

# 3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 11 No 8 August 2005

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Lucy Frazer  
David Allison  
Daniel Bayfield  
Tom Smith  
Richard Fisher  
Blair Leahy  
Stephen Robins  
Marcus Haywood  
Hannah Thornley  
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Two important judgments have marked the end of the Summer Term and the beginning of the Summer Vacation.

In a judgment handed down on 21 July 2005, Mr Justice Lewison refused to sanction a solvent scheme of arrangement proposed by British Aviation Insurance Company Limited. The Judge's decision was based on an analysis of the rights of those creditors who had claims relating to losses that had been incurred but not yet reported. He held that these rights were not sufficiently similar to the rights of creditors who had unsettled paid claims or outstanding losses so as to enable the relevant creditors to consult together. As separate class meetings had not been called, the court had no jurisdiction to sanction the scheme. Recognising that this was the first occasion on which a solvent insurance scheme had been opposed, however, the Judge granted leave to appeal. Gabriel Moss QC and Daniel Bayfield appeared for the petitioner, and Richard Sheldon QC and Hilary Stonefrost appeared for the opposing creditors.

On 9 August 2005, the Court of Appeal handed down judgment in the co-joined appeals in the cases of Huddersfield, Globe, Ferrotech and Granville Technology Group. The Court of Appeal overruled Mr Justice Peter Smith and upheld Mr Justice Etherton in holding that protective awards and payments in lieu of notice are not payable as administration expenses. The judgment put an end to two weeks of serious concern that the availability of the administration procedure in trading administrations was at an end. Felicity Toubé appeared for the administrators in the Globe and Huddersfield appeal and Jeremy Goldring appeared as junior counsel for the administrators in the Ferrotech and Granville appeals.

This edition of the Digest was compiled by Hannah Thornley.

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**Stephen Robins**

## GENERAL NEWS

The Insurers (Reorganisation and Winding Up) (Lloyd's) Regulations 2005 (SI 2005/1998), which came into force on 8 August 2005, have implemented EU Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings in relation to the Lloyd's of London market.

The Government is seeking views on the impact, cost and benefits of possible changes to the law relating to companies' security interests. The closing date for the consultation is 7 October 2005. Further details can be obtained from the DTI website: <http://www.dti.gov.uk/consultations>

In the US, the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 has been passed. It comes into force on 17 October 2005. See the American Bankruptcy Institute Website for further details: <http://abiworld.net/bankbill>

## BANKING

**BNP Paribas SA and Ors v Yukos Oil Company**  
[2005] EWHC 1321.

**Chancery Division (Evans-Lombe J).**

The defendant company was unable to resist an application for summary judgment as it was unable to demonstrate that the claimant banks' deci-

sion to issue a notice of default was unreasonable under the terms of a loan agreement.

**[David Alexander]**

## COMPANY

**Mumbray v (1) Lapper & (2) Berkeley Square London Ltd**  
[2005] EWHC 1152.

**Chancery Division (Robert Reid QC sitting as a Deputy Judge of the High Court).**

The claimant ("C") applied, inter alia, for: (1) permission pursuant to CPR r. 19.9 to continue a derivative claim for the benefit of the second defendant ("D2") against the first defendant ("D1"); and (2) a Wallersteiner v Moir order for indemnity as to C's costs out of D2's assets. It was held: (1) although the availability of an alternative remedy is often an extremely important factor in determining whether or not to grant permission under r. 19.9, the availability of an alternative remedy is not an absolute bar to the granting of permission, and the fact that it is possible to point to some other alternative method of achieving the desired result does not mean that it is inevitably inappropriate for permission for a representative action to be continued: *Nurcombe v Nurcombe* [1985] 1 WLR 370, *Barrett v Duckett* [1995] 1 BCLC 243 and *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 BCLR 336 applied; and (2) the fact that

a company is a two-man company or a quasi-partnership does not automatically prevent the making of a Wallersteiner and Moir order to enable one of the shareholders to pursue a representative action on behalf of the company, but this factor should be taken into account and may be a relevant and important factor in determining whether or not to grant the order: *Halle v Trax* [2000] BCC 1020 and *Jay Bird Group v Greenwood* [1986] BCLC 319 applied. On the facts, however, C's application would be dismissed.

**Secretary of State for Trade & Industry v Paulin**  
[2005] EWHC 888. **Chancery Division (Sir Andrew Morritt V-C).**

No permission to appeal from the decision of a Registrar to a single judge of the High Court is required for an appeal against a disqualification order made under s. 6 of the Company Directors Disqualification Act 1986.

**Sinclair Investment Holdings SA v Versailles Trade Finance Ltd & Ors**  
[2005] EWCA Civ 722. **Court of Appeal (Buxton LJ, Clarke LJ and Arden LJ).**

The appellant argued that the facts as pleaded were not sufficient to establish a fiduciary relationship. The Court of Appeal held: (1) the

defining feature of a fiduciary relationship is an assumption of an obligation of loyalty: Bristol & West Building Society v Mothew [1997] 2 WLR 436 considered; and (2) where a person who would not normally be in such a relationship has given an undertaking of loyalty with regard to property, a fiduciary relationship might well come into existence. In the circumstances, the pleadings disclosed an arguable case as to the existence of a fiduciary relationship.

## CONTEMPT

**The State of Brunei Darussalam v His Royal Highness Prince Jefri Bolkiah [2005] EWHC 1526. Chancery (Evans Lombe J) .**

In relation to an application to amend ongoing proceedings for contempt and committal, Evans Lombe J held (granting permission to amend) that where a party subject to a freezing order had substantial lifestyle expenses and had failed to disclose any bank accounts evidencing the current source of the funds being used to meet his living expenses, it was not reasonable to infer that such expenses were being met by third parties solely from assets not subject to the freezing relief. As such, it could not be said to be inappropriate to allow an amendment to the existing proceedings so as to allege a contempt of court

where such an allegation was based solely on inferences. It would be for the judge at the hearing of the application itself to consider whether, having regard to all of the evidence (or lack thereof), the only reasonable inference that could be drawn was that a contempt of court had occurred.

**[Stephen Atherton, Richard Fisher]**

**Re Huddersfield Fine Worsted Ltd & Globe Worsted Company Ltd; Re Ferrotech Ltd & Granville Technology Group Ltd [2005] EWCA Civ 1072.**

**Court of Appeal (Clarke LJ, Jacob LJ, Neuberger LJ).**

The appellants in two appeals appealed against decisions regarding the priority to be attached to protective awards under s.189 of the Trade Union and Labour Relations (Consolidation) Act 1992 and awards of pay in lieu of notice. In the cases of Huddersfield and Globe [2005] EWHC 1682 (Ch), the administrators of two companies had sought a declaration that liability for protective awards under the s. 189 of the 1992 Act and awards of pay in lieu of notice should be treated as unsecured claims in the administration and thereby not falling within the Insolvency Act 1986 Sch.B1 para. 99(4) to (6). The administrators' declaration had been refused by Peter Smith J who

had held, inter alia, that such a construction did not go against the "rescue culture" which had underlined the administration regime introduced by the 1986 Act. In the cases of Ferrotech and Granville Technology, the administrators had sought a similar declaration, but Etherton J had granted the declaration, refusing to follow Huddersfield which he viewed as "plainly wrong", as the evidence before him made it clear that to construe the terms of the legislation in the manner adopted in Huddersfield would have undermined the rescue culture.

The Court of Appeal held (allowing the appeal in Huddersfield and Globe and dismissing the appeals in Ferrotech and Granville) that liabilities for protective awards under s. 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 and awards of pay in lieu of notice (except those which would otherwise be regarded as "wages") are not payable in priority to an administrator's expenses of a company under Sch.B1 para.99 of the 1986 Act. The word "a period" in para 99(6) should be read as "such period", namely a period of holiday or illness, and should not be extended to all employment liabilities treated as earnings in social security enactments.

**[Felicity Toubé, Jeremy Goldring]**

## INSOLVENCY – CORPORATE

### Re The British Aviation Insurance Company Ltd [2005] EWHC 1621 (Ch). Chancery Division (Lewison J).

The Judge refused to sanction a scheme of arrangement promoted by a solvent insurer on the grounds that: (1) the insurer had two classes of scheme creditor, namely those with IBNR claims and those with claims other than IBNR claims, but had convened a single scheme meeting; and (2) the scheme was unfair on a number of grounds including that it would have involved dissenting, direct policyholders having their IBNR claims subjected to an estimation process, and paid early, in circumstances where the company was able to continue in run-off, meeting its liabilities as and when they fell due.

**[Gabriel Moss QC, Richard Sheldon QC, Hilary Stonefrost, Daniel Bayfield]**

Victoria Thompson "Pensions Act 2004: Notification obligations of Insolvency Practitioners" *Insolvency Law & Practice* 2005, vol. 21, no. 3 p.84

## INSOLVENCY – CROSS-BORDER

### Re Collins & Aikman Europe SA Unreported, 15 July 2005. Chancery Division (Lawrence Collins J).

On an application for

administration orders in respect of 24 companies incorporated in England and other EC countries and forming the European operations of a global automotive products group, the Court held that the relevant time for determining the COMI of each of the companies was at the date when the proposed orders would be made: *Shierson v Vlieland-Boddy* [2004] EWHC 2752 followed. In the present case, the arrangements for the carrying out of the head office functions of the European operations had changed following the entry into Chapter 11 proceedings of the US operations, and on the evidence the court was satisfied at the date on which the orders were sought the COMI of each of the applicant companies was in England and Wales. The Court therefore made administration orders in respect of each of the companies.

**[Richard Hacker QC,  
Tom Smith]**

### Re Sendo Ltd [2005] All ER (D) 356 (Jun). Chancery Division (Etherton J).

S Ltd ("the Company") was incorporated in the Cayman Islands in 1999. The Company applied for an administration order pursuant to Sch B1 to the Insolvency Act 1986. The Company's primary bank accounts were in the UK and it had headquarters in Birmingham from where its

management and operational functions were carried out. The majority of the company's 56 employees were employed at its Birmingham offices, and all its board meetings were held in the UK. Further, the Company appeared to be treated by the Inland Revenue as controlled from the UK for the purposes of liability to corporation tax. Although the application was unopposed, the issue arose as to whether the court had jurisdiction to make such an order, since the company had been incorporated in the Cayman Islands. Having reviewed the evidence, the Court was satisfied that the Company's COMI was in England and Wales, as required by Article 3 of the EC Regulation on Insolvency Proceedings. In those circumstances, the Court had jurisdiction to make the administration order, and for the reasons given, it was appropriate for it to do so.

**[Andreas Gledhill]**

### Shierson v Vlieland-Boddy [2005] All ER (D) 391 (Jul). Court of Appeal (Chadwick LJ, Longmore LJ, Sir Martin Nourse).

The Court of Appeal held: (1) a debtor's COMI is to be determined as at the date on which the court is required to decide whether or not to open insolvency proceedings; (2) the COMI is to be determined in the light of the facts as they are at the relevant time for determination, including his-

torical facts that have led to the position as it is at that time; (3) in making its determination, the court must have regard to the need for the COMI to be ascertainable by third parties, in particular creditors and potential creditors; (4) equally, a debtor is free to choose where he carries on activities falling within the concept of “administration of interests”; (5) in circumstances where there are grounds for suspicion that a debtor has sought, deliberately, to change his COMI in order to alter the insolvency rules that would apply to him in respect of existing debts, the court must be satisfied that the change that is said to have occurred is a change based on substance and not an illusion, and that the change possesses an element of permanence. On the facts of the instant case, it was impossible to say that the Judge was not entitled to reach the conclusion that he did, namely that the debtor’s COMI had moved to Spain. However, in light of the facts of the case, the Court of Appeal held that the debtor possessed an establishment in the UK for the purposes of Article 3.2 of the EC Regulation. Therefore the appeal was allowed and the bankruptcy order was restored, subject to a variation so as to recite that the proceedings were territorial insolvency proceedings rather than main proceedings.

## **INSOLVENCY – PERSONAL**

**Hurst v Supperstone**  
**[2005] All ER (D) 130 (Jun).**  
**Chancery Division (Michael Briggs QC sitting as a Deputy Judge of the High Court).**

The appellants were husband and wife. They purchased a property in 1984 in their joint names. There had been no agreement or discussion between them as to the nature or amount of their respective beneficial interests. The husband was made bankrupt in 2001. In 2003, the husband’s trustee in bankruptcy applied for an order for the possession and sale of the property and the distribution of the net proceeds of sale between him and the second appellant in equal shares. The Registrar decided that the property was beneficially owned by the husband and the wife in equal shares. The husband and wife appealed against that part of the Registrar’s decision. The appeal was dismissed. It was held that the size of the appellants’ respective beneficial interests fell to be determined on the basis of what appeared to the court to be fair, having regard to all the appellants’ conduct with reference to the property, both at the time of and subsequent to its purchase. On this occasion, and despite substantially greater original contributions to the purchase price by the wife, a 50/50 apportionment, as decided by

the Registrar, was fair to both the appellant and the bankruptcy creditors. *Oxley v Hiscock* [2004] 3 All ER 703 applied.  
**[Richard Fisher]**

## **PARTNERSHIP**

**Chahal v Mahal**  
**[2005] EWCA Civ 898. Court of Appeal (Arden LJ, Carnwarth LJ, Neuberger LJ).**

Where all the assets and operational activities of a partnership are transferred to a company in which the partners (or former partners) are issued with shares for their own personal benefit, in the absence of evidence to the contrary, it is likely to be inferred from their conduct that they have agreed that the partnership should come to an end in a way recognised by the Partnership Act 1890 by mutual agreement. On the facts and the evidence, the partnership had not been dissolved by mutual agreement until a much later date than the date claimed.

## **PROCEDURE**

**Three Rivers District Council v Bank of England**  
**Unreported, 7th July 2005.**  
**Court of Appeal (Pill LJ, Rix LJ, Rimer J).**

The Court of Appeal dismissed an appeal against the Judge’s order curtailing the length of cross-examination of a witness. The question for the Judge was not, as the appellants had submitted,

“How long could the cross-examination properly last?” Rather, the question for the Judge was, “How long was it necessary for the cross-examination to last in the interests of justice?” The Judge had made a case management decision which was peculiarly a matter for his discretion; it would only be disturbed on appeal if it was plainly wrong. It could not be said that the Judge’s decision was wrong. In circumstances where a witness was to be cross-examined for up to seven weeks, and where the trial Judge was a very experienced commercial judge in an unrivalled position to exercise his discretion, it would take the most obvious of injustices for the Court of Appeal to prefer its own view to that of the Judge. There was no sign of such injustice in this case. The Court of Appeal also dismissed an application for an order that the judgment be kept private because it contained confidential information.

**[Barry Isaacs, Ben Valentin, Tom Smith]**

**Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc [2005] EWCA Civ 854. Court of Appeal (Auld LJ and Dyson LJ).**

The questions arising on appeal were: (1) to what extent a defendant who makes an offer to settle a money claim which the

claimant fails to better at trial should be in the same position in relation to costs as he would have been if he had made an equivalent payment into court in accordance with CPR Part 36; and (2) whether it makes any difference that the defendant withdraws the offer after the time for its acceptance has passed. The Court of Appeal held: (1) there is no doubt that an offer by a defendant to settle a money claim will not automatically have the cost consequences set out in CPR 36.20(2) unless it is made by way of a Part 36 payment according to CPR 36.3(1); (2) the court can exercise its discretion to order that an offer which is not made in accordance with Part 36 shall have the costs consequences specified in CPR 36.20(2), according to CPR 36.1(2) and CPR 44.3(4)(c); (3) an offer should usually be treated as having the same effect as a payment into court if the following conditions are satisfied. First, the offer must be expressed in clear terms so that there is no doubt as to what is being offered. It should state whether it relates to the whole of the claim or to part of it or to an issue that arises in it, and if so to which part or issue; whether it takes into account any counterclaim; and if it is expressed not to be inclusive of interest, giving details relating to interest equivalent to those set out in CPR 36.22(2). This condition

does no more than reflect the requirements specified in CPR 36.22(2). Secondly, the offer should be open for acceptance for at least 21 days and otherwise accord with the substance of a Calderbank offer. Thirdly, the offer should be genuine and not sham or non-serious in some way. Fourthly, the defendant should clearly have been good for the money at the time when the offer was made. To the extent that any of these conditions is not satisfied, the offer should be given less weight than a payment into court for the purposes of a decision as to the incidence of costs. Where none of the conditions are satisfied, it is likely that the court will hold that offer affords the defendant no costs protection at all. *Calderbank v Calderbank* [1976] Fam 93 applied.

**Vehicles and Supplies Ltd & Anor v Financial Institutions Services Ltd [2005] UKPC 24. Privy Council (Lord Nicholls of Birkenhead, Lord Steyn, Lord Hoffmann, Lord Millett, Lord Walker of Gestingthorpe)**

An order for summary judgment is a final order adjudicating on the merits of proceedings. No estoppel per rem judicatam arises from an interlocutory order, or an order dismissing an action for want of jurisdiction. A judgment in default of appearance, or in

default of defence, is also lacking in finality so long as it is liable to be set aside. But summary judgment in proceedings in which a defendant appears and offers a defence, but the defence is held to be wholly defective, is a final judgment on the merits. *Patrick v Beverley Gardens Development Company Ltd* [1979] AC 547 distinguished.

## TORT

### **Mainstream Properties Ltd v Young & Ors**

**[2005] EWCA Civ 861. Court of Appeal (Sedley LJ, Arden LJ and Aikens J).**

The tort of interference with contractual rights is not satisfied by showing that the defendant was reckless as to whether his conduct interfered with the claimant's contractual rights or not. Neither is it enough to show that the action of the alleged wrongdoer was deliberate in the sense that it was not accidental but was a voluntary action. A defendant to a claim based on the tort cannot use mistake as to the law as a defence. *Douglas v Hello! Ltd* [2005] EWCA Civ 595 applied.

### **Society of Lloyd's v Henderson and Ors**

**[2005] EWHC 850. Queen's Bench Division (Commercial Court) (Andrew Smith J).**

Applications were made in litigation between The Society of Lloyd's ("Lloyd's") and

certain Names who are or were underwriting members of Lloyd's. The central issue was whether or not the Names should be permitted to assert claims against Lloyd's alleging misfeasance in public office. In *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1, Lord Steyn identified the following six ingredients of the tort of misfeasance in public office: (1) the defendant is a public officer; (2) power as a public officer is exercised either by the defendant himself or by someone for whom he is vicariously liable; (3) either the defendant or the person for whom he is responsible acts out of targeted malice in the sense of a specific intention to injure a person or persons or he acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff; (4) the claimant has a sufficient interest to have legal standing to sue; (5) there is damage caused by the wrongful act; and (6) the damage is not too remote to be recoverable. A common theme of the Names' allegations was that Lloyd's was liable for misrepresentations that were said to have induced them to become or remain Names or to increase their underwriting capacity. The Names wished to amend their statement of case in the current proceedings to include a new claim for misfeasance in public office. Where a party applies to amend his statement of case

and an applicable period of limitation stipulated by the Limitation Act 1980 has expired, the provisions of CPR r. 17.4 apply: "The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in proceedings". It was clear that the period of limitation applicable to the proposed new claim had expired and therefore the application to amend would not succeed unless the conditions of CPR r. 17.4 were satisfied. The conditions of CPR r. 17.4 were not satisfied, because, amongst other things, the proposed pleading would introduce many new areas of inquiry. In any event the applications would have been refused on the basis that the new claim did not have sufficient prospects of success, therefore as a matter of discretion the amendments would not have been permitted. Further, the proposed amendments were long, unstructured, repetitious and confused and no proper reasons were given for the delay in making the 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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