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a monthly review of relevant news, cases and articles Vol 11 No 6 June 2005

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Lord Alexander of Weedon QC
Christopher Brougham QC
Gabriel Moss QC
Simon Mortimore QC
Stuart Isaacs QC
Marion Simmons QC
Richard Adkins QC
Richard Sheldon QC
Richard Hacker QC
Robin St. J Knowles QC
Mark Phillips QC
Robin Dicker QC
William Trower QC
Martin Pascoe QC
Fidelis Oditah QC
Professor Ian Fletcher
Colin Bamford
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David Marks
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David Allison
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Tom Smith
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Marcus Haywood
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This month brings another warning for liquidators about the risks of litigation. In *RBG Resources plc (in liquidation) v Rastogi* [2005] EWHC 994 (Ch), Lightman J reminded liquidators to think very carefully about bringing or continuing proceedings for damages against impecunious individuals, particularly where they involve allegations of fraud or may only be discontinued upon payment of the defendant's costs. The costs consequences of such proceedings can seriously deplete assets in a liquidation.

This edition of the Digest was compiled by Simon Fuller.

Stephen Robins

ARBITRATION

Cetelem SA v Roust Holdings Limited

[2005] EWCA Civ 618. Court of Appeal (Morritt VC, Clarke LJ, Neuberger LJ).

The Court's jurisdiction to make orders in support of arbitration proceedings under section 44(3) of the Arbitration Act 1996 is limited to the grant of interim relief in cases of urgency where it is necessary to preserve evidence or assets. A contractual right to purchase a shareholding was an asset within section 44(3) which, in the present case, would be protected by an interim injunction.

CIVIL PROCEDURE

Yeheshkel Arkin v Borchard Line Ltd

[2005] EWCA Civ 655. Court of Appeal (Lord Phillips, Brooke LJ, Dyson LJ).

Where a professional funding company partially financed the costs of unsuccessful litigation in a manner that was not objectionable according to ordinary principles, its potential liability to meet a costs award was limited to the amount of funding provided. This rule struck a balance between, on the one hand, giving an impecunious claimant access to justice while, on the other hand, creating an incentive for professional funding companies to limit the costs incurred in

litigation and to fund only those cases where the prospects made the claim worthwhile.

Peer International Corporation

v Termidor Music Publishers Ltd

[2005] EWHC 1048 (Ch). Chancery Division (Lindsay J).

D applied for an order for the examination of certain witnesses out of the jurisdiction in Cuba. It was held: (1) the High Court has power to order examinations of witnesses out of the jurisdiction by a trial judge appointed as a special examiner pursuant to CPR r. 34.13(4); (2) the disadvantage to C in holding the examination in Cuba was outweighed by the convenience for the witnesses, many of whom were elderly and unable to travel, and would also lead to a reduction in costs; (3) although s. 71 of the Supreme Court Act 1981 restricted the High Court's jurisdiction to hear oral evidence to "any place in England and Wales", this did not apply to special examinations which were not a "sitting" of the High Court; (4) since the Cuban government had indicated its willingness for the special examination to be conducted in Cuba, there was no need to implement the formal letter of request procedure.

Peter Carroll v Christin Kynaston
[2005] EWHC 927 (QB).
Queen's Bench Division (Wilkie J).

It was appropriate to grant a general civil restraint order against an individual under CPR r. 3.11 in circumstances where the terms of an extended civil restraint order had been breached on several occasions and was insufficient to prevent further vexatious proceedings being pursued.

Benoit Julien Mathieu Paturel v Marble Arch Services Ltd
Unreported, 26 May 2005.
Supreme Court Costs Office (Cox J, Mather O'Hare, Robert Carter).

The Court is entitled to award a successful party's legal expenses against the unsuccessful party notwithstanding the fact that a solicitor was neither named on the Court record nor appeared on behalf of the successful party, provided the Court is satisfied on the available evidence that the advice had been obtained and the expenses incurred.

CIBC Mellon Trust Co v Stolzenberg
[2005] EWCA Civ 628.
Court of Appeal (Kennedy LJ, Chadwick LJ, Jonathan Parker LJ).

The Court is entitled to make a costs order against a shareholder where they fund, control and direct litigation by the company to protect or promote their own financial interests, provided the shareholder is not a director or otherwise obliged to act in the best interests of the company. *Fulham Motors Limited v Toyota (GB) Ltd* (unreported, 23 July 1999) applied.

CONTRACT
Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd
[2005] EWHC 830 (Comm).
Queen's Bench Division (Commercial Court) (Mr Richard Siberry QC sitting as a deputy judge of the High Court).

Where an individual signs an agreement relating to an investment opportunity without reading its terms, the individual takes the risk that the agreement contains subsidiary or ancillary provisions that were not what he expected. However, where the terms of the agreement were fundamentally different from the investment product that had been explained to him, it was possible to maintain an action for misrepresentation. The mere act of signing the agreement did not establish a lack of inducement or failure to rely upon the representations. On the facts, the defendant had made representations that the investor would (1) receive an interest in a Russian treasury bond and (2) have control in liquidation if there was default by the Russian government. Both representations were untrue. As there had been reliance upon them, the investor was entitled to recover damages for the difference between the amount obtained in the subsequent liquidation and the amount that would have been recovered if the representations had been true.

DAMAGES
Mandrake Holdings Ltd v Countrywide Assured Group plc
Unreported 26/05/05.

Court of Appeal (Clarke LJ, Rix LJ, Sir Martin Nourse).
 R sold the issued share capital of MA to C and provided an indemnity to meet any damages payable by MA further to an

ongoing investigation by the Security and Investment Board. R disputed the scope of the indemnity provision and C commenced proceedings seeking a declaration that R was liable to pay compensation. C then sought to amend the particulars of claim to include an award of damages for R's failure to pay the sums due under the indemnity provision at the appropriate time, on the basis that the value of MA's commercial undertaking had been lost by the delay. The Court of Appeal considered itself bound by the decision in *Sprung v Royal Insurance (UK) Ltd* [1999] 1 Lloyd's Rep IR 111 and, while indicating that the area of law was ripe for review by the House of Lords, held that the proposed claim could not succeed as a matter of English law with the effect that the application for permission to amend the particulars of claim had to be refused.

INSOLVENCY – CORPORATE
Ess Production Ltd (in administration) v Sully
[2005] EWCA Civ 554.

Court of Appeal (Auld LJ, Chadwick LJ, Arden LJ).
 A company is permitted to use a name that would ordinarily be prohibited under s. 216 IA 1986 where, pursuant to r. 4.230 IR 1986, the company carried on business in that name for at least 12 months before the related company entered liquidation. It is sufficient that the name was used as a shorthand or promotional reference to the company and it is not necessary to find that it was the only name which the company used in connection with the ongoing trade.

Fusion Interactive Communication Solutions Ltd v Venture Investment Placement Ltd
[2005] EWHC 736 (Ch). Chancery Division (Peter Smith J).

P entered a loan agreement with F that was secured by a debenture. F tendered payment by cheque for money due under the loan agreement which P accepted, but failed to process as a result of its own oversight. P threatened to appoint a receiver on the basis F had defaulted in its obligation to make payment. F applied to restrain the appointment. Held, F's obligation to pay the underlying debt was suspended as a result of P accepting the cheque. P should not be permitted to rely on its own failure which, on the facts, was an attempt to acquire the shares in F for a nominal amount. Since there was no triable issue, it was appropriate to grant a final injunction.

[Lloyd Tamlyn]

Re MHMH Ltd
[2005] BCC 536. Chancery Division (Evans-Lombe J).

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.

[David Marks]

RBG Resources plc (in liquidation) v Rastogi
[2005] EWHC 994 (Ch). Chancery Division (Lightman J).

Where a liquidator seeks to negotiate the discontinuance of proceedings brought by the company in liquidation but the

defendant maintains an unreasonable position on the issue of costs, the liquidator should apply to discontinue the proceedings on terms imposed by the Court. In the present case the defendant's position was unjustified and 40 per cent of their costs were disallowed to reflect the saving that would have occurred if the defendant had maintained a reasonable position. Liquidators must think carefully before bringing or continuing expensive proceedings for damages against impecunious individuals, particularly where they involve allegations of fraud or may only be discontinued upon payment of the defendant's costs.

INSOLVENCY – PERSONAL

Sidney Stubbs v Gina Gonzales and the Attorney-General

[2005] UKPC 22. Privy Council (Lord Hoffman, Lord Scott, Baroness Hale).

A Member of Parliament in the Bahamas ("S") appealed against the decision of the Bahamian Court of Appeal that it did not have jurisdiction to hear an appeal relating to a bankruptcy order made against him. The Bahamian Court of Appeal had determined that bankruptcy proceedings were not civil proceedings within section 10 of the Bahamian Court of Appeal Act, and that there was no other, non-statutory, jurisdiction to hear the appeal. The Privy Council, allowing the appeal, held that all proceedings are either civil or criminal for the purposes of an appeal and that insolvency proceedings, while clearly not criminal proceedings, should not be considered a hybrid action merely because a different set of procedural rules

applied to their determination. The jurisdiction of the Bahamian Court of Appeal to hear civil appeals, as defined in section 10 of the Bahamian Court of Appeal Act, was expressed in the widest terms and was restricted only by section 11 which did not prohibit an appeal against a bankruptcy order. More generally, it was considered that the Bahamian Court of Appeal's decision would lead to a remarkable black-hole in the appellate process given the seriousness of a bankruptcy order.

Triodos Bank NV v Ashley Charles Dobbs

[2005] EWCA Civ 630.

Court of Appeal (Chadwick LJ, Longmore LJ, Neuberger LJ).

A guarantee provided by D which applied to all moneys due "under or pursuant to" a specified loan agreement did not, on its true construction, apply to moneys loaned under a subsequent agreement advanced on different terms, which could not be regarded as an amendment or variation of the original.

Fourie v Le Roux (No 2)
Unreported, 18 May 2005. Chancery Division (Blackburne J).

Whether a person over whom a requesting court had asked the English Court to exercise its jurisdiction pursuant to section 426 of the Insolvency Act 1986 was within the jurisdictional reach of the requesting court was not relevant to the existence of the jurisdiction of the English Court to apply the insolvency law of the requesting court, but was an issue that went to the exercise of the English Court's discretion to give assistance as requested.

[Stuart Isaacs QC, Jeremy Goldring]

PARTNERSHIP**James Hay Pension Trustees Ltd v Hird****Unreported 25, May 2005.****Chancery Division (Lawrence Collins J).**

Where a defendant sought to defend an action brought on a partnership deed by way of alleging rectification of the deed on the grounds of common mistake, the relevant principles to be applied were those as stated in *T&N Ltd (in administration) v Royal & Sun Alliance plc* [2003] EWC 1016 (Ch). Further, in the case of alleged unilateral mistake by one party, the other party had to have knowledge of the mistake such that it was unconscionable for the party with knowledge to rely on the agreement. In the present case there was no real prospect of the defendant succeeding in a claim for rectification on grounds of common mistake and no plea to support a claim based on unilateral mistake. Accordingly, the Claimants' application for summary judgment would be granted.

[Tom Smith]**TAX****Greenalls Management Ltd v Customs & Excise Commissioners****[2005] UKHL 34. House of Lords (Lord Nicholls, Lord Steyn, Lord Hoffman, Lord Hope, Lord Walker).**

Whenever there has been an "irregular departure" of goods subject to a duty suspension arrangement as a result of the goods being "made available for consumption" within the

meaning of regulation 4(2)(a) of the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992, the person liable to pay the excise duty will be the authorised warehouse keeper pursuant to Reg. 5(4). It had not been appropriate for Jacob J, at first instance, to read additional words into regulation 4(2)(a) requiring that the goods be "made available for consumption from the warehouse" which would exclude diversions taking place after the goods have departed on route to another authorised warehouse; it is sufficient for the irregular departure to occur at any time while the goods are subject to a duty suspension arrangement.

Messenger Leisure Developments Ltd v Revenue & Customs Commissioners [2005] EWCA Civ 648.**Court of Appeal (Lord Phillips, Jonathan Parker LJ, Arden LJ).**

The memorandum of articles of a company, M, prohibited the distribution of surplus profits to shareholders and required such profits to be used for the improvement of services at a leisure complex operated by M for the benefit of all its users. Held, the prohibition in the memorandum of articles was insufficient to make the company a non-profit organisation within Article 13(a)(1) of the Sixth Directive (77/388). On the facts, the company's activities provided a clear financial advantage to its members with the effect that the company's supplies were not exempt from VAT.

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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