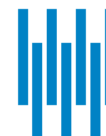
3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 11 No 4 April 2005

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The fifth annual general meeting and conference of the International Insolvency Institute will take place in New York on 6 and 7 June 2005. Gabriel Moss QC will take part in panel discussions on "Current Developments in European Insolvency and the New European Union System for Financial Difficulties of Financial Institutions" and "Co-ordinating Fractious International Cases". Robin Dicker QC will take part in a debate entitled "London should be the Insolvency Court for the World".

In January 2005, a reception was held for Professor Muir Hunter QC in Gray's Inn. The subject of the reception was the launch of the new edition of Kerr & Hunter on Receivers and Administrators. Gabriel Moss QC gave the address.

This edition of the Digest was compiled by Hannah Thornley.

Stephen Robins

GENERAL NEWS

The Government has published a White Paper entitled "Company Law Reform". This White Paper sets out the Government's proposals for comprehensive reform of the company law framework. It is currently intended that these reforms, which build on the work of the Company Law Review, will be introduced through the Company Law Reform Bill. The White Paper can be viewed online at www.dti.gov.uk/cld/review.htm

The Insolvency Act 1986 (Amendment) Regulations 2005 (SI 2005/879) came into force on 13 April 2005. These Regulations make important changes (described as clarification) to the jurisdiction to implement CVAs and initiate administration proceedings in respect of foreign and other non-Companies Act companies. A copy of the Regulations is available at http://www.legislation.hmso.gov.uk/si/si2005/20050879.htm

The Insolvency (Amendment) Rules 2005 (SI 2005/527) came into force on 1 April 2005. Most of the amendments involve minor changes, but paragraph 44 appears to reverse Levy v Legal Services Commission [2001] 1 FLR 435, so that a bankruptcy petition may now be founded on a statutory demand in respect of a lump sum order and/or a costs order in family proceedings. The Rules are available online at http://www.legislation.hmso.gov.uk/si/si2005/20050527.htm

Also coming into force on 1 April 2005 were the Insolvency Proceedings (Fees) (Amendment) Order 2005 (SI 2005/544), the Insolvency Practitioners and Insolvency Services Account (Fees) (Amendment) Order 2005 (SI 2005/523), and the Insolvency Practitioners Regulations 2005 (SI 2005/524). These statutory instruments are all available online at http://www.legislation.hmso.gov.uk

Form 6.28 regarding the Statement of Affairs in Administrations and the accompanying guidance notes have been updated. The new version, which came into force on 1 April 2005, can be found at http://www.insolvency.gov.uk/forms/forms.htm

CIVIL PROCEDURE

Hertsmere Primary Care Trust v The Estate of Balasubramanium Rabindra-Anandh

Chancery Division (Lightman J). [2005] EWHC 320 (Ch).

C made an offer to settle a claim against the deceased's estate. The offer letter, which stated that the offer was being made under Part 36 of the CPR, failed to comply with the requirements of r. 36.5. More particularly, the offer letter: (a) failed to mention the 21-day time limit for acceptance of the offer; and (b) failed to state that no acceptance would be possible after the expiry of the 21-day period without the Court's permission. Lightman J held that the omission was a pure technicality which did not preclude C's entitlement to the full benefit of the provisions of r. 36.21 with regard to costs. Mitchell v James [2002] EWCA Civ 997 considered. The behaviour of the defendant in purposely failing to point out the mistake in the letter was also to be taken into account under Part 1 of the CPR, as the parties must assist the court at all times in the furtherance of the overriding objective.

Kuwait Airways Corporation v Iraqi Airways Company

Court of Appeal (Ward LJ, Longmore LJ). [2005] EWCA Civ 286.

This case related to the "fraud exception" to legal professional privilege, namely where a person consults a solicitor in the furtherance of a criminal purpose, then whether or not the solicitor knowingly assists in the furtherance of such purpose, the communications between the client and the solicitor do not attract legal professional privilege. At first instance, the Judge held that the instant case fell within the fraud exception and that the defendant ("IAC") was obliged to disclose the documents in question. IAC appealed. On appeal, IAC submitted that if litigation is contemplated or has begun, such communications will attract the class of legal privilege known as litigation privilege, and that the fraud exception does not apply to this form of privilege. The Court of Appeal held that the fraud exception applies to litigation privilege as well as legal advice privilege. Furthering a criminal purpose after litigation begins or is contemplated cannot attract legal privilege any more than the original criminal purpose does.

Nabb Brothers Ltd v Lloyds Bank International

Chancery Division (Lawrence Collins J). [2005] All ER (D) 322 (Mar).

Pursuant to r. 6.21(2A) of the CPR, the court will not give permission for service out of the jurisdiction unless it is satisfied that England is the proper place to bring the claim. The claimant has to satisfy the court of three matters: (1) that the claimant has a cause of action against the defendant "with a reasonable prospect of success" (r. 6.21(1)(b)); (2) that the case falls within one of the four heads of r. 6.20; and (3) that England is the appropriate forum.

Barry Isaacs, "Legal Professional Privilege after the decision of the House of Lords in Three Rivers (No 6),"

International Corporate Rescue, Volume 2, Issue 2 (March 2005).
[Barry Isaacs]

COMPANY

Fisher v Cadman

Chancery Division (Mr Philip Sales sitting as a Deputy Judge of the High Court). [2005] EWHC 377 (Ch).

C made an application for relief under sections 459 and 461 CA 1985 or in the alternative for an order to wind up the company ("CDL") on the just and equitable ground under section 122(1)(g) IA 1986. The dispute arose out of a breakdown in relationships within a family business. The Judge held that the availability of relief under section 459 is not confined to "quasi-partnership" cases. In determining whether the members have become subject to equitable considerations between themselves in the exercise of their rights as members, the list of factors drawn up by Lord Wilberforce in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 at 379B-G is useful but not exhaustive, and the term "quasi-partnership" is simply a useful shorthand label. The test of unfairness under section 459 is an objective one. Conduct of the de facto controllers of the company may qualify as unfairly prejudicial to the interests of a member for the purposes of section 459 if it involves: (1) a breach of agreement between the members contained in the Articles of Association; and/or (2) a violation of such other, wider equitable constraints as may have arisen to bind the controllers. Here C did not have a management role in the company but had inherited her shareholding from her parents. The relationship between the parties was a relationship to which the term "quasi-partnership" applied although it did not share all the features typical of a true partnership-type relationship as identified in Ebrahimi. In re Bird Precision Bellows Ltd [1984] Ch 419, O'Neill v Phillips [1999] 1 WLR 1092 and RA Noble & Sons (Clothing) Ltd [1983] BCLC 273 also considered.

Campbell v Oce (UK) Ltd

Chancery Division (Laddie J). [2005] EWHC 458 (Ch).

The court has a discretion whether to accede to an application to strike out. No doubt in most cases, having determined that a plea has no real prospect of success, it will be proper to strike out, but it is not inevitably so. In each case the court should consider whether making such an order is proportionate.

CONTRACT

Lattimore v Mott

Chancery Division (Mr Richard Sheldon QC sitting as Deputy Judge of the High Court). [2005] EWHC 467 (Ch).

This was the trial of a preliminary issue as to whether there was a contract between the parties as set out in a written document dated the 17 July 2003, which was signed by D. The written document set out the terms on which C and D, who had been in business together for some 13 years, were to part company. On the basis of the evidence adduced regarding the meetings between the parties on 17 July 2003 and 29 July 2003, it was held that a binding contract was concluded on 29 July 2003 on the terms of the 17 July document.
[Richard Sheldon QC]

Cable & Wireless plc v Valentine

Queen's Bench Division (Commercial Court) (Cooke J). [2005] EWHC 409.

A letter of agreement relating to a compromise between the parties was qualified by a subsequent e-mail which contained a caveat. The caveat concerned a prior understanding between the parties that the defendant would not be fully legally responsible for certain acts

and omissions and breaches of duty. It was held that the letter of agreement and the e-mail could be read together in such a way as to make sense and to constitute an agreement with sufficient certainty for it to be enforceable.

INSOLVENCY – CORPORATE

Enron Metals & Commodity Ltd v HIH Casualty & General Insurance Ltd

Chancery Division (Pumfrey J). [2005] EWHC 485 (Ch).

Where a claim under a trade credit insurance policy had no real prospects of success, it was inappropriate to grant leave to the insured to commence arbitration proceedings against the insurer, which was in provisional liquidation, pursuant to section 130 IA 1986.

[Jeremy Goldring]

Re ICS Incorporation Ltd

Chancery Division (Lawrence Collins J). [2005] EWHC 404 (Ch).

Two ICS group companies applied for an injunction to restrain the defendant from presenting winding-up petitions against them. The only issue was whether or not the ICS companies could demonstrate that the alleged liability was subject to a bona fide and substantial dispute. The Court granted the relief sought. Even if the dispute would be thought to be "shadowy" in the context of a summary judgment application, an injunction should normally be granted.

[Lloyd Tamlyn]

Re Cabletel Installations Ltd

Chancery Division (Companies Court) (Registrar Baister). [2005] BPIR 28.

The administrators of Cabletel Installations Limited ("CIL") applied to court under r. 2.47 IR 1986 for an order fixing their remuneration. CIL had been involved in a dispute with Sky in respect of the supply of digital set top boxes. An administration order was made over CIL on 14 June 2004. At the creditors meeting, the creditors rejected the administrators' proposals. At a further meeting it was resolved that the administrators should resign. The administrators' request for authority to draw £1,617,555 by way of remuneration was rejected. A sum of £50,000 was considered to be more appropriate. The administrators refused to vacate office unless their fees were agreed. In August 2003, the administrators applied to discharge the administration order and wind up CIL. Those orders were made on 15 October 2003. The administrators claimed £237,770 in remuneration, together with legal fees of £90,000. The Registrar held that it was appropriate to have regard to: (1) the main work streams, and whether the time spent on them was justified; (2) the level at which the work was done; (3) the benefit of the work done and whether it was necessary; and (4) the larger picture, considering the case in terms of value, having regard to the fact that time spent is a measure not of the value of the service rendered but the cost of rendering it. An assessment of what constituted time properly spent by the administrators and their staff in attending to matters arising in the administration, as opposed to the time actually spent, taking into account the criteria in r. 2.47(4) IR 1986 and the views of the creditors, led to the conclusion that £107,565 was an appropriate figure for remuneration. However, that figure was too high having regard to the fact that this was a standard administration involving no special complexity or element of responsibility and that the role of the court was to assess value rather than cost. Other important factors taken into account were that: (1) there had been over-reliance on solicitors; (2) the administrators failed promptly to apply to discharge the administration order and had acted improperly in failing to vacate office without their fees being agreed; (3) the administrators had abused their position by declining to resign or to terminate their

role until their fees had been agreed; and (4) there had been an element of duplication arising from the absences of the senior manager. Accordingly, the remuneration was fixed at £86,052. Mirror Group Newspapers plc v Maxwell (No 2) [1998] 1 BCLC 638 and Re Independent Insurance Co Ltd (No 2) [2003] EWHC 51 (Ch) considered and applied.
[Stephen Atherton]

John Armour and Riz Mokal, "Reforming the governance of corporate rescue: The Enterprise Act 2002" [2005] Lloyd's Maritime and Commercial Law Quarterly 32

Riz Mokal, Corporate Insolvency Law: Theory and Application (Oxford: Oxford University Press, 2005)

INSOLVENCY – CROSS BORDER

Re TXU Europe German Finance BV

Chancery Division (Companies Court) (Mr Registrar Baister). [2005] BPIR 209.

Two companies in the TXU group were incorporated in the Netherlands and the Republic of Ireland. On 22 October 2004, resolutions were passed purporting to wind up the companies under section 84 IA 1986. The liquidators sought orders under r. 7.62 IR 1986 confirming the creditors' voluntary winding up of each of the two companies. The orders sought by the liquidators were granted because: (1) the centre of main interests for each of the two companies was in the UK; (2) due to the amendment to section 221(4) IA 1986 by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, the statutory restriction on winding up a foreign company as an unregistered company by means of a voluntary winding up had gone; (3) by Arts 2(a) and 3(1) of the Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings, there was jurisdiction to allow a company that has a centre of main interests in England to be wound up in England by means of a creditors' voluntary winding up. Re BRAC Rent-A-Car International Inc [2003] 1 WLR 1421 followed.

INSOLVENCY – PERSONAL

Portsmouth v Alldays Franchising Ltd

Chancery Division (Patten J). [2005] All ER (D) 381 (Mar).

P applied to set aside three statutory demands served on him by A on the grounds that he had cross-claims against A in contract, estoppel and misrepresentation. On the evidence, P's contentions failed. There was no evidence that any agreement had ever been concluded, and neither promissory estoppel nor misrepresentation could be established.
[David Allison]

Chan Sui Ko v Appasamy

Chancery Division (Judge Weeks QC sitting as a Judge of the High Court). [2005] All ER (D) 165 (Mar).

The debtor ("D") had been a director and shareholder of a Mauritian company ("C"). A foreign draft was drawn on C's bank account in favour of D. Subsequently C entered receivership. C's receiver ("R") considered that that sum constituted a loan from C to D and issued a statutory demand against D. At first instance, D's application to set the demand aside was successful. The district judge accepted the D's submission that a counterclaim existed which equalled or exceeded the amount of the demand. R appealed. R argued that the company had made another loan in a similar manner to D which exceeded the total of D's cross-claims. The appeal was dismissed. The district judge had been correct to conclude that, on the evidence before him, there appeared to be a counterclaim, set-off or cross-demand which equalled or exceeded the amount in the statutory demand. TSB Bank plc v Platts [1998] 2 BCLC 1 considered.
[Lloyd Tamlyn]

Papanicola v Humphreys

Chancery Division (Laddie J). [2005] EWHC 335 (Ch).

A trustee in bankruptcy ("P") appealed against the decision of the Registrar to rescind a previous order. P contended that there had been no or no sufficient grounds for exercising the powers to rescind under section 375 IA 1986. Laddie J held as follows. (1) The section gives the Court a wide discretion to review, vary or rescind any order made in the exercise of the bankruptcy jurisdiction. (2) The onus is on the applicant to demonstrate the existence of circumstances which justify exercise of the discretion in his favour. (3) Those circumstances must be exceptional. (4) The circumstances relied on must involve a material difference (i.e. "something new") which justifies the overturning of the original order. (5) There is no limit to the factors which may be taken into account. They can include, for example, changes which have occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time. (6) Where the new circumstances relied on consist of or include new evidence which could have been made available at the original hearing, that, and any explanation the applicant gives for the failure to produce it then or any lack of such explanation, are factors which can be taken into account in the exercise of the discretion.

Lam v Inland Revenue

Chancery Division (Blackburne J). [2005] All ER (D) 234 (Mar).

The Inland Revenue presented a bankruptcy petition against the appellant ("L"). The debt represented the balance due in respect of unpaid tax assessments. The Deputy Registrar adjudged L bankrupt. L appealed on the ground that his liabilities under the assessments were incorrect and based on profits which had in fact been made by a limited company of which he was an employee. On appeal, it was held that: (1) Parliament has provided clear and exclusive machinery for considering appeals against tax assessments; and (2) it is not open to the bankruptcy court to go behind such assessments and review the manner in which they were made, or to investigate the merits of the assessments, save in exceptional circumstances. In L's case, no exceptional circumstances were relied upon. On the contrary, the Inland Revenue had entertained attempts by L to reconsider the amounts due, but had not done so. Therefore, the Deputy Registrar was correct to make the bankruptcy order and the appeal would be dismissed.

Coulter v Chief of Dorset Police

Court of Appeal (Waller, Chadwick and Carnwath LJJ). [2005] BPIR 62.

In 1998, the claimant ("C") brought proceedings against the Chief Constable of Dorset Police ("A"). The proceedings were struck out. A obtained an order for costs in the sum of £6,627.47 against C. In 1999, A retired and was replaced by a new Chief Constable ("S"). In July 2003, S served a statutory demand on C claiming the costs and interest. On 5 August 2003, C issued an application to set aside the statutory demand, arguing that the claim was vested in A and that the statutory demand could not be validated by a subsequent assignment. The application was dismissed. C appealed. The appeal was dismissed. C appealed to the Court of Appeal. The Court of Appeal dismissed the appeal. Pursuant to the Police Act 1996, Dorset Police Authority ("the DPA") was entitled to the benefit of the debt. Both A and S would have to account to the DPA for any money recovered by them. As at the date of the hearing before the district judge, the person entitled to sue for the debt at law, to give a good receipt for the debt and to present a creditor's petition (in the event of the statutory demand not being set aside) was S.

Coulter v Chief of Dorset Police (No 2)

Chancery Division (Evans-Lombe J). [2005] BPIR 76 (Ch).

C made a second application to set aside a statutory demand on the basis that there had been a compromise agreement. The second application was dismissed. C appealed. The appeal was dismissed. It was held that C should have advanced his case on an alleged compromise in the first application to set aside the statutory demand. The principle of estoppel by res judicata applied to prevent C raising new arguments on this application. The district judge had acted entirely appropriately in dismissing C's application. Turner v Royal Bank of Scotland [2001] EWCA Civ 64 applied.

Nicholas Berry, "Bankruptcy, Occupation Rent and Equitable Accounting" NLJ (2005) Vol. 155, No. 7170, pp. 486-487.

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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