

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 11 No 5 May 2005

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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
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Stephen Atherton
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The House of Lords heard the eagerly awaited Spectrum Plus case between 25 and 28 April 2005. The panel was composed of Lords Nicholls, Steyn, Hope, Scott, Walker, Brown and Baroness Hale. Judgment is expected before the end of the summer term.

On 26 April 2005, the Financial Services Authority made its first application for the appointment of provisional liquidators of an insurance intermediary partnership since it took over regulatory responsibility for insurance intermediaries on 14 January 2005. Dan Schwarzmann and Nicholas Reed of PWC were appointed as provisional liquidators of Whiteley Insurance Consultants. Glen Davis acted for the FSA.

This edition of the Digest was compiled by Hannah Thornley.

Stephen Robins

GENERAL NEWS

Statistics showing insolvencies in the first quarter of 2005 were published on 6 May 2005 by the DTI. There were 2,900 liquidations in England and Wales in the first quarter of 2005 on a seasonally adjusted basis. This was a decrease of 1.3% on the previous quarter and a decrease of 7.4% on the same period a year ago. There were 13,229 individual insolvencies over the same period. This was an increase of 1.6% on the previous quarter and an increase of 27.9% on the same period a year ago. See <http://www.dti.gov.uk/sd/insolv> for further details.

The Joint Insolvency Committee Annual Report for the year ended 31 December 2004 was published in April 2005 and is available on the Insolvency Service website: www.insolvency.gov.uk

On 20 April 2005, the United States enacted the UNCITRAL Model Law on Cross-Border Insolvency as a new Chapter 15 to the US Bankruptcy Code. The new Chapter 15 is expected to become effective in October 2005. A copy of Chapter 15 is available on the International Insolvency Institute website: www.iiglobal.org

COMPANY**Confiance Ltd v Timespan Images Ltd****[2005] All ER (D) 224****(Apr). Chancery Division (Pumfrey J).**

A debenture holder ("C") had failed to obtain the registration of its debenture within the 21 days prescribed by s. 395 CA 1985. The reasons for failing to do so were inadequate, but there was no reason to suppose that any prejudice would result from an extension of time permitting late registration under s. 404 CA 1985. Mere delay in bringing an application, and C's decision to rely upon other means of protecting the debenture which failed, did not defeat the application for late registration where no prejudice had been caused. The only test to be applied by the Court on late registration was whether it was just and equitable to grant relief.

Further, upon discovering the failure to register C's debenture, the company had granted its sole director, S, a debenture that S registered almost immediately. The Court ordered that C's debenture should be registered ahead of S's debenture. S could not have registered the second debenture in good faith knowing of C's outstanding

debenture that S himself had negotiated. It was just and equitable to grant the relief sought.

[Felicity Toube]

John Birchall, "Duties of good faith in commercial joint ventures? Contractual duties, fiduciary duties, and shareholder remedies," JBL, May 2005, pages 269-286

Jonathan Ross and Tamar Halevy, "Indemnifying directors," NLJ (2005) vol. 155, no. 7174, pages 662-663

COMPETITION**Floe Telecom Ltd v Office of Communications****[2005] CAT 14. Competition Appeal Tribunal (Marion Simmons QC sitting as Chairman).**

The Office of Communications ("Ofcom") made an application to set aside two paragraphs of a previous judgment of the Competition Appeal Tribunal ("CAT") dated 1 December 2004, which had referred the matter back to Ofcom for re-investigation, on the grounds that the CAT had no inherent jurisdiction to order re-investigation by Ofcom, but that the powers of the CAT were specifically prescribed by statute. The tribunal considered the relevant provisions of the

Competition Act 1998, European law decisions and previous decisions of the CAT on the matter of jurisdiction and the power to remit. The tribunal was satisfied on the basis of the statute law and previous decisions that it had: (a) a power to remit cases for investigation; and (b) a power to give time period directions to the competition authority in question. Therefore, the application was dismissed unanimously.

[Marion Simmons QC]**CONFLICT OF LAWS****JP Morgan Europe Ltd v Primacom AG****[2005] EWHC 508 (Comm). Queen's Bench Division (Commercial Court) (Cooke J).**

D1 and D2 were German companies. A number of banks ("the Banks") provided a loan to D1 and D2. The loan was specifically governed by English law and contained an exclusive jurisdiction clause in favour of the courts of England and Wales. D1 and D2 issued proceedings against the Banks in Germany. The agent of the Banks ("C") commenced actions against D1 and D2 in England seeking various declarations, injunctions and orders for repayment. D1 and D2 applied under CPR Part 11 for a stay of the English proceedings. As matter of

English law, it was clear that the German proceedings were commenced in breach of the exclusive jurisdiction clause, and the evidence suggested that D1 and D2 had commenced the German proceedings in order to frustrate any possible attempt by C and the Banks to bring proceedings in England. Nevertheless the German Court was first seised of the matter, and therefore article 27 of Council Regulation 44/2001 applied. This meant that the English claim for declarations, which was based on the same cause of action as was involved in the German proceedings, should be stayed until the German courts had determined their own jurisdiction. The English claims for re-payment and injunctions, however, which were not based on the same cause of action and did not raise any possibility of irreconcilable judgments, would not be stayed. *Erich Gasser GmbH v MISAT Sri* [2005] 1 QB 1 (ECJ) applied.

Limit (No 3) Ltd v PDV Insurance Company [2005] EWCA Civ 383. Court of Appeal (Auld LJ, Tuckey LJ and Clarke LJ).

The Venezuelan national oil company ("A") entered into a contract of insurance with a Venezuelan insurance company ("B") to provide cover against the risk of leaks.

B reinsured the risks with a Venezuelan reinsurer ("C"). C retroceded the risk to an English retrocessionaire ("D"). An oil leak occurred, causing pollution to the surrounding land and waterways. D issued English proceedings against C for declarations that it was not liable to indemnify C. D obtained permission to serve the claim forms on C out of the jurisdiction. C challenged this decision. The Judge set aside the previous order and held that Venezuela was the appropriate forum. D appealed. D submitted that: (1) England was the appropriate forum because the retrocessions were governed by English law; and (2) there were no countervailing factors making it appropriate for the claims to be tried in Venezuela. The Court of Appeal dismissed the appeal. C wished to raise many issues in the proceedings against other Venezuelan companies, and it would be desirable for all the issues to be resolved in one set of proceedings. All but one of the parties were located in Venezuela, and the underlying contracts were probably all governed by Venezuelan law. This was a good indication of where the centre of gravity lay. Further, in the absence of cogent evidence, an English Court should not prefer English jurisdiction to that of another

country on the ground that justice will not be done in that other jurisdiction. The exercise for a judge in deciding whether to permit service out of jurisdiction is one of discretion, not the application of a rigid mathematical analysis as to probabilities or likelihood, in the individual weighing of relevant factors. Factors to be taken into account include: the nature of the dispute; the legal and practical issues likely to arise or that could cause significant difficulties in one jurisdiction rather than another if they did arise; questions as to local knowledge; availability of evidence; and efficiency, expedition and economy, not only in the trial of the instant proceedings, but also in related proceedings that, in the interests of justice should be tried in the same jurisdiction. The answer in each case is pre-eminently a matter for the trial judge and an appellate court should be slow to intervene.

CONTRACT

NBTY Europe Ltd v Nutricia International BV [2005] EWHC 734 (Comm). Queen's Bench Division (Commercial Court) (Mr Nigel Teare QC sitting as a Deputy Judge of the High Court).

C claimed £2,500,000 pursuant to an alleged agreement ("the Settlement

Agreement") evidenced by an exchange of e-mails between the parties on 30 October and 3 November 2003. D argued that the parties were at cross-purposes as to what they were attempting to settle by way of the exchange of e-mails and that there was no binding contract. D's arguments were rejected. There was no latent ambiguity in the terms of the settlement agreement. *Raffles v Wichelhaus* (1864) 2 H&C 906 and *The Great Peace* [2002] 2 Lloyds Rep 653 applied. D also failed to establish that the parties were at cross-purposes.

DISQUALIFICATION

Secretary of State for Trade and Industry v Swan [2005] EWHC 603 (Ch). Chancery Division (Etherton J).

The Secretary of State for Trade and Industry ("S") commenced disqualification proceedings under s. 6 of the Company Directors Disqualification Act 1986 ("CDDA") against the former directors of F Ltd. F Ltd and 12 subsidiaries went into administrative receivership on 5 October 2000. It was discovered that the subsidiaries had been involved in "cheque kiting". The directors of F Ltd should have known

that the subsidiaries had been engaged in cheque kiting. The cheques cried out for comment and enquiry. Whether or not the cheque kiting within the group was dishonest, it was a wholly unacceptable and improper practice. In the circumstances, the conduct of the defendants fell below the required level of competence and amounted to unfitness. The directors were disqualified for periods of three years and four years respectively. *Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 applied.

INSOLVENCY

Timothy Mayer, "Personal liability for trading under a prohibited name: recent developments," *Insolvency Law & Practice* (2005) vol. 21, no. 1, pages 12-15

"Leyland Daf rages on: a case of over-reaction?" *Insolvency Law & Practice* (2005), vol. 21, no. 1, pages 1-3

Claire Martin-Royle, "Exit from administrations for the court appointed administrator," *Insolvency Law & Practice* (2005), vol. 21, no.1, pages 4-6

Jesus Iglesias Martinez, "The new Spanish insolvency law: Part II," *Insolvency Law &*

Practice (2005), vol. 21, no. 1, pages 7-9

Philip Mudd and Caroline Whittington, "Cathedral saved by CVA," *Insolvency Law & Practice* (2005), vol. 21, no. 1, pages 10-11

Jeffrey Greenbaum and Silvio Tersilla, "Parmalat II revealed," *In-House Lawyer*, March 2005, no. 128, pages 25-26

Rachel Richards and John Tribe, "Members voluntary liquidations: Part 1: a declaration of under use?" *Company Lawyer* (2005), vol. 26, no.5, pages 132-136

Lisa Linklater, "New style administration: a substitute for liquidation?" *Company Lawyer* (2005), vol. 26, no. 5, page 129

Adrian Walters, "Corporate restructuring under Sch. B1 of the Insolvency Act 1986," *Company Lawyer* (2005), vol. 26, no. 4, page 97

PROCEDURE

Goodwood Recoveries Ltd v Breen

[2005] EWCA Civ 414.

Court of Appeal (May LJ and Rix LJ).

C was a debt recovery company which had purchased a claim against D. C commenced proceedings against D when in fact the debt had already been paid. The Judge dismissed the claim and made a costs order against C's director ("S") under s. 51 of the Supreme Courts Act 1981. S appealed. The Court of Appeal dismissed the appeal. The costs of the litigation brought by the claimant company would not have been incurred without S's involvement. S was the real party for whose benefit the litigation was brought. He controlled it throughout. Lack of bona fides on the part of S was not a necessary condition.

Howells v Dominion

Insurance Company Ltd

[2005] EWHC 552. Queen's Bench Division (Cox J).

The chairman and secretary of the Hemel Hempstead Football & Sports Club ("the Club") issued representative proceedings against D on behalf of the members of the Club seeking a declaration that an insurance policy was valid. D counterclaimed for return of interim payments. The Club's claim failed and D obtained judgment on the counterclaim and an order for costs. D applied to the court

for permission under CPR r. 19.6(4) to enforce the judgment and costs order against 32 members of the Club. The Master held that the members as principals had not given the committee as agent sufficient authority to commence or pursue the litigation so that the members were not individually liable for the judgment. D appealed. On appeal, the Judge allowed the appeal and held that the members of the Club were prima facie bound by the estoppel created by the judgment, and, in the absence of any special facts relating to each individual case, the judgment was enforceable against the members. *Markt and Co Limited v Knight Steamship Company Limited* [1910] 2 QB 1021 applied. However, the represented members were not liable for costs. *Moon v Atherton* [1972] 2 QB 435 applied.

PROPERTY

Savva v Jaikaran

[2005] All ER (D) 202 (Apr).

Chancery Division (Mr Stuart Isaacs QC sitting as a Deputy Judge of the High Court).

C entered into a contract to sell a property to D1 ("the Main Contract"). Later, C entered into an agreement with D2 assigning C's rights under the Main Contract to D2 in return for the payment

of a £35,000 deposit and the payment of the balance of the purchase price on completion. D1 was notified of the assignment and thereafter served a notice to complete. Once D2 had failed to complete the Main Contract with D1, C then gave D2 notice of the rescission of the assignment and completed the Main Contract. C then commenced proceedings against D1 for an order obliging D1 to complete the Main Contract by transferring the property which was the subject of the Main Contract into C's name. The issue for determination by the court was whether C was entitled to have the property transferred into his name on the basis that he had validly accepted the repudiation by D2 for having failed to complete the purchase of the property in accordance with the terms of the Main Contract. It was held that the assignment in question was an absolute legal assignment executed in accordance with s. 136 of the Law of Property Act 1925 which was complete prior to D2's breach. Once the assignment was complete, C lost his ability to obtain title under the Main Contract. Therefore C was not entitled to an order transferring the property or to a declaration that the assignment had been rescinded. However, C was entitled to relief on the basis of a lien or charge, which could be

enforced by sale of the property with vacant possession.

[Stuart Isaacs QC]

REGULATORY

Re Whiteley Insurance Consultants

Unreported, 26 April 2005. Chancery Division (Blackburne J).

On the first application by the FSA for the appointment of provisional liquidators of an insurance intermediary partnership since the FSA took over regulatory responsibility for insurance intermediaries on 14 January 2005, the court appointed Dan Schwarzmann and Nicholas Reed of PWC as provisional liquidators. The judge also directed a brief embargo period before a press release could be issued.

[Glen Davis]

TAX

Travellers Casualty & Surety Company of Europe Ltd v Commissioners of Customs and Excise London Tribunal Centre (Theodore Wallace sitting as Chairman).

The appellants were reinsurers which had entered into contracts of insurance ("the Contracts") covering risks accepted by insurance companies in respect of the issue of surety bonds. The

issue before the tribunal was whether premiums payable on the Contracts were liable to insurance premium tax ("IPT") under the Finance Act 1994 ("the 1994 Act"). Under s. 70 of the 1994 Act, any contract of insurance is a taxable insurance contract unless it falls within one or more of the paragraphs of Part I of Schedule 7A. Paragraph 1 of Schedule 7A provides as follows: "A contract falls within this paragraph if it is a contract of reinsurance". The 1994 Act contains no definitions of the terms "contract of insurance" and "contract of reinsurance". The tribunal held that the Contracts were contracts of reinsurance within paragraph 1 of Schedule 7A because: (a) expert evidence suggested that the transfer of risk to other insurers on surety bonds issued by insurers was regarded in the market as reinsurance; and (b) it is clear from the structure of the legislation that there would be double taxation unless reinsurance was excluded from the liability for IPT.

[Gabriel Moss QC]

TALKS AND SEMINARS

Daniel Bayfield gave a talk on Guarantees to the Inn Group at the offices of Bird & Bird on 19 April 2005.

On 5 May 2005, Glen Davis addressed members of the Inn Group on Recent Changes to the Law of Set Off under the Insolvency (Amendment) Rules 2005.

On 17 May 2005, Stephen Robins gave a talk on the new draft TUPE Regulations at Sweet & Maxwell's TUPE Conference 2005.

PUBLICATIONS

David Marks has contributed a chapter on English insolvency law and procedure to a special edition of the Bulletin published by the Paris Chamber of Commerce under the auspices of the Observatoire Consulaire des Entreprises en Difficultés.

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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