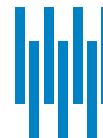


3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 11 No 3 March 2005

Michael Crystal QC
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
John Briggs
David Marks
David Alexander
Antony Zacaroli
Mark Arnold
Lexa Hilliard
Stephen Atherton
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Glen Davis
Andreas Gledhill
Roxanne Ismail
Barry Isaacs
Ben Valentin
Felicity Toube
Jeremy Goldring
Samantha Knights
Lucy Frazer
David Allison
Daniel Bayfield
Tom Smith
Richard Fisher
Blair Leahy
Stephen Robins
Marcus Haywood
Hannah Thornley
Simon Fuller

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There has been an interesting development in the latest stage of the Federal Mogul saga. In *Centre Reinsurance International Co v Freakley* [2005] EWCA Civ 115, the Court of Appeal concluded that claims handling expenses paid other than by the administrators (in this case by the reinsurers in the exercise of claims handling rights transferred to them under a reinsurance policy) are to be treated as an administration expense. As a result, it is now the case that liabilities that are not in fact incurred by administrators (but which could have been properly incurred by the administrators if they had incurred them) are to be treated as expenses. This new category of expenses is potentially very wide, and might well be said to be a step too remote from the traditional categories of expense. It remains to be seen if the House of Lords will deal with this issue. It is understood that an appeal by the Administrators is being considered.

This edition of the Digest has been compiled by Simon Fuller.

Stephen Robins

ARBITRATION

Thyssen Canada Ltd v Mariana Maritime SA
Queen's Bench Division (Commercial Court) (Cooke J). [2005] EWHC 219 (Comm).

A party that participates in arbitration will not be permitted to challenge the award for serious irregularity pursuant to section 68 of the Arbitration Act 1968 where, at the time of the arbitration, that party knew of grounds for objection or could have discovered such grounds with reasonable diligence.

BANKING

O'Meara Food Products Ltd v Agricultural Development Bank of Trinidad and Tobago
Privy Council (Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Walker of Gestingthorpe, Baroness Hale of Richmond). [2005] UKPC 6.

O and others appealed the decision of the Trinidad and Tobago Court of Appeal that an instrument of charge executed by the Agricultural Development Bank of Trinidad and Tobago ("the Bank")

was ultra vires. The appellants argued that the loan which underlay the instrument of charge was a short-term loan within the definition of the Agricultural Development Bank Act 1968 (“the Act”) and that the Bank had failed to use the correct form prescribed by the detailed regulations addressing the creation of short-term loans. It was held, dismissing the appeal, that although the loan was correctly categorised as a short-term loan, the regulations provided no more than helpful practical guidance on how to create certain loans and did not restrict the width of general powers granted by other sections of the Act that gave the Bank power to create loans. In the circumstances, the form that had been used by the Bank to create the instrument of charge was appropriate.

**[Michael Crystal QC,
Hannah Thornley]**

CIVIL PROCEDURE

**Watford Petroleum Ltd v
Interoil Trading SA
Chancery Division (Peter
Smith J). Unreported, 22
February 2005.**

In an appropriate case, the Court may order cross-examination of an individual on an interlocutory basis. This power is not limited to cases involving freezing and search

orders and post-judgment issues. Although an order for cross-examination on an interlocutory basis will always be exceptional, it may be appropriate if it would materially reduce the number of issues between the parties or the likely Court time. On the facts, however, it was not appropriate to make such an order because the examination would be premature pending the completion of disclosure and consideration of the relevant evidence.

**Dadourian Group
International Inc v Simms
Chancery Division (Laddie J).
Unreported, 16 February
2005.**

Where a party obtains a freezing injunction and later seeks to have it varied to permit enforcement in a foreign jurisdiction, it is necessary to establish a real prospect that assets are located in that territory.

**Barnes v
Hand Acceptances Ltd
Court of Appeal (Neuberger
LJ, Gage LJ). [2005] All ER
(D) 114 (Mar).**

B issued proceedings in a County Court and subsequently made an application to join additional parties and to amend his particulars of claim. The application was refused on the basis that the amended

particulars were lengthy and overly complex, contrary to CPR rule 16.4. Following an unsuccessful appeal B commenced new proceedings in the High Court based on the amended particulars. The High Court claim was struck out. B appealed. The Court of Appeal held the claim against the original defendant should be struck out as an abuse of process because it was an attempt to resurrect failed proceedings in the County Court. B had been given an opportunity to continue the proceedings against the new parties on condition that he simplified the particulars of claim but had failed to do so. As a result it had also been appropriate to strike out that part of B’s claim.

**Carnegie v Giessen
Court of Appeal (Ward LJ,
Dyson LJ, Carnwarth LJ).
[2005] EWCA Civ 191.**

When enforcing a foreign currency judgment by means of a charging order, it is not necessary to convert the sum into sterling before enforcement is complete.

**Forrester Ketley & Co v
Brent
Court of Appeal (Auld LJ,
Neuberger LJ). Unreported,
1 March 2005.**

It was appropriate to make an “unless order” requiring the

defendant to provide a clear and concise statement of his defence and counterclaim (in place of the 100 page document that had been produced). It had also been right for the Judge to strike out the defence and counterclaim following non-compliance with the unless order within the specified period of time.

CONTRACT

Alfred McAlpine Capital Projects Ltd v Tilebox Ltd Queen's Bench Division (Jackson J). Unreported, 25 February 2005.

A liquidated damages clause will not be rendered unenforceable as a penalty merely because the genuine pre-estimate of damage turns out to be inaccurate. The pre-estimate of damage does not have to be right to be reasonable. There has to be a substantial discrepancy between the level of damages stipulated and the level of damage likely to be suffered before the clause will become unreasonable. On the facts, it was reasonable to allow the enforcement of a liquidated damages clause which provided for a daily reduction in the completion payment due to a contractor notwithstanding that neither party could have foreseen the length of the delay at the time the agreement was entered

into and that the effect of the clause was to cancel out all the sums due to the contractor upon completion.

Manchester City Football Club plc v Royle Court of Appeal (Sedley LJ, Smith LJ, Gage LJ). [2005] EWCA Civ 195.

R had a fixed term contract to manage MCFC which was prematurely terminated two days after the final game of the season. The contract provided for R to be compensated at a higher rate of salary if a termination took place while MCFC was "in the Premier League" or, otherwise, at a lower rate. MCFC was due to be relegated at the end of the season. It was held at first instance that, at the time the contract was terminated, MCFC were still shareholding members of the Premier League and the higher rate was therefore payable. MCFC appealed. Held, allowing the appeal, the compensation provisions were intended to provide an equivalent to a common law assessment of damages for loss of earnings that R would have received the following season if the contract had not been terminated. Due to the imminent relegation of MCFC it followed that R was only entitled to remuneration at the lower rate of pay.

Fourie v Le Roux Court of Appeal (Sir Andrew Morritt VC, Mance LJ, Jonathan Parker LJ). [2005] EWCA Civ 204.

To obtain interim relief under section 25 of the Civil Jurisdiction and Judgments Act 1982, the foreign claim has to be such that the relief sought in England could be identified as interim relief in relation to the final order sought abroad in the proceedings relied on. Here there was no such connection between the South African proceedings relied on and a freezing injunction, and therefore the Judge's order would not be varied.

[Stuart Isaacs QC and Jeremy Goldring]

INSOLVENCY – CORPORATE

Re Chesterton International Ltd HHJ Weeks QC (sitting as a deputy judge of the High Court). Unreported, 8 March 2005.

The Court has no discretion to make an administration order where administrative receivers have been appointed over a company unless the person who appointed the administrative receivers consents to the making of an administration order or the Court thinks that the charge

would be liable to be set aside as a transaction at an undervalue or a preference or avoidable as a floating charge pursuant to section 245 of the Insolvency Act 1986.

[Lucy Frazer]

Penwith District Council v VT Developments Ltd Chancery Division (Laddie J). [2005] EWHC 259 (Ch).

V, which was involved in arbitration proceedings, entered into a company voluntary arrangement ("CVA") with its creditors. P subsequently obtained costs orders against V in the arbitration proceedings and petitioned for V's winding up. V applied to have the petition struck out or stayed on the grounds that it had a genuine and serious cross-claim in the outstanding arbitration proceedings that would equal or exceed the petition debt. P argued that following the CVA there was no longer the required mutuality because the costs orders were payable by V personally, whereas V's claim in the ongoing proceedings was held by V as trustee for the creditors of the CVA. It was held that the petition should be dismissed because: (1) V had a personal interest in both the petition debt and the outstanding arbitration claims; and (2) since V's personal interest in the outstanding arbitration claims exceeded the petition debt, it

was possible for V to rely on an equitable set-off. The Court further held that a disputed petition should not be allowed to continue unless there were special circumstances, which did not include the existence of a CVA.

[Jeremy Goldring]

Re Margaretta Ltd Chancery Division (Michael Crystal QC). Unreported, 17 February 2005.

An accountant, A, was instructed to investigate whether VAT was payable by a company, M, in relation to a transaction it had entered. M transferred funds to A for the purpose of discharging the VAT liability if payment was considered due. The funds were misappropriated by A. M entered liquidation on the petition of the Commissioners of Customs & Excise ("C&E") in respect of the unpaid VAT. The liquidator recovered a substantial part of the misappropriated funds and applied to the Court for directions as to whether the monies should be paid to C&E or distributed *pari passu*. Held, on the facts it was not possible for C&E to maintain that the funds were held on an express trust for their benefit. However, when M received the funds he was restricted to applying them for the purpose of discharging M's VAT liability and the funds were therefore held on a Quistclose trust. It followed

that the cause of action pursued by the liquidator had also been held on trust for C&E and the net proceeds were payable to them.

[Michael Crystal QC]

Regalway Care Ltd v Shillingford Chancery Division (Blackburne J). [2005] EWHC 261 (Ch).

R obtained a freezing order over the assets of a company ("E") and others on the basis that they were implicated in missing trader intra-community VAT fraud. An application was made by three intervening parties ("the Interveners") who sought to vary the freezing order to permit repayment of sums they had paid into E's bank account in relation to the purchase of telecommunications equipment. The Interveners claimed the money was due in the ordinary course of business. R challenged the good faith of the Interveners. Blackburne J held that when deciding whether to vary a freezing order the Court must do what is just and convenient in the circumstances and is guided by the following considerations: (1) only bona fide obligations will be permitted to be paid out; (2) such obligations may include obligations which arise otherwise than in the ordinary course of business or

which are not legally enforceable but which the defendant reasonably wishes to discharge; (3) the party applying to vary the freezing order bears the burden of establishing that the payment should be permitted; (4) the fact that a defendant leaves it to a third party to make the application (rather than make the application himself) does not alter the burden of proof; (5) the court will refuse to authorise a payment if there is credible evidence that there is or may be collusion between the defendants and the third party, or the payment sought is for the purpose of defeating the claimant's claim, or that there are other circumstances which fairly call into question the good faith of the intended payment; (6) the fact that there is no basis for questioning the good faith of the third party is not, in itself, a sufficient reason for sanctioning the payment. The court must be satisfied by evidence that it is sanctioning no more than a payment which would normally have been made out of the defendant's assets had there been no freezing order. Blackburne J dismissed the applications as they could not be resolved on a summary basis. He directed a trial on the issue of the good faith of the Interveners. **[Hannah Thornley]**

**Re a Company
Chancery Division (Sir
Francis Ferris). Unreported,
24 February 2005.**

The Law Society issued a final remuneration certificate in relation to the legal fees of a firm. The firm's client, a company, applied to restrain the firm from presenting a winding-up petition pending the outcome of a complaint made to the Law Society alleging inadequate provision of services and seeking a fee reduction. Held, although the company's grounds of complaint had little prospect of success, it was not appropriate to allow the winding up petition to be presented because there was a risk the company would be forced into liquidation before the complaint could be resolved.

**Centre Reinsurance
International Co v Freakley
Court of Appeal (Civ)
(Chadwick LJ, Latham LJ,
Arden LJ). [2005] EWCA Civ
115.**

At first instance, Blackburne J held that once T&N entered administration the re-insurers of an asbestos liability policy held by T&N, collectively referred to as R, were entitled to conduct asbestos claims and were further entitled to recover the cost of handling the claims under the terms of the insurance and re-insurance policy. However Blackburne J declined to find that the han-

dling costs amounted to an expense of the administration which, in the circumstances, left little prospect of a recovery. Both parties appealed. The Court of Appeal affirmed R's entitlement to conduct litigation and charge handling costs, rejecting an argument based on section 1(3) of the Third Parties (Rights against Insurers) Act 1930, and allowed R's appeal. It was necessary to process the asbestos claims in order to achieve the purpose of the administration order and, as a result, the handling costs to be treated as liabilities incurred by the administrators in carrying out their functions for the purposes of section 19(5) of the Insolvency Act 1986.

[Gabriel Moss QC]

**Ridgeway Motors
(Isleworth) Ltd v ALTS Ltd
Court of Appeal (Brooke LJ,
Mummery LJ, Scott Baker
LJ). [2005] EWCA Civ 92.**

A judgment creditor is entitled to base a winding-up petition or bankruptcy petition on a judgment debt more than six years after the date of judgment notwithstanding that section 24(1) of the Limitation Act 1980 prohibits "an action on a judgment" after that time. The expression "an action on a judgment" only prevents the creditor bringing a fresh action on a judgment to obtain a second judgment. It

does not prevent the creditor from enforcing the judgment by the usual methods or the commencement of insolvency proceedings.

INSOLVENCY – PERSONAL

Harrison v Seggar Chancery Division (Blackburne J). Unreported, 28 February 2005.

A bankruptcy petition was adjourned generally following the debtor's promise to make periodic payments. The petitioner appealed. Held, a petitioner is entitled to a bankruptcy order where liability has been established, payment is outstanding and there is no defence to the petition. There is discretion to adjourn the petition to provide the debtor with time to make payment: *Re Gilmartin* (1989) 1 WLR 513. However, it is only appropriate to allow an adjournment: (1) for a reasonable period of time; and (2) where there was some evidence that the debtor was able to make payment.

Klamer v Kyriakides & Braier (a firm) Chancery Division (Bankruptcy Registry) (Mr Registrar Simmonds). Unreported 1, March 2005.

The professional fees of a solicitor which have not been assessed under the Solicitors Act 1974 ("the Act") or other-

wise pursued to judgment do not amount to a "liquidated sum" within section 267(2)(b) of the Insolvency Act 1986 and, as a result, cannot found a statutory demand or bankruptcy petition. The professional fees remain an unliquidated debt notwithstanding that the firm's client has failed to demand an assessment within the 12 month period specified in the Act: *Turner v Palomo* [1999] 4 All ER 353. Therefore solicitors must provoke the assessment procedure or obtain judgment with quantum to be assessed by a costs judge prior to serving a statutory demand.

LEGAL PROFESSION

Bowman v Fels Court of Appeal (Brooke LJ, Mance LJ, Dyson). [2005] EWCA Civ 226.

A legal professional engaged in the ordinary conduct of litigation does not become "concerned in an arrangement which ... facilitates the acquisition, retention, use or control of criminal property" within section 328 of the Proceeds of Crime Act 2002. As a result, a legal professional who suspects that their client or their opponent's client has acquired, retained, used or controlled criminal property is not under an obligation to make a report to the National Criminal Intelligence Service. *P v P*

(Ancillary Relief: Proceeds of Crime) (2003) EWHC 2260 (Fam) disapproved. This is an important case for the legal profession and further guidance can be obtained at www.barcouncil.org.uk.

Colin Bamford, "Solicitors' Conflicts of Interest" (2005) 2 JIBFL 64

TALKS AND SEMINARS

On 9 February 2005, Hannah Thornley gave a talk to the R3 Southern Regional Meeting in Reading on the new administration regime.

On 23 February 2005, Colin Bamford gave a talk about financial assistance to Howard Kennedy.

On 23 February 2005 Hannah Thornley addressed a seminar at Howard Kennedy on the EC Regulation on Insolvency Proceedings.

On 4 March 2005, Christopher Brougham QC, Gabriel Moss QC, Simon Mortimore QC, Professor Ian Fletcher, John Briggs, Hilary Stonefrost, Felicity Toubé and David Allison all gave talks at the Hawksmere Conference on "Current Issues in Insolvency".

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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