

# 3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 11 No 1 January 2005

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Christopher Brougham QC  
Gabriel Moss QC  
Simon Mortimore QC  
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Marion Simmons QC  
Richard Adkins QC  
Richard Sheldon QC  
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Lucy Frazer  
David Allison  
Daniel Bayfield  
Tom Smith  
Richard Fisher  
Blair Leahy  
Stephen Robins  
Marcus Haywood  
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On 15 December 2004, the next stage in the Mytravel saga took place before the Court of Appeal. Michael Crystal QC, Robin Dicker QC, Stephen Atherton and Jeremy Goldring appeared for the appellants, and Richard Sheldon QC and Hilary Stonefrost appeared for the respondents. The Court of Appeal's judgment provides important guidance on the correct procedure to be adopted in relation to Schemes of Arrangement. It has generated much interest in the bond markets and elsewhere.

As Blair Leahy reaches the end of her allotted term as the editor of the Digest, we would like to thank her for all her hard work over the past year. This edition of the Digest was compiled by Simon Fuller.

**Stephen Robins**

## ARBITRATION

**Sun Life Assurance Co of Canada  
v The Lincoln National Life  
Assurance Co**

**Court of Appeal (Mance LJ,  
Longmore LJ and Jacob LJ).  
[2004] EWCA 1660.**

A finding made by an arbitrator will not give rise to an issue estoppel if it was not necessary for the matter to be determined in the arbitration. Further the finding will not be binding in a subsequent arbitration between different parties.

## CIVIL PROCEDURE

Kate Dawson, "The Doctrine of Forum Non Conveniens and the Winding Up of Insolvent Foreign Companies," [2005] JBL 28

## COMPETITION

On 2 December 2004, Stuart Isaacs QC gave an interview to The Law Channel on recent developments in EU and Competition law.

**[Stuart Isaacs QC]**

## CONTRACTS

**Sirius International Insurance Co Ltd (PUBL) v FAI General Insurance Ltd House of Lords (Lord Bingham, Lord Nicholls, Lord Steyn, Lord Walker, Lord Brown). [2004] UKHL 54.**

A retrocessionaire (F) provided a letter of credit to a reinsurer (S) as security for "fronting" several reinsurance agreements. A side letter contained a number of conditions outlining when S could draw on the letter of credit. The insured syndicate made a claim

against S who in turn commenced arbitration proceedings against F. The proceedings were eventually settled by way of a Tomlin Order pursuant to which the letter of credit was drawn down and the proceeds were placed in escrow. S demanded payment of the sums held in escrow. The demand was not met and S commenced proceedings. The judge held that the conditions contained in the side letter date been satisfied. F appealed. The Court of Appeal allowed the appeal. S appealed. The House of Lords held that the side letter and Tomlin Order should be construed objectively in their commercial context and not literally. If the Tomlin Order were given a literal interpretation it would effectively mean S had abandoned the chance of fulfilling the conditions in the side letter. In the commercial context of the agreement, the conditions for drawing on the letter of credit had been satisfied and S was entitled to the proceeds.

**[Gabriel Moss QC]**

## FINANCIAL SERVICES

### The Financial Services Authority v Martin

**Chancery Division (HHJ Alton). Unreported, 21 December 2004.**

The Financial Services Authority applied for summary judgment against a law firm and an individual partner in respect

of a breach of section 3 of the Financial Services and Markets Act 2000 (“FSMA”) which had allegedly been committed by one of the firm’s clients. It was held that the Court had the power to make an order against a solicitor who was “knowingly concerned” in a breach of FSMA notwithstanding the fact that it was the client who had actually committed the contravention. On the facts, however, it was not clear whether the client had in fact acted in breach of section 3 of FSMA and the application would therefore be dismissed.

## INSOLVENCY – CORPORATE

### Re MHMH Ltd

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

The appointment of provisional liquidators for a four-year period was fully justified in circumstances where the company in question was dormant and where there was a serious question over whether it was entitled to recover deferred consideration payable by a party which had previously acquired the company’s former business. The receipt of the deferred consideration was of clear potential benefit to the company’s creditors. Moreover, the clause which otherwise brought the company’s entitlement to

continued receipt of the deferred consideration to an end in the event of liquidation did not on its true construction apply to the company’s directors’ application for provisional liquidation.

**[David Marks]**

### Re T&N Ltd

**Chancery Division (David Richards J). [2004] EWHC 2878 (Ch).**

T&N Ltd and various subsidiaries entered parallel insolvency proceedings in England and the US (being administration and Chapter 11). Pursuant to an application made in the administration proceedings, Mr Justice David Richards approved a framework document for the purpose of facilitating communications between the High Court and the United States Bankruptcy Court for the District of Delaware (the ICCP). An application was made by the US Plan Proponents in accordance with the ICCP for a communication between the two courts concerning the estimation of the total amount of asbestos related personal injury claims against T&N and its subsidiaries. It was suggested that the communication could take place by way of conference call. Mr Justice David Richards, whilst acceding to the application that there be a communication between the two courts, decided that he would not participate in

a telephone conference with the US Court. He held that, in circumstances where the Plan Proponents were seeking to bring about a decision of the US Court which they might seek to argue was binding on the Administrators for various purposes, it would be inappropriate for him to discuss the issues arising where those issues were matters of controversy between the parties and which might subsequently come before the High Court for determination. Mr Justice David Richards directed that a document be produced and agreed (to the extent possible) by the parties listing the relevant issues of English law and an explanation of the position in English law, which document was to be sent to the US Court for its assistance.

**[Simon Mortimore QC, Richard Sheldon QC, Robin Dicker QC, Richard Fisher]**

**Re Mytravel Group plc  
Court of Appeal (Chadwick LJ, Jacob LJ, Lloyd J). Unreported, 15 December 2004.**

On a company's application for the convening of scheme meetings under section 425 of the Companies Act 1985, it was wrong for the Companies Court to determine whether a class of creditors who were not parties to the proposed scheme of arrangement and whose interests were self-evidently materially different from those of the

general creditors who were parties to the proposed scheme of arrangement had an economic interest in the company.

**[Michael Crystal QC, Richard Sheldon QC, Robin Dicker QC, Stephen Atherton, Hilary Stonefrost, Jeremy Goldring]**

**Re British American Racing (Holdings) Limited  
Chancery Division  
Companies Court (Evans-Lombe J). [2004] EWHC 2947 (Ch).**

The main asset of R, a joint venture company, was a subsidiary that operated a Formula 1 racing team. The subsidiary had always been loss-making and was financially supported by loans from R that, in turn, were funded by the proceeds of convertible loan stock that B issued to R. B converted loan stock into shares in R following which it owned 89% of the total shareholding. B decided to re-organise the business and formed a new joint venture company with the team's engine supplier intending to purchase the interest of the minority shareholders and transfer the racing business to the new company. B demanded repayment of its outstanding loans from R and then applied, as a creditor, for an administration order on the basis that R was unable to pay its debts within paragraph 11 of Schedule B1.

M, a minority shareholder, opposed the application. M submitted that: (a) B was not a creditor because the loan stock had been provided to R under a supplemental agreement that prevented its conversion into a repayable loan until a fixed (and unexpired) period of time had elapsed with the effect that B did not have a presently enforceable claim against R; and (b) the application was an abuse of process as it was made to exclude M from participating in R and the new joint venture as opposed to any of the statutory purposes. It was held that: (a) B had made loans to R that were repayable and therefore had standing as a creditor; and (b) the application was not an abuse of process because the administration was likely to achieve a better realisation for the company's creditors as a whole than an immediate liquidation. R was heavily insolvent and there was no prospect of B providing ongoing support beyond the short term. It would be quicker and simpler for an administrator to sell R's assets than a comparable sale by the directors. B did not stand to benefit in any greater measure than the other creditors of R.

**[William Trower QC, Daniel Bayfield]**

**Alstom Transport v Elequip Projects Ltd**  
**Chancery Division**  
**(Birmingham) (Hart J).**  
**[2004] EWHC 2897 (Ch).**

It was appropriate to restrain the presentation of a winding up petition where the debtor company was able to make a seriously arguable case that the no set-off provision on which the petitioner relied did not apply to the company's cross-claim and should not, as a result, prevent the company maintaining a cross-claim against the petitioner.

**[Lloyd Tamlyn]**

**Re General Healthcare Group Ltd**  
**Chancery Division (Patten J).**  
**Unreported, 13 December 2004.**

It was appropriate for an injunction restraining the presentation of a winding up petition to be continued indefinitely in circumstances where there was no accrued debt or liability to support a petition and the claim was for an unliquidated sum.

**[Blair Leahy]**

**INSOLVENCY – PERSONAL**

**Malcolm v Benedict Mackenzie**  
**Court of Appeal (Mummery LJ, Chadwick LJ, Tuckey LJ).**  
**[2004] EWCA Civ 1748.**

The Court of Appeal held that the Insolvency Act 1986 did not discriminate between the pension rights of employees

and the self-employed and, as a result, was not in violation of Article 14 of the European Convention on Human Rights. In order to determine whether pension rights form part of the bankrupt's estate under sections 283(1) and 436 it is necessary to construe the terms of the relevant pension scheme. Unlike the contractual pension schemes created by most self-employed individuals, the terms of an employee's occupational pension created by way of trust often provide for the individual's rights to be forfeited in the event of their bankruptcy. This resulted in differential treatment as the contractual rights of a self-employed individual vested in the Trustee whereas the rights of a beneficiary under an occupational pension scheme (after forfeiture on bankruptcy) did not. The differential treatment was not brought about by an individual's status as employed or self-employed or as a result of the insolvency legislation. It was not possible to construe sections 283(1) and 436 of the 1986 Act in such a way as to exclude contractual pension rights from their scope.

**Thornhill v Atherton**  
**Court of Appeal (Waller LJ, Jonathan Parker LJ and Lloyd J).** [2004] All ER (D) 316 (Dec).

In 1999, A's wife purported to assign a matrimonial debt arising from ancillary relief proceedings to B. B subse-

quently petitioned for, and obtained, a bankruptcy order against A. Four years later A applied to annul the bankruptcy order on the basis that, following an order of the court in the ancillary relief proceedings, the matrimonial debt was not due to his wife and should not have been assigned to B. The court made an annulment order on condition that A paid the fees and disbursements of his Trustee in Bankruptcy (T). A appealed on grounds that the annulment should have been unconditional because his former wife or B should have been liable to pay T's fees and disbursements. The Court of Appeal dismissed the appeal holding: (a) as between A and T it was A's fault for failing to bring the application until 2004 by which time T had reasonably incurred significant fees and disbursements; (b) neither B nor A's former wife were before the Court and in due course there was potential for A to recover T's fees and disbursements from his own solicitors for failing to advise him to make an earlier application.

**[Daniel Bayfield]**

**Adams v Mason Bullock**  
**Chancery Division**  
**(Bernard Livesey QC sitting as a Deputy Judge of the High Court).** [2004] EWHC 2910 (Ch).

Where the debtor could have advanced an argument concerning the validity of the

debt in the course of the hearing of his application to set-aside a statutory demand but failed to do so, it was reasonable to infer that the argument had been abandoned. It would be an abuse of process for the debtor to raise the argument for the first time at the hearing of the petition. *Turner v Royal Bank of Scotland plc* [2000] BPIR 683 considered.

#### **Dean v Stout**

**Chancery Division  
(Lawrence Collins J).  
Unreported, 3 December  
2004 .**

A district judge ordered that a bankrupt's matrimonial home be sold to pay the bankruptcy debts and expenses. The bankrupt's wife submitted that there were exceptional circumstances and appealed. The Court dismissed the appeal and held that the fact that the bankrupt's wife had paid a large part of the bankruptcy debts and expenses and had kept up to date with the mortgage repayments did not collectively or separately constitute exceptional circumstances.

Jonathon Morgan,  
"Bankruptcy and Hybrid  
Claims" (2005) 121 LQR 46

## **INSURANCE**

### **Re Chevanstell Ltd**

**Chancery Division  
(Blackburne J). Unreported,  
15 December 2004.**

Riverstone Insurance (UK) Ltd made an application for the court to approve transfers of insurance business of Sphere Drake Insurance Limited and thirteen other companies under Part 7 of the Financial Services and Markets Act 2000. Nationwide Mutual and Nationwide General Insurance Company Limited had standing to be heard on the applications. The applicants offered concessions to put beyond doubt the scope of the transfers and in those circumstances Nationwide Mutual and Nationwide General did not pursue their objections.

**[Glen Davis]**

**Re AGF Insurance Ltd and  
Connie Lee Insurance Ltd  
Chancery Division (David  
Richards J). Unreported, 21  
December 2004.**

On the hearing of applications for the court to approve transfers of insurance business under Part 7 of the Financial Services and Markets Act 2000, National Casualty Company and National Casualty Company of America Limited had standing to be heard on

the applications. They had only received some six days' notice of the proposed transfers, and the court granted a very short adjournment to enable National Casualty to prepare its case. Applications for disclosure and for a more substantial adjournment were refused. Under those circumstances, counsel for National Casualty was instructed to withdraw.

**[Glen Davis]**

**Doheny v New India  
Assurance Company Ltd  
Court of Appeal (Potter  
LJ, Longmore LJ, Sir  
Christopher Staughton).  
[2004] EWCA Civ 1707.**

An insurance agreement required the insured to sign a declaration that no director or company in which the director had an interest had been "declared bankrupt" or was "the subject of bankruptcy proceedings". The insured were both directors of a company that had entered liquidation. The insurer refused to make payment in relation to a fire at the insured's premises on the basis of non-disclosure. The Court held that the insured was permitted to withhold payment since the correct interpretation of "bankruptcy" in the context

of the agreement included both personal and corporate insolvency proceedings. Any reasonable person on reading the form would realise that the insurer was interested not only in their personal solvency but the solvency of any corporate vehicle they used.

### LEGAL PROFESSION

On 9 December 2004, Marion Simmons QC gave a talk entitled "Tribunal, Regulators and Accountability" to the EU China Legal and Judicial Co-operation Programme.

**[Marion Simmons QC]**

### REAL PROPERTY

#### Mortgage Express v Mardner

**Court of Appeal (Pill LJ,  
Sedley LJ and Thomas LJ).  
[2004] All ER (D) 299 (Dec).**

The Court of Appeal held that a mortgagee in possession owes the evidential burden of proving that all reasonable steps had been taken to obtain the best available price when selling a property.

### SECURITIES

Stephen Atherton and Rizwaan Mokhal, "Charges over chattels: issues in the fixed/ floating jurisprudence" (2005) 26 Co Law 10.

**[Stephen Atherton,  
Rizwaan Mokhal]**

### FORTHCOMING TALKS

On 10 March 2005, Gabriel Moss QC will be delivering a talk entitled "Dealing with International Insolvency Proceedings" at the Second German Convention on Insolvency Law in Berlin, at which he will also take part in a panel debate with the title "Cross-Border Insolvency Proceedings: A Race Between Legal Systems?"

**[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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