

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 11 No 2 February 2005

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Richard Hacker QC
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The new administration regime has raised a number of interesting issues. One of them was how far the new rule on administration expenses, rule 2.67, would in practice mirror the law of liquidation expenses. On 16 February 2005, in *Re Alders Department Stores Ltd*, Mr Justice Lawrence Collins dealt with this knotty problem. He confirmed that the liquidation expenses rule contained in *Re Toshuku Finance UK plc* [2002] 3 All ER 961 does not apply to administrations. He also addressed the nature of employment liabilities in paragraph 99 of Schedule B1 and Schedule 6 to the Insolvency Act 1986. Richard Sheldon QC and Felicity Toube appeared for the Administrators, and William Trower QC appeared on behalf of the Attorney-General.

Another decision of public importance is that in relation to the challenge to the hunting ban. Representative members of the Countryside Alliance are continuing their attempt to overturn the Hunting Act 2004. Although unsuccessful before the Court of Appeal, they are now preparing an expedited petition to the House of Lords. Marcus Haywood is junior counsel to the applicants.

This edition of the Digest was compiled by Hannah Thornley.

Stephen Robins

GENERAL NEWS

Initial Provisions of the Companies (Audit Investigations and Community Enterprise) Act 2004 came into force on 1 January 2005. Further provisions will come into force on 6 April 2005, 1 July 2005 and 1 October 2005. See the Companies (Audit, Investigations and Community Enterprise) Act 2004 and Companies Act 1989 (Commencement

No.18) Order 2004 (SI 2004/332) for further details.

Insolvency statistics for the fourth quarter of 2004 have been released by the Department of Trade and Industry. The statistics show that there were 2,938 liquidations in England and Wales in the fourth quarter of 2004 on a seasonally adjusted basis. This was a decrease of 0.9% on the previous quarter

and a decrease of 11.1% on the same period a year ago. There were 13,013 individual insolvencies in England and Wales in the fourth quarter of 2004 on a seasonally adjusted basis. This was an increase of 8.0% on the previous quarter and an increase of 34.6% on the same period a year ago. See <http://www.statistics.gov.uk> for further details.

ADMINISTRATIVE

R v (on the application of Jackson and others) v Attorney General

QBD (Admin) (Maurice Kay LJ, Collins J). [2005] EWHC 94 (Admin).

Court of Appeal (Lord Woolf CJ, Lord Phillips MR and Lord Justice May). [2005] EWCA Civ 126.

The claimant members of the Countryside Alliance applied for judicial review in respect of the validity of the Hunting Act 2004. The 2004 Act had been made under the procedure set out in the Parliament Acts 1911 and 1949. The 1949 Act had amended the Parliament Act 1911 by reducing the time requirements within which the House of Commons could pass a bill for Royal Assent without the consent of the House of Lords. The 1949 Act had itself been made under the powers contained in the 1911 Act. The Claimants contended that: (1) as a matter of construction

the 1911 Act procedure could not be used to achieve amendments to the 1911 Act itself; (2) the procedure characterised by the 1911 Act was akin to one of delegated legislation, such that it was unlawful for the Sovereign and the House of Commons to enlarge the scope of its own authority without the approval of the parent body, Parliament, which included the House of Lords; (3) legislation passed under the 1911 Act was subordinate, not primary legislation. It was a fundamental tenant of constitutional law that, in the absence of an express power, a subordinate body could not modify or amend the conditions upon which its power to legislate was granted. Kay LJ and Collins J held that: (1) the Parliament Act 1911 section 2(1) expressly stated that the power to pass a bill without the consent of the House of Lords was in respect of "any Public Bill" except for two named types of Bill. The word "any" was deliberately wide and the existence of the express exclusions militated against the implication of additional excluded categories. There was no scope for interpreting section 2 as containing an exclusion in relation to a Bill to amend the provisions of the 1911 Act. (2) The correct way to describe the 1911 Act was as a statute that had redefined or remodelled the

legislature in such a way that there were two routes through which Acts of Parliament could be enacted. Section 2 expressly provided that what emerged when a Bill was enacted pursuant to section 2 was itself an Act of Parliament, not delegated legislation. (3) The formulation of section 2 of the 1911 Act was wide enough to embrace a Bill that amended section 2 itself. In the circumstances the 1949 Act was not invalid, and therefore the Hunting Act 2004 was not invalid. The applicants appealed to the Court of Appeal. The Court of Appeal held that the circumstances in which it would be appropriate for the courts to rule on the validity of legislation that had received the Royal Assent were limited, but in the instant case it was perfectly appropriate for the courts to have been involved. There was nothing in the language of section 2(1) of the 1911 Act which would prevent the amendment which the 1949 Act sought to make. Ultimately, the question was whether the relatively modest changes made to the 1911 Act by the 1949 Act fell outside the scope of the 1911 Act. Moreover, the restrictions on the exercise of the powers of the House of Lords that the 1949 Act purported to make had been so widely recognised and relied upon that they were today a political fact. A fuller summary of the Court of

Appeal's decision will appear in the next edition of the Digest.

[Marcus Haywood]

BANKING

Kelly John Tinkler, "The bank, the thief, the freezing order – but whose duty?" NLJ (2005) Vol. 155, p. 82

Eme Kubianga and Gordon Bon, "Rescue Me!" NLJ (2005) Vol.155, pp.181-182

COMPANY

Paddy Ireland, "Shareholder Primacy and the distribution of wealth" (2005) MLR Vol.68, No.1, p. 49

Bree Taylor, "Implications for the Corporate Veil Principle: Gross v Rackind" BLR (2005) Vol.26 No.1 p.2

Mohammed B. Hemraj "Canada: directors owe no duty to creditors: Peoples Department Stores v Wise Stores Inc" Comp. Law. (2005) Vol.26 No.1 p.31-32

CONTRACT

Dumford Trading AG v

Oao Atlantrybflot

Court of Appeal (Lord Justice Brooke, Lord Justice Rix and Lord Justice Jonathan Parker). [2005] EWCA Civ 24.

This was an appeal against summary judgment for

£1,890,000 under two contracts of guarantee. There was a dispute about the identity of the parties to the contracts of guarantee. The Respondent submitted that the references to one party throughout the contractual documentation were, in fact, a misnomer. Arguments based upon estoppel by convention were also raised. The Court of Appeal allowed the appeal, holding that the doctrine of misnomer is of uncertain width. It is clearly a doctrine of construction, but it is not plain to what extent it permits reference to extrinsic evidence. Where there are two possible entities, unless one can say from the four corners of the document that the parties must have intended to refer to one entity rather than the other entity, then the doctrine does not apply (*Davies v Elsbey Brothers Limited* [1961] 1 WLR 170 applied). If, however, there is only one possible entity, then it is possible to use extrinsic evidence to identify a misdescribed party. The cases and common sense suggest that a case of mere misnomer is not easily, if ever, successful. The mistake is usually explicable. Nevertheless, it is dangerous to deal with issues of misnomer and estoppel by convention (which are essentially factual issues) by way of summary disposal.

Jackson and another v Royal Bank of Scotland

House of Lords (Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood). [2005] UKHL 3 (HL).

The Appellants were the former partners in a business partnership ("S"). They claimed damages from the Respondent ("RBS") for breach of a contractual obligation of confidence pursuant to which RBS was obliged not to disclose to the end purchaser any of the documents relating to the purchase by S of the products from its supplier. RBS had wrongly disclosed a document to S's principal customer ("E") in a sale transaction. The disclosure of the document by RBS revealed to E the amount of profit that S was making on the transaction. The Appellants contended that E had terminated its relationship with S as a result of RBS's breach of contract and claimed for loss of the opportunity to earn further profits from that relationship. The Judge held that S was entitled to damages for the loss of the opportunity to earn profits from its trading relationship and that the trading relationship was likely to have continued for another

four years. Due to the uncertainties of the future relationship, the Judge reduced the amount of profit that could be recovered each year, with a cumulative increase in the reduction made. The implication of his judgment was that after the end of the fourth year, the chance of S obtaining repeat business with this customer was so speculative so as not to be sound in damages. RBS appealed. RBS submitted that the claim for the loss of repeat business was too remote and that in any event the relationship between S and E was so unstable that S should be awarded no more than general damages. Although the Court of Appeal rejected RBS's submissions, the Court of Appeal held that the Judge erred in his approach to quantum. In awarding the damages reference should have been made to RBS's limited knowledge and the foreseeability of loss. Therefore the Court of Appeal reduced the period for which profit could be claimed to one year. On appeal to the House of Lords, their Lordships upheld the Court of Appeal's decision that the loss was not too remote on the grounds that RBS was obliged not to pass on the information and S had an obvious and commercial interest in maintaining its confidentiality. However, the House of Lords restored the Judge's award of damages on

a reducing basis over a four year period. The fact that E could have discovered the extent of the mark-up independently of RBS's mistake did not limit the extent of damages due.

INSURANCE

In re Dunbar Assurance plc, Zurich Assurance plc, City of London Insurance Company Ltd, Pilot Assurance Company Ltd and Eagle Star Life Assurance Company Ltd Chancery Division (Evans-Lombe J). [2005] EWHC 28 (Ch).

Five insurance companies ("the Companies") were subsidiaries of a Swiss company called Zurich Group Holding ("ZGH"). ZGH was itself the subsidiary of a Swiss company called Zurich Financial Services ("ZFS"). The Companies and Allied Zurich plc applied to the High Court for the sanction of a scheme for the transfer of insurance businesses under Part VII of the Financial Services and Markets Act 2000 ("FSMA"). The scheme for sanction had the object of concentrating the insurance business conducted by the Companies into Eagle Star Life Assurance Company Ltd. Evans-Lombe J held that he was satisfied that the transfers concerned were transfers of insurance businesses within section 105(2)(a) and that the substantive and procedural

requirements prescribed by Part VII of FSMA had been complied with. But notwithstanding compliance with the requirements, the Court has an overriding discretion in deciding whether to grant or refuse its sanction: *Re AXA Equity and Life Assurance Plc* [2001] 2 BCLC 447 referred to. In all the circumstances of the case, however, it was appropriate to sanction the scheme.

INSOLVENCY CORPORATE

Re Allders Department Stores Ltd Chancery Division (Lawrence Collins J). [2005] EWHC 172 (Ch).

The Administrators of the Allders Group companies applied for directions in relation to the proper treatment of statutory liabilities for redundancy and unfair dismissal. The DTI took the view that they were payable as expenses, and the Attorney General intervened to argue this point of view. The employee related liabilities which are payable by virtue of para 99 of Sch B1 to the Act, in priority to the administrators' expenses, are those liabilities which have both been adopted after 14 days of the administrators' appointment and which are 'wages or salary'. Statutory liabilities for redundancy or unfair dismissal payments are not 'wages or salary' and

therefore do not have priority under para 99. These liabilities are not 'necessary disbursements' for the purposes of r 2.67(1)(f) of the Rules. Such an interpretation would be inconsistent with the scheme of the legislation if the payments referred to in Sch 6 IA 1986 (including protective awards in redundancy cases) are to be treated as preferential, and yet all other employee-related payments are to be paid as expenses of the administration. Further, a construction of r 2.67(1)(f) which applied it to statutory redundancy payment liabilities and other statutory liabilities would have such adverse policy consequences on the administration regime that it was impossible to see that such a result could have been intended.

Re Toshuku Finance UK plc [2002] 3 All ER 961 was not to be applied to administrations.

[Richard Sheldon QC, William Trower QC and Felicity Toubé]

**Re Harringtons Ltd
Chancery Division (Rimer J). [2005] All ER (D) 106.**

The Claimant ("C") was the liquidator of Harringtons Ltd ("H"). C applied pursuant to section 236 of the Insolvency Act 1986 for the examination of a senior manager ("L") of a company called S&W Ltd in respect of its dealings with H. L consented, and an order for his examination was made. C

then issued proceedings against several companies that had dealt with H. Proceedings were not issued against S&W Ltd. Nevertheless, S&W Ltd contended that the issue of proceedings constituted a "material change of circumstances" and applied to the court to set aside the order for examination of L. The application was dismissed, as the court was not satisfied that the issue of proceedings by C was a sufficient change of circumstances which could lead to a revisiting of the original order for examination.

[Glen Davis]

**INSOLVENCY –
CROSS-BORDER**

**Al Sabah v Grupo Torras SA
and Culmer**

Privy Council. [2005] UKPC 1.

This was an appeal to the Privy Council from a decision of the Cayman Islands Court of Appeal. The Appellants were the wife and son of Sheikh Fahad Mohammed Al Sabah ("the Debtor"). The Debtor was resident in the Bahamas and was adjudicated bankrupt in the Bahamas in 2001. In 1992, the Debtor had created two trusts in the Appellants' favour, governed by the law of the Cayman Islands. In 2002, the Debtor's Trustee in Bankruptcy ("the Trustee") made an ex parte application to the Bahamian Grand Court for an order requesting aid from the Grand

Court of the Cayman Islands. The Trustee sought to be given power to commence an avoidance action under a provision in a Cayman bankruptcy statute regarding the avoidance of settlements. The avoidance provisions in a bankruptcy regarding settlements in the laws of the Cayman Islands are wider than those in the Bahamas. The main questions considered by the Privy Council were: (1) whether the Court of Appeal was correct in its view that the Grand Court had jurisdiction under section 156 of the Cayman Islands Bankruptcy Law; (2) whether the Grand Court had jurisdiction under section 122 of the Bankruptcy Act 1914 or under its inherent jurisdiction; and (3) whether the Grand Court had the jurisdiction to confer the powers contained in the Cayman Islands avoidance provisions on a Bahamian trustee in bankruptcy. After an analysis of the historical and colonial context of the legislation, the Privy Council concluded that: (1) section 156 of the Cayman Islands law could not give the Grand Court jurisdiction; (2) although section 122 had been repealed in the UK, it had not been repealed out-side of the UK and therefore continued to have effect in every British Court elsewhere; and (3) section 122 was as wide in its application as section 426 of the Insolvency Act 1986.

[Robin Dicker QC]

Kate Dawson, "The doctrine of forum non conveniens and the winding up of insolvent foreign companies" JBL (January 2005) p.28-47

INSOLVENCY – PERSONAL

St Barbe Green and Mitson v Commissioners of the Inland Revenue

Chancery Division (Mann J). [2005] EWHC 14 (Ch).

An appeal was made against a determination of the Commissioners of the Inland Revenue concerning the valuation of a person's estate for inheritance tax chargeable on his death. Angus Charles Drogo Montagu, the twelfth Duke of Manchester, had died with an insolvent estate. The issue was whether the excess of the liabilities over the assets of the deceased in his personal free estate could be used to reduce the value of the assets comprised in certain settlements for the purpose of computing the amount chargeable to tax. After a consideration of the meanings of "estate" and "property" within the Inheritance Act 1984, it was held that the personal estate comprises the property in that estate net of liabilities. Once that estate is reduced to zero by those liabilities its value cannot decline further, and any additional liabilities have nothing against

which they can be offset. Therefore the further liabilities that have not been offset in the personal estate cannot be carried over and offset against the settled property for inheritance tax purposes.

Adrian Walters, "Bankruptcy and Hybrid Claims" (2005) 121 LQR 46

PARTNERSHIP

Gill v Sandhu Chancery Division (Lightman J). [2004] EWHC 43 (Ch).

The Respondent ("R") commenced proceedings in 1999 to wind up a partnership between himself and the Appellant ("A"). A dispute had arisen as to how the assets and liabilities of the partnership were to be divided and especially the profits made by A. The issue between the parties both in front of the Master and on appeal focussed on the words "share of the partnership assets" within section 42 of the Partnership Act 1980 ("the Act"). The Master held that "share of the partnership assets" means "share of the proprietary ownership of everything belonging to the partnership at the date of dissolution having money value". This would result in both A and R gaining a half share of the assets and profits

made by the partnership. On appeal from the Master, it was contended by A that the words "share of the partnership assets" within section 42 of the Act mean "share of net partnership assets after payment of all the debts and liabilities owing to non-partners". This meaning would result in R receiving substantially less from the dissolution. The Judge held that "share of the partnership assets" means the outgoing partner's share in the proprietary ownership of assets belonging to the partnership, because the Act makes express use of the phrase "net assets" to refer to a partner's interest in the surplus of the partnership assets after satisfying the partnership liabilities.

Elspeth Berry "Partnership Bill 2003: Unnecessary tinkering or much-needed reform?" JBL (January 2005) p.70-90

PROCEDURE

Nexus Communications Group Ltd v Lambert and Munn

Chancery Division (Gabriel Moss QC sitting as a Deputy Judge of the High Court). Unreported, 31 January 2005.

This case raises an interesting question of election and affects actual and potential

litigants who raise inconsistent arguments before or during litigation. A dispute arose out of a share purchase agreement. The Claimant ("C") agreed to purchase the entire share capital of a company ("P") from the Defendants ("D"). C argued that D ought not to be allowed to advance a contention which was inconsistent with D's previous position. C contended that this was a question of election. It was held that D's inconsistent contention did not amount to election in the relevant sense. *Lissenden v Bosch Limited* [1940] AC 412 considered. Election in equity means that a party cannot both accept an instrument or judgment and reject it. The doctrine of approbation and reprobation (as developed by Sir Nicholas Browne-Wilkinson in *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320) is not a principle of law of general application but is in fact a legal maxim which must be treated with caution. In an ordinary case, the mere putting forward of inconsistent arguments, either before or during litigation, does not lead to the abandonment or loss of either argument. There is normally nothing inequitable in running inconsistent arguments up to judgment, as long as they are put in the alternative. There must be

something inequitable about maintaining arguments thereafter. Where a party succeeds in obtaining judgment on the basis of a particular contention, he cannot then resist judgment based on that same contention where to do so would be inequitable.

[Gabriel Moss QC]

PROPERTY

Rosenfeld v Ransley
Chancery Division (Sir Francis Ferris). [2004]
EWHC 2962 (Ch).

The Claimant ("C") contended that he had lent money to the Defendant ("D"). D had executed a legal charge which contained a personal covenant for repayment. D argued that the charge was procured by undue influence. It was held that the factors pointing to potential undue influence in the execution of the charge by D were not enough to amount to undue influence as outlined in *Royal Bank of Scotland v Etridge* [2002] AC 773 or *BCCI v Aboody* [1990] 1 QB 923. However, there was insufficient documentary evidence to show that C had in fact lent the money to D.

[Stephen Robins]

William Swadling, "Rescission, Property and the Common Law" (2005) 121 LQR 123

CORRECTION

Re MHMH Ltd
Chancery Division (Evans-Lombe J). [2004] All ER (D) 327 (Dec).

The judgment of Evans-Lombe J was summarised in the last edition of the Digest. The final sentence of the summary was incorrect and should be deleted.

TALKS AND SEMINARS

Daniel Bayfield gave a talk entitled "Football and Insolvency" at an R3 Special Event entitled "Who would buy a football club?" which took place at Elland Road, Leeds, on 13 January 2005. The Special Event also included an address by Gerald Krasner, the now ex-chairman of Leeds United FC, and a tour of the changing rooms.

[Daniel Bayfield]

Stephen Robins gave a talk entitled "The Law of Insolvency" to the Inn Group at the offices of Bird & Bird.

[Stephen Robins]

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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