount of his salary and benefits for a three year period. The court held that the relevant conditions had not been met and M was only entitled to recover

damages in respect of the remaining 12 months. The court went on to hold that a three year notice period would have operated as a liquidated damages clause and would have been void as a penalty. It could not be regarded as a genuine pre-estimate of the damage that M was likely to suffer, since it neither made allowance for the income he would be likely to earn from other sources once he was no longer working at the company, nor took into account M's duty to mitigate his loss.

INSOLVENCY – CORPORATE

Quickson (South & West) Ltd v Stephen Mark Katz Chancery Division (Etherton J). [2004] All ER (D) 138 (Aug).

A parent company (B) had the same directors and used the same bank as its subsidiary (Q). When Q entered liquidation the liquidators commenced preference proceedings against B pursuant to section 239 of the Insolvency Act 1986. B applied to have the preference proceedings struck out and, additionally, applied for the removal of the liquidators. The Court refused to strike out the preference proceedings but ordered the removal of the liquidators on grounds that: (1) the liquidators' conduct had been unsatisfactory and inappropriate in a number of respects; in particular they had failed to take advice on the merits of the claim and had not acted in an efficient or expedient

manner; (2) this conduct led to an understandable loss of confidence by B in the liquidators' professional judgment, such that the removal of the liquidators was in the best interests of Q's liquidation.

CUSTOMS & EXCISE

Commissioners v Anglo Overseas Ltd

Chancery Division (Lewison J). [2004] EWHC 2198.

A winding up petition was presented against a company (AO) by Customs & Excise based on a debt due under the bonded warehouse regime contained in the Excise Duty Points (Duty Suspended Movement of Goods) Regulations 2001. AO opposed the petition on grounds that (1) it was an abuse of process to present a petition at a time when there was an appeal pending before the VAT tribunal; and (2) the debt was disputed on substantial grounds because there was an arguable claim that it was not liable under the Regulations. The Court held that the presentation of a petition at the time of a pending appeal did not constitute an abuse of process, but was a factor that the court was entitled to take into account when exercising its discretion whether to make a winding up order. There were, however, substantial grounds supporting AO's argument that it was not liable under the Regulations, resulting in the dismissal of the petition. The court indicated that it would not have exercised its discretion to make a winding up order in

any event because there were difficulties in interpreting the Regulation that made it inappropriate to make an order based on an untested assessment by Customs, particularly given that AO was not complicit in the fraud that premised its alleged liability.

Secretary of State for Trade & Industry v Bell Davies Trading Ltd

Court of Appeal (Mummery and Scott Baker LJ and Lawrence Collins J). [2004] All ER (D) 598 (Jul).

The Court of Appeal held that it was justifiable for the Secretary of State to present a winding up petition pursuant to section 124A in relation to a company that had been used as part of a trading operation aimed at circumventing EC Regulations imposing quotas on imported footwear and ceramics produced in China. The judge at first instance had not acted improperly by requiring the individuals that controlled the company to give an undertaking to cease the offensive trading operations as a condition of dismissing the petition. The Court of Appeal confirmed the recent judicial guidance on public interest petitions contained in *Re Supporting Link Ltd* [2004] 1 WLR 1249.

Lucio Pena v Martin Coyne and others

Ch D (Hildyard QC). Unreported, 23 July 2004.

P sought to set aside a sale of property on grounds that it was a transaction defrauding creditors within the meaning

of section 423 of the Insolvency Act 1986 (the "1986 Act"). A number of alterations had been made to the property since the sale. The purchaser argued that it should be entitled to take the property free from adverse claims by payment of a sum that represented the amount of the undervalue at the date of the transaction plus interest. The court held that although the case law revealed strong reservations about allowing a transferee to retain an asset transferred at an undervalue by simply making an additional payment at a later date, it was an acceptable form of relief on the facts of the case. The parties and all the creditors of the company were all agreed that it was appropriate; it met the objectives of section 423 to 425 of the Insolvency Act 1986 and removed the delay and expense that would result from additional expert evidence.

AES Barry Ltd v TXU Europe Energy Trading (in administration) Chancery Division (Patten J). [2004] All ER (D) 160 (Sep).

AES and TXU entered an agreement for the supply of gas. TXU entered administration, which entitled AES to enforce an early termination and payment clause. The parties failed to agree on the amount due under the early termination provision and AES applied for leave to commence proceedings against TXU pursuant to section 11 of the Insolvency Act 1986 (the "1986 Act"). Patten J

held that AES should not be given permission to commence proceedings because: (1) a creditor with a mere monetary claim would only be entitled to circumvent the statutory procedures established for a company in administration in exceptional circumstances; (2) TXU was in the process of entering a scheme of arrangement pursuant to section 425 of the 1986 Act that would contain a right for any creditor to have a disputed claim submitted for determination by an expert or by the court. In the meantime AES would not suffer any prejudice.

[William Trower QC, Adam Goodison]

Re Logitext.Uk Ltd Chancery Division (Lindsay J). [2004] All ER (D) 535 (Jul).

A creditor company applied for an administration order to be made in respect of L. L was no longer trading and it seemed likely that its only assets were potential claims against, amongst others, the directors of the company. The administration application was opposed by the company and the holder of a floating charge on the basis that (1) the creditor's debt was disputed on substantial grounds; and (2) the court could not be satisfied that the jurisdictional hurdle at paragraph 11(b) of Schedule B1 was met, namely that an administration order would be reasonably likely to achieve the purpose of the administration. Lindsay J held that (1) the debt was not disputed on substantial grounds; and (2) it was more appropria-

te to make an administration order than an order for the winding-up of the company by the court, since: (i) the creditor company was prepared to fund an investigation into the potential claims if the company entered administration, whereas there was no equivalent offer in place if the company entered liquidation; (ii) in these circumstances an administration order was likely to result in a better realisation for the creditors as a whole.

[David Allison]

Re Hill & Tyler (in administration), Harlow and another v Loveday Chancery Division (Richard Sheldon QC sitting as a Deputy High Court Judge). [2004] BCC 732.

The shareholders of HTL agreed in principle to enter a number of share sale agreements with J Ltd in consideration for which J Ltd agreed to pay £1.4m. The purchase was to be funded by way of an inter-company loan from HTL to J Ltd that, in turn, HTL raised by obtaining a number of secured loans. HTL received professional advice that financing the purchase of the shares in this manner would constitute unlawful financial assistance contrary to section 151 of the Companies Act 1985 ("CA 1985") so that the company needed to comply with the "whitewash" procedure for private companies in section 155-158 CA 1985. HTL took steps to comply with the whitewash procedure, the directors made a statutory declaration of compliance pursuant to section 155(6),

and the agreements were concluded. HTL entered administration and the administrators applied to court seeking directions on whether the agreements were contrary to section 151 and, if so, the effect that would have on the security entered into by HTL pursuant to the agreement. The deputy judge held that the funding arrangements did constitute unlawful financial assistance within section 151, but that the whitewash procedure was valid.

[Richard Sheldon QC]

Fidelis Oditah QC, "Fixed Charges and the Recycling of Proceeds of Receivables", (2004) 120 LQR, 533.

[Fidelis Oditah QC]

Antony Zacaroli, "The Powers of Administrators under Schedule B1 Prior to the Creditor's Meeting – Transbus International Limited", 1 ICR 4, 208.

[Antony Zacaroli]

Samantha Knights, "Pooling Arrangements in Cross-Border Insolvencies", 1 ICR 4, 194.

[Samantha Knights]

Riz Mokal, "Liquidation Expenses and Floating Charges – the Separate Funds Fallacy", [2004] LMCLQ 387.

[Riz Mokal]

P G Turner, "Floating Charges – a 'No Theory' Theory", [2004] LMCLQ 319.

Lisa Linklater, "Enterprise Act Administrations: A Sense of Déjà vu?", (2004) 25 Co Law 9, 257.

INSOLVENCY – PERSONAL

Owo-Samson v Barclays Bank Plc (No 3)

Chancery Division (His Honour Judge Howarth sitting as a judge of the High Court). [2004] BPIR 303.

OS applied to annul a bankruptcy order made against him on the petition of Barclays Bank, which application was unsuccessful both at first instance before the Registrar and on appeal before a High Court Judge. However, the Court of Appeal allowed his appeal and directed that the annulment application should be redetermined in the light of its judgment that the bankruptcy order, at the time it was made, ought not to have been made.

When OS's annulment application was re-considered by Registrar Jacques, it was once again dismissed, principally on the ground that, if an annulment was granted, OS would be unable to pay Barclays Bank plc and the unsecured creditors in full.

Dismissing OS's appeal against Registrar Jacques's decision, the Court held that: (1) on an insolvency appeal involving the exercise of discretion, the appeal court should only interfere where it considers that the court below has exceeded the generous ambit within which discretion can properly be exercised; (2) in the present case, although the Registrar, in giving his reasons, placed too much emphasis on certain aspects of OS's conduct, the Registrar was right to conclude that the

application should be dismissed.

[Adam Goodison, David Allison]

Romano Barca v Malcolm John Mears (Trustee of the Estate of Romano Barca) Chancery Division (Nicholas Strauss QC sitting as a Deputy High Court Judge). [2004] All ER (D) 153 (Sep).

The bankrupt, B, resisted the Trustee in Bankruptcy's application for possession and sale of his home on the basis that (1) his former wife had a beneficial interest in the property and (2) it would cause disruption to the education of his son, who had special needs. The Court held that there may need to be a shift in the emphasis of s 335A, 336 and 337 of the Insolvency Act 1986 to achieve compatibility with Article 8 of the ECHR. The existing approach of English law, established in *In Re Citro, Domenico (A Bankrupt)* (1990) 1 FLR 71, revealed a strict and narrow definition of the type of exceptional circumstances that would justify the postponement of an order for possession and sale. In most cases the creditor's interests would outweigh all other interests, but it should be open to a Court to find that, on a proper consideration of the facts of a particular case, the circumstances were exceptional. In the present case there was not sufficient reason to postpone the sale, since the proceeds would be held until determination of his former wife's beneficial interest in the property and it would not require his son to change school.

In the matter of Metal Distributors (UK) Ltd Chancery Division (Pumfrey J). Unreported, 27 July 2004.

M applied to restrain the presentation of a bankruptcy petition by his solicitors based on five 5 unpaid bills of costs that he disputed. The court held that the unpaid bills were a suitable debt to form the basis of a petition: (1) an individual could require a bill of costs to be assessed by the court where it was challenged within one 1 month of receipt (section 70 of the Solicitors Act 1974). Following the expiration of one 1 month but within 12 months the court retained discretion to tax a bill. However, the five 5 bills at issue were received (and had become payable) more than 12 months prior to the application. M did not dispute the quality of the solicitor's work, only the amount due. The court would not review a bill of costs once more than 12 months had expired unless there were exceptional circumstances; on the facts there were none. The debt was due and payable and the solicitors should not be prevented from presenting the petition.

Simon Gardner, "Quantum in *Gissing v Gissing Constructive Trusts*", (2004) 120 LQR, 541.

PARTNERSHIP

Chahal v Mahal Chancery Division, Birmingham District Registry (Hazel Williamson QC sitting as a Deputy High Court Judge). [2004] All ER (D) (Sep).

A partnership will not be dissolved by the mere transfer of partnership assets to a company owned by the partnership, unless the transfer operates as an express or implied agreement to dissolve the partnership.

TALKS AND SEMINARS

On 15th September 2004, Simon Mortimore QC gave a talk to Jones Day entitled, "The Enterprise Act, One Year On". He subsequently gave an interview to the Law Channel on the same topic. **[Simon Mortimore QC]**

On 28th September 2004, Marion Simmons QC gave a talk to the Inn Group entitled "Enterprise Act – The Thinking Administrator". **[Marion Simmons QC]**

Gabriel Moss QC gave a talk at INSOL Prague entitled, "The EU Insolvency Regulation – The Record So Far". **[Gabriel Moss 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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