

# 3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 11 No 9 October 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  
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Lexa Hilliard  
Stephen Atherton  
Adam Goodison  
Hilary Stonefrost  
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Glen Davis  
Andreas Gledhill  
Roxanne Ismail  
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Ben Valentin  
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Samantha Knights  
Lucy Frazer  
David Allison  
Daniel Bayfield  
Tom Smith  
Richard Fisher  
Blair Leahy  
Stephen Robins  
Marcus Haywood  
Hannah Thornley  
Simon Fuller

The long-awaited opinion of Advocate General Jacobs in the dispute between the Irish and Italian courts in the Eurofood IFSC Limited case has now been delivered. His opinion relates to the jurisdiction of the Italian and Irish courts to open main proceedings under the EC Regulation on Insolvency Proceedings in respect of Eurofood, a subsidiary of Parmalat SpA. The opinion, which followed a reference to the European Court of Justice by the Supreme Court of Ireland, favours the Irish court's decision to open main proceedings, primarily on the basis that an order appointing a provisional liquidator constitutes the opening of proceedings. The judgment of the European Court of Justice is now eagerly awaited. Gabriel Moss QC appeared for the Italian office-holder, Dr Bondi. In another interesting cross-border dispute, Mr Justice David Richards has handed down judgment in the case of HIH Casualty & General Insurance Limited & Ors [2005] EWHC 2125 (Ch). He held that the English provisional liquidators should not transmit the proceeds of English assets to the Australian liquidators, because the Australian scheme of distribution was not the same as the English statutory scheme. William Trower QC and Jeremy Goldring appeared for the English liquidators, Simon Mortimore QC and Stephen Robins appeared for the Australian liquidators, and Richard Adkins QC appeared for two Australian insurance creditors.

This edition of the Digest was compiled by Simon Fuller.

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**Stephen Robins**

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## GENERAL NEWS

On 22 September 2005, Gabriel Moss QC and Fidelis Oditah QC addressed a symposium on the implications of the House of Lords' recent decision in *Spectrum Plus* at St Hugh's College, Oxford.

Stuart Isaacs QC gave a talk on the art of cross-examination to the Law Society of Singapore on 22 September 2005 at the invitation of Justice VK Rajah.

The Insol Europe annual conference was held in Amsterdam between 30 September and 2 October 2005. The event included papers by Gabriel Moss QC on the EC Insolvency Regulation and cross-border insolvency.

On 14 October 2005, Gabriel Moss QC, Simon Mortimore QC, Professor Ian Fletcher, David Marks, Felicity Toubé, Jeremy Goldring, Daniel Bayfield and Tom Smith each spoke at the "Current Issues in Insolvency" conference.

## AGENCY

**PJ Pipe & Valve Co Ltd v Audco India Ltd**  
**Queen's Bench Division**  
**(Fulford J). [2005] EWHC 1904 (QB).**

An individual can be a commercial agent within regulation 2 of the Commercial Agents

(Council Directive) Regulations 1993 notwithstanding that the individual has no power to negotiate the sale of goods on behalf of his principal. The word "negotiate" in regulation 2 should be construed purposively so as not to exclude agents whose role is to develop the principal's business. On the facts, the relevant company was a commercial agent because its duties included interesting third parties in the products of its principal in return for commission on subsequent sales.

## CIVIL PROCEDURE

**Phillips v Symes**  
**Chancery Division**  
**(Peter Smith J). [2005] EWHC 1880 (Ch).**

Ordinarily, an English Court will not have jurisdiction under the Lugano Convention unless the relevant proceedings have been issued and served on the defendant. In exceptional circumstances, however, the Court has discretion to dispense with the need for service. On the facts, it was appropriate to dispense with service as the Claim Form in the English proceedings was not served on the Swiss defendants due to an error on the part of the Swiss process server and the Swiss post office. Both defendants were aware of the proceedings. The Claimant was without blame and any

refusal to allow reliance on the Lugano Convention would have been unjust.

## COMPANY

**It's A Wrap (UK) Ltd v Gula**  
**Chancery Division**  
**(Nicholas Davidson QC sitting as a Deputy Judge of the High Court). [2005] EWHC 2015 (Ch).**

The words "is so made" in s. 277(1) CA 1985 mean "is made in contravention of this Part of the Companies Act 1985". Therefore where dividends are paid in breach of s. 263(1) CA, which states that no distribution may be made except from accumulated realised profits, the shareholders will not be liable to make repayment unless they knew or had reasonable grounds to believe: (1) that the dividends were not being made from accumulated realised profits; and (2) that the legal effect of such a distribution was to make the director liable to make repayment. In other words, the shareholder must have known or had reasonable grounds to believe not just the facts that gave rise to the contravention but also the legal result of contravention. In the present case, the shareholders had received professional advice that the payment of dividends in this manner was a tax-efficient method of receiving payment

for their services. If the shareholders had been aware that they were liable to make repayment they would not have sanctioned the distribution and should not, as a result, be required to make any repayment.

**Halton International Inc (Holding) SARL v Guernroy Ltd**

**Chancery Division (Patten J). [2005] EWHC 1968 (Ch).**

A number of shareholders entered a voting agreement which gave a single shareholder, G, an absolute discretion to raise new capital through any available source as agent for and on behalf of the other shareholders. G raised new capital by, inter alia, issuing new shares to himself in disregard of the pre-emption rights in the company's Articles of Association. The other shareholders brought proceedings on the basis G's actions amounted to a breach of fiduciary duty. Held, there is no general principle imposing a fiduciary relationship between agents and their principals. In ordinary circumstances fiduciary duties will only arise where the agent's agreement with the principal requires the agent to act in the interests of the principal. In the present case, such a duty would have been inconsistent with the absolute

discretion that had been vested in G. Further, G's power to raise funds could not be limited by a flexible construction of the express terms of the voting agreement or the imposition of an implied term because that would have been inconsistent with the wide powers given to G and the factual background that existed at the time the agreement was entered.

**Ultraframe (UK) Ltd v Fielding**

**Chancery Division (Lewison J). [2005] EWHC 1638 (Ch).**

Where an individual becomes a shadow director as a result of the company being accustomed to act on his or her instructions, that individual will be required to comply with s. 320 CA 1985 which prohibits substantial property transactions to directors or connected parties except to the extent they are approved by a resolution of the company. On the facts, however, the defendant was not a shadow director, and therefore the relevant transactions did not fall within s. 320. Further, the claimants' proprietary claims and allegations of knowing receipt or dishonest assistance were not substantiated as against the shadow director.

**CONTRACT**

**Bryen & Langley Ltd v Boston**

**Court of Appeal (Pill LJ, Clarke LJ, Rimer J). [2005] EWCA Civ 973.**

The Court may determine that a concluded agreement has been reached notwithstanding correspondence between the parties which proposed that the terms of the agreement be reduced to writing in a formal signed document. On the facts, the parties had entered an oral agreement on the same terms that were due to be, but in the event were not, reduced to writing.

**DATA PROTECTION**

**Chief Constables of South Yorkshire, West Yorkshire and North Wales Police v Information Commissioner**

**Information Tribunal (David Marks as Deputy Chairman of the Tribunal). Unreported, 12 October 2005.**

The issue before the Information Tribunal was whether the holding of conviction data on the Police National Computer for lengthy periods was contrary to certain basic principles of the data protection legislation. The Information Tribunal held that the data in question should be restricted to police users only within six months of the Tribunal's judgment.

**[David Marks]**

## INSOLVENCY – CROSS-BORDER

### Re Eurofood IFSC Limited Opinion of Advocate General Jacobs. Case C-341/04.

The Advocate General's opinion expressed the view that:

(1) The appointment of a provisional liquidator will, in combination with the presentation of a winding-up petition, constitute a judgment opening insolvency proceedings within Article 16 of the Regulation.

(2) Where a Court in a Member State opens main proceedings in respect of a company which has its registered office in that jurisdiction and which conducts the administration of its interests on a regular basis in a manner ascertainable by third parties within that Member State, the courts of another Member State do not have jurisdiction to open main proceedings under Article 3(1) of the Regulation.

(3) The mere fact that the company is a subsidiary of a parent company whose registered office is in a different Member State does not rebut the presumption in Article 3(1) of the Regulation that the COMI of the subsidiary company is in the Member State of its registered office, notwithstanding that the parent company is in a position to control and does in

fact control the policy of the subsidiary where the fact of such control is not ascertainable by third parties.

(4) Where, however, it is manifestly contrary to the public policy of a Member State to give legal effect to a decision of another Member State on the opening of main proceedings, there is no obligation to give the decision any legal effect.

#### [Gabriel Moss QC]

### Re HIH Casualty & General Insurance Ltd Chancery Division (David Richards J). [2005] EWHC 2125 (Ch).

The four companies in the HIH group ("the Companies") were incorporated in Australia, where they carried out the majority of their business, but had also carried out a significant amount of business in England. Winding-up orders had been made in respect of the Companies in Australia, and provisional liquidators ("the JPLs") had been appointed in England on the basis of a letter of request from the Australian Court. Winding-up petitions were subsequently presented against the Companies in England. It was common ground that it was desirable for the Companies to promote schemes of arrangement which would be designed to reflect the priorities applicable to the distribution of assets

among creditors in the liquidation of the Companies. The JPLs applied to the English court for directions as to whether the English court would direct any subsequent liquidator to transmit the Companies' English assets to the Australian liquidators ("ALs"). The ALs sent a letter to the JPLs requesting the JPLs to transmit the Companies' English assets to them. The Australian court issued a letter of request asking the English court to determine whether the JPLs should transmit the Companies' English assets to the ALs and, in the event of an affirmative answer being given to the question, to direct the JPLs to transmit the assets to the ALs. The ALs then applied to the English court under s. 426 IA 1986 for relief in the terms of the letter of request. The Judge held that in an English ancillary liquidation of a foreign company, the English court has no power to direct the English liquidator to transfer funds to the foreign liquidator for distribution in the foreign liquidation, if the scheme for distribution in the foreign liquidation is not substantially the same as the statutory scheme which would apply in an English liquidation. As the Australian scheme for the distribution of the proceeds of the Companies' assets was not the same as the English statutory

scheme, the English court would not direct an English liquidator of the Companies to transmit the assets to the ALs. If the Companies had already been wound up, the English court could not accede to a letter of request from the Australian court asking for an order that the proceeds of the English assets be transmitted to the ALs. There was a significant prospect that, in the absence of schemes of arrangement, winding-up orders would be made. A principle function of JPLs was to safeguard the assets of the Companies. It would be inconsistent with this function to direct the JPLs to transfer the assets to the ALs at this stage.

**[Simon Mortimore QC, Richard Adkins QC, William Trower QC, Jeremy Goldring, Stephen Robins]**

**Shierson v Vlieland-Boddy**  
**Court of Appeal**  
**(Chadwick LJ, Longmore LJ, Sir Martin Nourse). [2005]**  
**EWCA Civ 974.**

A debtor's COMI is to be determined at the time the Court is asked to open insolvency proceedings, which will usually be the hearing of the petition, but may be earlier where there is an application for interim relief. Where there are reasonable grounds to suspect that a debtor has deliberately sought to relocate

his COMI by moving his economic and personal affairs to another country in order to escape the jurisdiction of the English court, the court will not accept that the debtor's COMI has relocated unless the change of circumstances is a matter of substance rather than illusion and has the necessary element of permanence. In the present case the Court was forced to accept that the debtor ("V") had moved permanently to Spain, where he worked on a full-time basis, by the time of the petition hearing. To establish otherwise would have been dependent upon cross-examination of V at the petition hearing. The move to Spain was sufficient to relocate his COMI. However, by virtue of V's continuing status as a commercial landlord in England, V continued to operate an establishment in England, and this provided jurisdiction to open territorial proceedings.

Simon Fuller, "EC Regulation: COMI Moves to Spain," [2005] 2 ICR 285.

## **INSOLVENCY – PERSONAL**

**Oakes v Simms**  
**Chancery Division**  
**(Pumfrey J). Unreported,**  
**1 August 2005.**

It was appropriate to make a general civil restraint order

against the wife of a bankrupt in circumstances where she had commenced four sets of proceedings against the trustee in bankruptcy which raised substantially the same matters and which were totally devoid of merit.

**Ruddock v Jeffrey Green**  
**Russell**  
**Chancery Division**  
**(Evans-Lombe J). [2005]**  
**All ER (D) 123 (Oct).**

The client of a firm of solicitors asked the Law Society to assess the firm's bills. The Law Society provided a certificate of remuneration stating that one of the bills was payable in full whilst another should be reduced. The client submitted a complaint to the Law Society about the quality of service he had received from the firm. The firm served a statutory demand on the client in respect of the unpaid fees. The deputy district judge set aside the statutory demand on the basis of rule 6.5(4)(d) IR 1986 – "some other reason" – saying that it was not appropriate for a firm to bankrupt its own client at a time when an investigation by the Law Society was pending. On appeal, it was held: (1) the supposed inappropriateness of the statutory demand was not a sufficient "reason" within rule 6.5(4)(d); and (2) rule 6.5(4)(a) required that the court should go through an assessment

process to see whether the claimant's counterclaim (if any) exceeded the defendant's claim. Therefore the appeal was allowed, but the client's application to set aside the statutory demand would be stayed pending the conclusion of the Law Society's investigation.

**Simpson v Simpson  
Chancery Division (Gabriel Moss QC sitting as a Deputy Judge of the High Court). Unreported, 21 September 2005.**

Joint interests of an individual relating to either personal or real property will be severed upon bankruptcy. The bankrupt individual's severed interest will pass to the trustee in bankruptcy in the ordinary course. On the facts, a property transferred to a company by J was held by the company on constructive trust or express oral trust for the benefit of P, the sole heir of J, unless and until a sum of money loaned to J by certain of the company's shareholders was repaid. Subject to payment of that sum of money, P was entitled to have the property conveyed into her name.

**[Gabriel Moss QC]**

Finch, "The Recasting of Insolvency Law" (2005) 68 MLR 713.

## LEGAL PROFESSION

**Hughes v Newham  
London Borough Council  
Supreme Court Costs  
Office (Master O'Hare).  
Unreported, 28 July 2005.**

Where a solicitor fails to advise a client that legal aid is available, the solicitor's claim to a success fee pursuant to the terms of a conditional fee agreement within regulation 4(2)(d) of the Conditional Fee Agreements Regulations 2000 will be rendered unenforceable. A solicitor must, as far as possible, ensure the client makes an informed choice about the available funding options and fully understands what they are entering into. The court indicated that it will not be sufficient for a solicitor to mention that legal aid was available if, by whatever means, the solicitor discouraged the individual from pursuing it further.

## SECURITY

David Marks, "Spectrum Plus and Limitation and Mistake," *Insolvency Law & Practice*, Vol. 21, No. 4, 2005 at page 127.

## 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 at 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](mailto:gabrielmoss@southsquare.com)



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For further information please contact Sue Brown at 3/4 South Square on tel 020 7696 9900 or fax 020 7696 9911. E-mail may be sent to [digest@southsquare.com](mailto:digest@southsquare.com).

3/4 South Square, Gray's Inn  
London WC1R 5HP

**Telephone**

+44 (0)20 7696 9900

**Facsimile**

+44 (0)20 7696 9911

**E-mail**

[clerks@southsquare.com](mailto:clerks@southsquare.com)

**Document Exchange**

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**Website**

[www.southsquare.com](http://www.southsquare.com)

