

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 11 No 10 November 2005

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On 9 September 2005, Mr Justice Warren dismissed the applications of a group of bondholders to revoke or suspend of the approval of CVAs relating to two companies in the TXU group. The Judge also held that there were no grounds for removing the office-holders. Michael Crystal QC, Robin Dicker QC, Mark Arnold and David Allison acted for two of the office-holders.

On 2 November, the Liquidators of BCCI SA discontinued their action against the Bank of England for misfeasance in public office, bringing 12 years of litigation to an end. Since 1993, the case had been to the Court of Appeal six times and to the House of Lords three times. The abandonment of the action, on the 256th day of the trial before Mr Justice Tomlinson, came when Gordon Pollock QC, for the Liquidators, told the Judge that, following an application by the Liquidators for directions, the Chancellor, Sir Andrew Morritt, had held that it was no longer in the best interests of the creditors for the litigation to continue and that the action should be discontinued. Mark Phillips QC, Ben Valentin and Tom Smith appeared for the Bank of England. Barry Isaacs appeared for the Liquidators.

This edition of the Digest was compiled by Hannah Thornley.

Stephen Robins

GENERAL NEWS

On 1 November 2005, the Company Law Reform Bill was introduced in the House of Lords. The Bill is designed to simplify and improve company law, including: (1) restructuring those parts of company law most relevant to small businesses, so as to make it easier for them to understand what they need to do; (2) introducing simpler rules for forming a company; (3) abolishing the need for a company secretary; and (4) proposing new model articles. The Bill also seeks to introduce: (1) greater clarity in relation to directors' duties, including making clear that directors have to act in the interests of shareholders, but also need to pay regard to the longer term needs of the company, the interests of employees, suppliers, consumers and the environment; (2) greater use of e-communications, removing the need for hard copy share certificates; and (3)

an option for all directors to file a service address on the public record rather than a private address. The Bill also includes proposals to boost audit quality by, inter alia, introducing a new offence for recklessly or knowingly including misleading, false or deceptive matters in an audit report.

The latest insolvency statistics from the Department of Trade & Industry have revealed yet a further increase in the number of personal insolvencies. There were 17,562 cases of personal insolvency in England and Wales in the third quarter of 2005, of which 12,043 were bankruptcies and 5,519 were IVAs. This was an increase of 46% on the same period last year. Corporate insolvencies have also increased, with 3,389 companies going into liquidation in the third quarter of 2005. This was a 14% increase on the same period last year.

BANKING**Indofood International Finance Ltd v JP Morgan Chase Bank****Chancery Division (Evans-Lombe J).****[2005] EWHC 2103 (Ch).**

C, a company incorporated in Mauritius for the sole purpose of issuing certain loan notes ("the Notes"), sought a declaration that it was entitled to redeem the Notes on the ground of a material tax change, viz. the loss of a double taxation benefit under a double taxation agreement ("DTA") between Mauritius and Indonesia. D, the trustee under a trust deed of the Notes, relied on a provision in the trust deed which prevented redemption except where C could not avoid the effects of the tax change by taking reasonable measures. D submitted that a reasonable measure available to C was the restructuring of the Notes by the interposition of a new Netherlands company which, by reason of the application of a DTA between Indonesia and Netherlands, would avoid the increased tax charge. The court held that the double taxation benefit, which had been lost, could be regained by taking reasonable measures to restructure the loan arrangements to take advantage of the Indonesia/Netherlands DTA, and therefore C was not entitled to redeem the Notes.

[Richard Sheldon QC, David Alexander]

COMPANY**Siteground and Siteburn Chancery Division (Mark Cawson QC, sitting as a Deputy Judge of the High Court). Unreported, 9 November 2005.**

Directors of two companies entered into IVAs. By virtue of Regulation 81 of Table A, which

was incorporated into the Articles of Association of the companies, a director who entered into a composition or arrangement with his creditors "shall vacate" the office of director. As a result, the directors should have automatically given up their office. One of the shareholders of the companies sought injunctions preventing the directors from continuing to act as such. In response, the directors contended that because the shareholder knew that they were in IVA and had constructive notice of Regulation 81, it was estopped from contending that they were no longer directors. The Judge held that although it was possible in exceptional circumstances that estoppel could operate in such a situation, no estoppel was made out on the facts.

[Felicity Toubé]

CONFLICTS**A-G of Zambia v Meer Care & Desai****Chancery Division (Peter Smith J).****[2005] EWHC 2102 (Ch).**

C brought proceedings to recover substantial sums of Zambian Government money that were allegedly fraudulently misappropriated between 1996 and 2002 through the use of false contracts. A worldwide freezing order was granted in favour of C against the English and Zambian Ds in England. The Zambian Ds applied to stay the proceedings in England on the basis that it was fairer that fresh proceedings should be commenced against them in Zambia. It was held that the risk inherent in two trials and the fact that the same issues might be determined in two cases is to be avoided as it is clearly a "potential disaster from a legal point of view": *Aratra Potato Co Ltd v The Egyptian Navigation Co*

[1981] 2 Lloyd's Rep 119 applied. In the instant case, there was no advantage whatsoever in splitting the civil proceedings between England and Zambia but only considerable disadvantages of delay, inconvenience and wasted costs. Trial difficulties could be addressed by part of the evidence being heard either by video link or even by evidence heard in Zambia: *Peer international Corporation v Termidor Music Publishers Ltd* [2005] EWHC 1048 (Ch) applied.

CONTRACT**Chawla v Hare****Chancery Division****(Mark Herbert QC sitting as a Deputy Judge of the High Court). Unreported, 27 October 2005.**

It is the essence of a loan that the borrower agrees to repay it, or at least that he agrees to repay it if asked. The ordinary presumption of law is that, in the absence of an express term for repayment, that a loan is repayable immediately without any need for a formal demand, though the parties can expressly agree to make it repayable on demand. However, even if a loan is unconditional and is not therefore repayable on demand or repayable immediately, the law will imply a right for the lender to give notice, at a reasonable time, to call for its repayment.

CONSTITUTIONAL**R (Jackson and Others) v Attorney-General****House of Lords (Lord Bingham, Lord Nicholls, Lord Steyn, Lord Hope, Lord Rodger, Lord Walker, Baroness Hale, Lord Carswell and Lord Brown). [2005] UKHL 56.**

The House of Lords held that the Parliament Act 1949 and the Hunting Act 2004 are Acts of

Parliament of full legal effect. The Parliament Act 1911 effected an important constitutional change, not in authorising a new form of sub-primary parliamentary legislation but in creating a new way of enacting primary legislation. The 1911 Act could not be understood as a delegation of legislative power or authority by the Lords, or by Parliament, to the Commons. The statutory objective was not to delegate power; but to restrict, subject to compliance with the specified statutory conditions, the power of the Lords to defeat measures supported by a Commons majority, and thereby obviate the need for the monarch to create peers to carry the government's programme in the Lords. S. 2(1) made provision, subject to three exceptions, for any public Bill which satisfied the specified conditions, to become an Act of Parliament without the Lords' consent. Subject to those exceptions s. 2(1) applied to any public Bill including a Bill to amend the 1911 Act itself. Per Lords Nicholls, the s. 2(1) procedure could not be used to force through a Bill deleting from s. 2 the exception relating to any provision to extend the duration of Parliament. If that were possible, the Commons could then use the s. 2 procedure to pass a Bill extending its duration. Per Lord Steyn, although the supremacy of Parliament was still the general principle of our constitution, it was a construct of the common law, as the judges had created that principle. If that was so, it was not unthinkable that circumstances might arise where the courts might have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the

Appellate Committee of the House of Lords or a new Supreme Court might have to consider whether that was a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons could not abolish.

[Marcus Haywood]

COSTS

Sisu Capital Fund Ltd v Tucker Chancery Division (Warren J). The Times 4 November 2004.

Following the respondents' successful defence of the applications for the revocation or suspension of the CVAs and removal of the respondents from office, the respondents sought to recover their firm's time costs of the litigation from the applicants as a cost of the litigation. Warren J found that the office-holders could only seek assessment of their firm's time costs to the extent that they related to work of an expert nature, and that the office-holders could not recover for the costs of their firm incurred in the general assistance of the conduct of the litigation. In reaching this conclusion, Warren J found that the rule of practice established by *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (namely, that a litigant in person who was a solicitor could recover costs as if he had employed a solicitor) had only been applied in respect of litigants in person who were solicitors and that it would be an inadmissible extension of that case to treat the principle established by it to other professionals. Generally, litigants in person cannot recover for their time. Litigants in person are now dealt with by Part 48 of the CPR and special provision is made for solicitors who are litigants in person under rule 48.6(6). There is no similar provision made in the case of professionals, and

rule 48.6 does not draw a distinction between a litigant who happened to be a professional, other than a solicitor, or other person entitled to conduct litigation, and an ordinary litigant in person. The CPR therefore reflected that the approach in *London Scottish* was restricted in its operation to solicitors. The position of an office-holder was no different. It might be that in the fulfilment of his duty an office-holder might have to bring or defend litigation, but that fact did not mean it was part of his profession in the way that it was for a solicitor to do so. Furthermore, this conclusion was not altered by the fact that an office-holder's remuneration is ultimately under the control of the court. Accordingly, there was no reason under the regime of the CPR to depart from the practice established in the authorities determined under the RSC that recovery could only be made in respect of work of an expert nature (see, for example, *Re Nossen's Letter Patent* [1969] 1 WLR 638) and not time spent in the general assistance of the conduct of litigation.

[Michael Crystal QC, Robin Dicker QC, Mark Arnold, David Allison]

ENFORCEMENT

Society of Lloyds v Longtin Queen's Bench Division (Commercial Court) (Morison J). [2005] EWHC 2491 (Comm).

In March 2003, C obtained a certificate under s. 10 of the Foreign Judgment (Reciprocal Enforcement) Act 1933 for the purpose of seeking recognition and enforcement of an English judgment against D in Quebec. C began an action against D in Quebec in March 2004. An issue arose in the Quebec proceedings as to whether the judgment was still enforceable in England.

Therefore C applied to the English court under RSC Ord. 46, r. 2 for leave to issue a writ of execution, in order to demonstrate that the judgment was still enforceable. Leave was granted *ex parte*. D applied to set aside the order giving leave. It was held that the legal test was whether there were facts which took the case out of the general rule that execution would not be allowed after six years. The exercise of that discretion had to be directed to doing justice between the parties, having regard to all the circumstances of the case. In the instant case, there were factors taking it out of the ordinary. From the outset, D had known that C remained intent on enforcing the English judgment against him. There could be no prejudice. Further, C had remained active in seeking to have recognised and enforced, in many jurisdictions, the numerous judgments against Names. In the course of that task C had to be allowed time to consider its position and to adopt stances which reasonably appeared to C to be the best way of proceeding. Looked at overall, the period of delay did not disentitle C from the relief sought. *Patel v Singh* [2002] All ER (D) 227 (Dec) and *The Good Challenger* [2003] All ER (D) 320 (Nov) considered.

[Stephen Robins]

INSOLVENCY – CORPORATE

Re Daewoo Motor Co Ltd
Chancery Division (Lewison J).
Unreported, 15 November 2005.

The provisional liquidators of a Korean company applied for an order permitting the transmission of the proceeds of the company's English assets to a receiver appointed by a Korean court. It was held: (1) Were there is an

English ancillary liquidation and a foreign principal liquidation, the English court has no power to order transfer unless the scheme for distribution in the principal liquidation is substantially the same as the English statutory scheme. (2) If there is no liquidation in England, but provisional liquidators have been appointed in England, the issue of transfer is a matter of discretion for the court. (3) If the English provisional liquidation is likely to turn into a full winding-up, it would not be a correct exercise of discretion to order transfer unless the scheme for distribution in the principal liquidation is the same or substantially the same as the English statutory scheme. (4) If it appears that a winding up order will not be made in England, there can be no valid objection to transfer, as the English statutory scheme will never apply. On the evidence before the court, all the creditors, save three, would be advantaged by the transmission as they would receive a better cash dividend under the Korean reorganisation than they would receive if the proceeds of the Company's English assets were distributed by means of an English winding-up. If the transmission was permitted, there would be no winding up in England and Wales as the provisional liquidators would invite the court to dismiss the winding up petition. Therefore the order for the transmission of assets to the Korean receiver was granted but, in order to give purchasers of cars an opportunity to assert any claims for breach of warranty, the court directed that the transmission would take after the expiry of a two-month period. *Re HIH Casualty and General Insurance Ltd* (2005) EWHC 2125 (Ch) applied.

[Robin Knowles QC,
Stephen Robins]

Re DAP Holding NV
Chancery Division (Lewison J).
Unreported, 26 September 2005.

The court has jurisdiction to sanction a scheme of arrangement pursuant to s. 425 CA 1985 in respect of a foreign company so long as the company is liable to be wound up as an unregistered company under s. 221 IA 1986. There is no requirement to show that, as at the date sanction is sought, the court would actually have jurisdiction to wind up the company.

[William Trower QC,
Daniel Bayfield]

Re GHE Realisations Ltd
Chancery Division (Rimer J).
[2005] EWHC 2400 (Ch).

Where an administrator wishes to make a distribution to non-preferential unsecured creditors, he may only do so if: (1) he has sufficient funds for the purpose, (2) he does not propose that the exit from the administration should be into a voluntary liquidation pursuant to a notice given under paragraph 83 of schedule B1 of the Insolvency Act 1986, (3) his statement of proposals to creditors, as approved by them, included a proposal to make the relevant distribution, and (4) the payment of a dividend is consistent with the functions and duties of the administrator and any proposals made by him or which he intends to make. A consideration of the above four factors is likely to be material to whether or not the court is disposed to give permission to the administrator of a company to make such a distribution under paragraph 65(3). An administrator may dissolve a company in administration pursuant to paragraph 84 (a) where the company has no property available for distribution to creditors, and (b) where the

administrators have made distributions under paragraph 65 and there is no further distribution to be made, whether through the medium of an administration or a liquidation. Dicta of Blackburne J in *Re Ballast plc* [2005] 1 WLR 1928 not followed.

Hammonds v Thomas Muckle & Sons (Builders) Ltd (in administration) Chancery Division (Leeds District Registry). Unreported, 21 October 2005.

On an application by solicitors to seek leave against administrators to institute proceedings under s.73(1) of the Solicitors Act 1974 for a declaration that they were entitled to charge a property recovered through their instrumentality, failure by the solicitors to receive the fund prior to administration was not a bar to the granting of leave. S. 73 did no more than provide a procedure for enforcing the solicitors' common law rights. Moreover on the facts the presentation of a winding up petition by the solicitors for recovery of their costs did not represent any form of waiver of their security.

[David Marks]

Re Interlink Overseas Trading LLC Chancery Division (Hart J). Unreported, 4 November 2005.

P applied to wind up C on the grounds that, on the construction of a contract made between P and C for the sale and purchase of oil, C had failed to pay a present debt. C contended that the obligation to pay the debt was contingent on C receiving payment from a third party. The court preferred C's interpretation of the contract. The court also rejected P's submission that if payment was contingent on payment by a third party, C should

be treated as having received that payment when it assigned the right to payment by the third party. Accordingly, the petition was dismissed.

[Hilary Stonefrost]

Sisu Capital Fund Ltd v Tucker Chancery Division (Warren J). Unreported, 19 October 2005.

A group of bondholders brought applications seeking (1) the revocation or suspension of the approval given by creditors' meetings to CVAs relating to two companies in the TXU group ("EGO BV" and "EH3"); (2) the removal of the first respondents as liquidators of EH3; and (3) the removal of the second respondents as administrators of EGO BV. The court dismissed the applications, holding:

(1) It is not for the court to speculate whether the terms of a proposed CVA put forward by an office-holder were the best that could have been obtained, or whether it would have been better if the CVA had not contained all of those terms. Unless the court is satisfied that better terms or some other compromise would have been on offer, the comparison is between the proposed compromise and no compromise at all, judging matters as at the date of the vote on the CVA. If an office-holder puts forward a proposal which he considers to be fair, then, unless it is established that he acted other than in good faith or that he is partisan to the interests of some only of the creditors, the court should not speculate about what other proposals might have gained acceptance and been capable of implementation.

(2) An office-holder should try to structure a CVA capable of achieving the necessary statutory majorities and not unfairly prejudicial to any creditor. There would,

inevitably, be a range of proposals which he could put to creditors. To achieve a proposal which fell within the permissible range, he would often need to adopt a variety of approaches, including in particular acting as a mediator or broker between various groups of creditors in an attempt to see whether sufficient common ground could be found. If, after attempting to broker a deal, he was able to establish consensus among a majority, he could put the consensus forward as a proposal for a CVA, but only if he considered that it was not unfairly prejudicial to the minority. If he could not find a consensus among majority creditors, he could, and should if possible, nonetheless formulate proposals for a CVA to put forward for approval. Again, he should only do so if he considered that the proposals were not unfairly prejudicial to any creditor constituency. Further, he should not put forward proposals unless he considered that there was a reasonable prospect of those proposals being adopted. If he knew that a minority sufficient to block the proposals was adamantly opposed to them, he would be wasting time, effort and money in formulating such proposals in detail and ought not to do so. In those circumstances, he might have to accept that he simply could not formulate a CVA which had any prospect of being accepted, in which case a winding up would be inevitable. That approach was correct whether one was looking at the office-holders of a single company who were proposing a CVA for that company or at the office-holders of several companies who were jointly attempting to formulate proposals for a complicated and interlocking set of CVAs in relation to a group of companies.

(3) In large group insolvencies, the appointment of a common office-holder is likely to be in the interests of the general body of creditors of each company. A potential conflict or actual conflict between certain companies within the group should not preclude the appointment of a common office-holder. There is no rigid requirement to avoid conflicts. The correct approach is to ensure that conflict are managed (assuming that they are capable of being managed).

(4) The office-holders had not acted in breach of their professional rules. In any event, the fact that an office-holder is in a position of conflict, even serious conflict, and that he is in breach of his professional rules is not sufficient, of itself, to establish unfair prejudice under s. 6 IA 1986.

(5) Even assuming that the applicants would have constituted a separate class of creditors in the event that the office-holders had proposed a scheme of arrangement as opposed to a CVA, this did not mean that a scheme of arrangement was the only way in which the office-holders could properly have proceeded. The office-holders had the statutory power to propose a CVA. Furthermore, the mere fact that the Applicants would have been able to block a scheme of arrangement as a separate class did not entail that they were necessarily unfairly prejudiced when the vote of the CVA went against them.

(6) There was no reason to hold that the CVAs were unfairly prejudicial because of the releases contained in the CVAs which, in the applicants' submission, precluded them from bringing claims against the office-holders for breach of duty. There was no reasonable prospect of a successful claim being brought against

the office-holders. Alternatively, at the very least such claims would be fraught with difficulty. Accordingly, even if the releases precluded such a claim and were unfairly prejudicial to the applicants, it would not be right to take any substantial risk of losing the inter-locking CVAs.

(7) The reasonable and honest man in the same position as the applicants might reasonably have approved the CVAs. Accordingly, the challenge to the CVAs failed.

(8) The court considered the test to be applied when the removal of an administrator was sought under paragraph 88 of Schedule B1 IA 1986. Although the free standing power under paragraph 88 to remove an administrator appeared to be unlimited, the Judge could not think of any circumstances in which the court would remove an administrator under this power without cause being shown.

(9) The liquidators did not require sanction in order to propose a CVA to the creditors. The liquidators did not require sanction to enter into a lock-up agreement relation to EH3's claim against company A binding EH3 to support company A's CVA in circumstances where the CVAs of EH3 and company A were conditional on the approval of each CVA. The liquidators did not require sanction to vote the claim of EH3 in company A's CVA. In any event, the question of sanction ceased to be relevant on the approval of the CVA as the effect of the CVA was to ratify on behalf of EH3 and all of the creditors voting so that none of the creditors could complain about the manner in which the liquidators voted in relation to company A's CVA.

[Michael Crystal QC, Robin Dicker QC, Mark Arnold, David Allison]

INSOLVENCY – PERSONAL

Hurst v Supperstone

Chancery Division (Warren J). [2005] All ER (D) 362 (Oct).

A bankrupt applied to the court seeking a stay of an order for possession pending the hearing of various claims including two sets of proceedings concerning allegations of negligence against an accountancy firm in which the trustee was a partner. A stay was initially granted pending an application for summary judgment and an interim award of damages in one set of proceedings. Those proceedings were, however, struck out. The registrar then refused to extend that stay any further, notwithstanding the existence of other ongoing proceedings. The bankrupt appealed against the registrar's decision on the basis that it would be unjust for the court to allow the execution of the order for possession of the property while the second set of negligence proceedings remained pending. The court dismissed the appeal. S. 335A of the 1986 Act requires that, unless a bankrupt is able to show that exceptional circumstances existed, it is to be assumed, more than one year having passed since the making of the bankruptcy order, that the interests of the bankrupt's creditors outweighed all other considerations and an order for possession should therefore be made. However, the terms of the order may as a matter of discretion provide for a postponed sale even in the absence of exceptional circumstances: *Bowe v Bowe* [1997] BPIR 747 applied. Such a postponed order may be appropriate depending on all the circumstances. This will include the merits of any litigation which is relied upon to justify the postponed sale. The same test should

be applied when considering whether or not to stay enforcement of an order for sale and possession. In the current case, Warren J considered the merits of the claim against the trustee's firm to be hopeless. The court held that there had been no error by the registrar in the exercise of his discretion. He had taken account of all relevant factors and had been entitled to reach his decision. As such, there was no basis upon which to challenge the Registrar's decision.

[Richard Fisher]

PARTNERSHIP

Gill v Sandhu

Court of Appeal (Mummery LJ, Neuberger LJ and Black J). [2005] EWCA Civ 1297.

The reference in s. 42 of the Partnership Act 1890 to "share of the partnership assets" was to the net partnership assets, and not the gross partnership assets. The "share" referred to was the actual share of those assets attributable to the partner concerned in the net assets in the winding up process in accordance with s. 44 of the 1890 Act. The practical consequence was that there would have to be an account of the assets and liabilities of the partnership and of the value of each partner's share of the net assets, as at the date of dissolution, in order to determine the amount to which the excluded partner was entitled pursuant to the provisions of s. 42(1). On a winding up under s. 44, the partners would only be presumed to have equal shares in any sum that remained after they had been paid what was due to each of them in respect of advances and of capital. *Popat v Sonchhatra* [1997] 1 WLR 1367 considered.

Marsden v Tower Taxi

Technology LLP

Court of Appeal (Longmore LJ, Lloyd LJ and Sir Christopher Staughton). [2005] All ER (D) 162 (Oct).

The LLP's business purpose was narrowly defined within the partnership agreement by reference to the acquisition of certain computer software rights. These rights had been acquired from a third party ("C") shortly after the incorporation of the LLP ("the Agreement"). While the petitioners were members of the LLP's board, a dispute arose with C in relation to the Agreement and C purported to terminate the same. The board wished to litigate against C but under the partnership agreement, the unanimous consent of all members was required to commence any litigation. This unanimous consent was not forthcoming. The petitioners were removed from the board and petitioned for the winding up of the LLP on the just and equitable ground, claiming that the business purpose could only be achieved if the Agreement was performed and that this would be possible only if the LLP litigated against C, which the LLP was unwilling to do. Accordingly, it was argued that the LLP's business substratum had disappeared. The LLP applied to strike out the petition. The LLP's evidence was that it was not presently litigating because the new board was in negotiations with C and that there was therefore every prospect of the Agreement being performed. Moreover if settlement was not achieved, the new board believed that they could achieve the unanimous consent of the members to litigate against C. At first instance, the Judge held that it impossible to say at the time the petition had been

presented or at the time of hearing of the application to strike out that the LLP's substratum had disappeared. There was still every possibility that the Agreement would be performed and even if it was not, there was still every possibility that the LLP would commence proceedings against C. Therefore the Judge struck out the petition. The petitioners appealed. The Court of Appeal held that it would only be just and equitable to wind up a limited liability partnership on the basis that its business substratum had disappeared where it was "utterly impossible" to carry on that business. In the circumstances, the Judge had been entitled to hold that the existence of the negotiations was inconsistent with the petitioners' proposition that the substratum of the LLP had gone for good. Accordingly, the Court of Appeal dismissed the appeal.

[Blair Leahy]

PRIVILEGE

Sisu Capital Fund Ltd v Tucker Chancery Division (Warren J). Unreported, 25 July 2005.

The applicants, who were creditors of a company, asserted that the office-holders of that company could not maintain a claim of legal advice privilege against the applicants in their capacity as creditors of that company. The Judge held that as a matter of the obligations of a party to disclose documents, the office-holders of a company are as a matter of principle entitled to assert legal advice privilege against the creditor, but they are subject to a discretion in the court to order disclosure. That discretion arises for two reasons. First, they are officers of the court and are subject to its directions. Second, the posi-

tion of creditors of a company in relation to legal advice received by the office-holders was analogous to the position of beneficiaries in relation to legal advice received by a trustee. In this regard, following the decision in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, it is not possible to say that beneficiaries of a trust, even a fixed interest trust, have an absolute right to see documents relevant to trust administration, whether or not documents attracting legal professional privilege. The court would not exercise its discretion to order the office-holders to disclose the privileged material either in exercise of its jurisdiction over them as officer holders or by analogy with trust principles in circumstances where the creditors' reason for wanting to see the material was to support their case to have the CVAs of other group companies revoked and the revocation of those CVAs would be to the detriment of the creditors of the company as a class.

[Michael Crystal QC, David Allison]

BOOKS

In March 2006, Oxford University Press will publish a new book on EU Banking and Insurance Insolvency, which will cover the relevant Directives and their implementation in the UK and in most of the EU/EEA countries. The contributors to the new book include Gabriel Moss QC, Professor Ian Fletcher, Tom Smith, Marcus Haywood and Cecile Dupoux. Readers of the Digest are entitled to buy this book for the reduced price of £108 rather than the full price of £135. If you wish to take advantage of this opportunity, please email gabrielmoss@southsquare.com.

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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