

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 12 No 4 April 2006

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On 12 April 2006 Tomlinson J handed down his judgment regarding the Bank of England's application for indemnity costs in the long-running litigation brought against the Bank by the liquidators of BCCI. The Bank was awarded costs on the indemnity basis for the entirety of the action. Further, the Court held that it had jurisdiction to give a judgment exonerating Bank officials, and did so, concluding that the allegations made against them had been without foundation.

Mark Phillips QC, Ben Valentin and Tom Smith acted for the Bank.

This edition of the Digest was compiled by Hannah Thornley.

Stephen Robins

GENERAL NEWS

The Cross-Border Insolvency Regulations 2006 (S.I. 2006 No. 1030), which give effect to the UNCITRAL Model Law in Great Britain, came into force on 4 April 2006. The aims of the Regulations are to: (1) provide access to foreign representatives and creditors to courts in Great Britain; (2) set out criteria for determining whether a foreign proceeding is to be recognized; (3) provide for the British courts and British insolvency officeholders to co-operate with foreign courts or foreign representatives in the areas covered by the Model Law; (4) set out procedural matters in relation to proceedings under the Model Law in England, Wales and Scotland; and (5) make provision in relation to notices delivered to the registrar of companies under the Regulations.

The Insolvent Partnerships (Amendment) Order 2006 (S.I. 2006 No. 622) came into force on the 6 April 2006. The Order has been made in consequence of defects

in S.I. 2005 No. 1516 and is being issued free of charge to all known recipients of that Statutory Instrument.

BANKING

Barclays Bank plc v Kingston Queen's Bench Division (Stanley Burnton J). [2006] EWHC 533 (QB).

The duties of mortgagees to mortgagors are largely the product of equity rather than the common law. In relation to a security such as a mortgage of a property, the duties of the creditor and the rights of the guarantor will vary with the circumstances of the case. The creditor is normally under no duty to the principal debtor or to any sureties to realise any securities. He cannot be compelled to realise a security at any particular time or at all, but if he does realise a security he must do so prudently, with reasonable care, so as to seek to obtain a proper price. The duty to take reasonable care to obtain a proper price is owed to the principal debtor and to the guarantor. *Standard Chartered Bank v Walker*

[1982] 1 WLR 1410, *American Express v Hurley* [1985] 3 All ER 564 and *Skipton Building Society v Stott* [2000] 1 QB 261 applied; *Burgess v Auger* [1998] BCLC 478 distinguished.

Three Rivers District Council v Governor and Company of the Bank of England Queen's Bench Division (Commercial Court) (Tomlinson J). [2006] EWHC 816 (Comm).

On 12 April 2006 Tomlinson J delivered his judgment following the claimants' discontinuance of their claims for misfeasance in public office against the Bank of England. The judgment was given on the Bank's application for an order that it be paid its costs of the action on the indemnity basis, that the Court state that the allegations against the Bank, its officials and former officials were unfounded and wholly unsupported by the evidence, and that the Court should give its reasons for that conclusion. The Bank further requested that the Court give guidance to the Costs Judge regarding the assessment of costs. Prior the hearing, the claimants agreed to pay the Bank's costs of the action on the indemnity basis whilst denying that the Bank was in fact entitled to the order sought. The Judge concluded that he nevertheless retained jurisdiction to make the order sought, to give a judgment exonerating the Bank officials and commenting on the action and to give appropriate guidance to the Costs Judge. On the award of indemnity costs, the Judge concluded that it was difficult

to think of a case in which the entitlement to indemnity costs could be more clearly made out. The Judge also held that the Bank officials should be fully exonerated of the allegations which had been made against them. The Judge concluded that the allegations against the Bank had been misconceived, and he criticised the conduct of the claimants in making and pursuing various allegations. Finally, the Judge said that he would give such further assistance to the Costs Judge in the assessment of the Bank's costs as was appropriate.

[Mark Phillips QC, Ben Valentin, Tom Smith]

Wright, "Making lenders liable for damages caused by 'wrongful acceleration' of loans," *Comp. Law.* (2006) Vol. 27, No. 4, pp.123-124.

CIVIL PROCEDURE

Stockdale and Mitchell, "Who is the client? An exploration of legal professional privilege in the corporate context," *Comp. Law.* (2006) Vol. 27, No. 4, pp. 110-118.

COMPANY

Wrexham Association Football Club Ltd v Crucialmove Ltd Court of Appeal (Sir Igor Judge, Dyson LJ, Sir Peter Gibson). [2006] EWCA Civ 237.

A finding of bad faith may be reached on a summary judgment application if in the circumstances of the case it is possible for the issue to be decided without a trial. The seriousness of the allegation does not oblige the judge to dismiss the summary judgment

application. Therefore the judge was entitled to give summary judgment on the basis that there was no real prospect of the director in question succeeding in his defence.

Henning, "The Company Law Reform Bill, small businesses and private companies," *Comp. Law.* (2006) Vol. 27, No. 4, pp. 97-98.

Hemraj, "Maximising shareholder's wealth: legitimate expectation and minority oppression," *Comp. Law.* (2006) Vol. 27, No.4, pp. 125-127.

Mike Griffiths, "The Phoenix Syndrome," *N.L.J.* (2006) Vol. 156, No. 7218, pp. 530-531.

CONTRACT

James E McCabe Ltd v Scottish Courage Ltd Queen's Bench Division (Commercial Court) (Cooke J). [2006] EWHC 538 (QBD Comm).

A duty to co-operate in the performance of a contract has content only by virtue of the express terms of a contract, and the law will enforce a duty of co-operation only to the extent that it is necessary to make the contract workable. The court cannot, by implication of such a duty, exact a higher degree of co-operation than that which could be defined by reference to the necessities of the contract. The duty is required to be determined not by what might appear reasonable but by the obligations imposed upon each party by the agreement itself: *Mona Oil Equipment & Supply Co Ltd*

v Rhodesia Railways [1949] 2 AER 1014 applied. On the facts, the claimant had no realistic prospect of success on its claim for an implied term, and summary judgment was given on that issue. However, there were other factual disputes arising out of the agreement and a dispute as to whether a particular clause of the agreement was an unreasonable restraint of trade that could not be determined on a summary basis.

Peekay Intermark Ltd & Anor v Australian & New Zealand Banking Group Ltd
Court of Appeal
(Chadwick LJ, Moore-Bick LJ, Lawrence Collins J).
[2006] EWCA Civ 386.

Whether or not a person has been induced by misrepresentation to enter a contract is a question of fact. As such, it is always open to the defendant to show, if he can, that since the claimant was aware of the true facts, he was not induced by the misrepresentation to act as he did. For that purpose, however, it is not enough to show that the claimant could have discovered the truth, but that he did discover it: *Redgrave v Hurd* (1881-82) LR 20 Ch D 1, *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2003] 1 WLR 577 and *Spencer Flack v Pattinson & Anor* [2002] EWCA Civ 1820 applied. In the instant case the true position appeared clearly on the face of the documents containing the terms of the contract. In addition, Moore-Bick LJ held that there is no reason in principle why parties to a contract should not agree

that a certain state of affairs should form the basis for the transaction, whether it be the case or not. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed, because the contract itself gives rise to an estoppel: *Colchester Borough Council v Smith* [1991] Ch 448, affirmed on appeal [1992] Ch 421. Accordingly Moore-Bick LJ could see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in *Colchester Borough Council v Smith*. As there was no such clause in the instant case, however, Moore-Bick's remarks on this issue were strictly obiter.

EVIDENCE

Abbey National plc v JSF Finance & Currency Exchange Co Ltd
Court of Appeal (Sir Andrew Morritt C, Jacob LJ, Moore-Bick LJ). [2006] EWCA Civ 328.

A argued on appeal that it was entitled to rely upon similar fact evidence to show that it had substantial grounds for disputing the claim of R in order to gain an injunction

restraining R from presenting a winding up petition against A in respect of an unpaid debt. It was held that A was entitled to rely on similar fact evidence if it could prove the facts on which it relied and demonstrate that they were indeed similar to the transaction in question: *O'Brien v Chief Constable for South Wales* [2005] 2 AC 534 applied. The dispute related to a cheque fraud, where A had been instructed by its customers not to pay out on a cheque because the cheque had been procured by an impostor. On the facts the claim was disputed on substantial grounds and the injunction was granted.

INSOLVENCY – CORPORATE

In re AY Bank Ltd
Chancery Division (Sir Andrew Morritt C).
[2006] EWHC 830 (Ch).

The liquidators of AY Bank Ltd applied to Court for directions as to whom to pay dividends to in relation to bank accounts in AY Bank Ltd's books in the name of National Bank of Yugoslavia. Between 25.06.91 and 05.04.92, four of the six republics which made up the state of Yugoslavia declared independence. It was common ground that the old state of Yugoslavia underwent a process known to public international lawyers as a 'dismembratio' (dismemberment) in 1991 and 1992, the consequence of which was that the various successor states to old Yugoslavia were joint successors to the old state's property. In 2001, under the auspices of the UN, the successor states

(Serbia Montenegro, Croatia, Slovenia, Bosnia-Herzegovina and Macedonia) entered into a treaty to resolve succession issues, the Agreement on Succession Issues ("ASI"). They agreed what percentage each of the successor states should receive in respect of various assets, including bank accounts in the name of National Bank of Yugoslavia. The treaty contained dispute resolution clauses for determinations to be made by a Standing Committee made up of representatives of each of the successor states, but any final decision required unanimity. The liquidators, in their directions application, suggested to the Court that the bank accounts at AY Bank Ltd in the name of National Bank of Yugoslavia should be divided out between each successor state in accordance with the terms of the ASI, but noted that Serbia Montenegro alleged that Serbia Montenegro was entitled to all dividends in respect of the accounts, which argument was not accepted by the other successor states. A preliminary point was raised by Serbia Montenegro and heard by the Chancellor as to whether the issues raised by the liquidators' application were justiciable by the English Court. Croatia opposed Serbia Montenegro's application.

Serbia Montenegro argued that the English Court could not make determinations as asked for by the liquidators because such determinations would involve interpreting and enforcing an international treaty governed by international

law, and thus the matters were non justiciable by the English Court. Croatia argued that the factual issues which the Court would determine did not involve any interpretation of the ASI, and that the English Court could make determinations upon the liquidators' application because the liquidation of AY Bank Ltd was an English liquidation (thus imposing English proof of debt rules) and the relevant asset was a chose in action (the balances at AY Bank Ltd in the name of National Bank of Yugoslavia) situate in England. The Chancellor decided that the issues raised by the liquidators' application were justiciable by the English Court and dismissed Serbia Montenegro's application. The Chancellor noted the normal rule that an English Court has no power to interpret or enforce treaties on the international plane; *Buttes Gas v Hammer* [1982] AC 888 and *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418. He observed: (1) that this principle is not a categorical rule; *Kuwait Airways v Iraqi Airways* [2002] 2 AC 883, 1101; and (2) that the principle admits of exceptions; *JH Rayner (Mincing Lane)* [1990] 2 AC 418. The English Courts can in particular examine the context to determine whether it is appropriate to interpret or have regard to unincorporated treaties (i.e. unincorporated into domestic law); *Republic of Ecuador v Occidental* [2006] 2 WLR 70. The reasons the Chancellor gave for dismissing Serbia Montenegro's appli-

cation, and for deciding that the issues raised by the liquidators' application were justiciable by the English Court, were that: (1) The context before the English Court included an invitation by the UN (in the form of resolution 1022) to domestic courts to help the states resolve their differences, and although this was not an exception to the principle of non-justiciability it was appropriate for the Court to have regard to it. (2) The issues raised by the liquidators' application concerned determinations about private law rights, namely the amount of a debt owed by AY Bank Ltd to National Bank of Yugoslavia, which affected the rights of AY Bank Ltd and other unsecured creditors, and thus this was within one of the exceptions to the non justiciability principle. (3) The issues did not involve the interpretation or enforcement of the ASI or interference with the dispute resolution procedure set up in the ASI, but the application of rules of English law, including where appropriate principles of private international law.

[Richard Hacker QC, Adam Goodison, David Alexander]

**Re ML Design Group Ltd
Chancery Division (Richard Sheldon QC sitting as a Deputy Judge of the High Court). [2006] All ER (D) 75 (Jan).**

The joint administrators of the company applied for orders: (1) under para. 55(2)(a) of Sch. B1 IA 1986 that their appointment should cease

to have effect due to the creditors' rejection of their proposals; (2) under para. 98(2)(c) of Sch. B1 for their discharge from liability in respect of any of their actions; and (3) under r. 2.106(6) IR 1986, fixing remuneration. It was held that in the absence of any authority or rules of procedure applicable to applications under para. 55 of Sch. B1 for an administration order to cease to have effect, r. 2.114 IR 1986, relating to analogous provisions under para. 79 of Sch. B1, should apply. The application under para. 55(2)(a) of Sch. B1 was adjourned with a direction that the administrators should comply with r. 2.114 (1) and (3) IR 1986, i.e. that a progress report should be attached to the application for an order ending the administration and notice should be given to the creditors of the administrators' intention to make such an application, drawing attention to the creditors' rights to petition to wind up the company to preserve the time limits for challenging certain transactions under s. 238 IA 1986.

Re T&N Ltd

Chancery Division (David Richards J). [2005] EWHC 2990 (Ch).

The administrators of T&N applied for directions on a number of issues concerning proposed CVAs for 51 companies in the group (substantially in respect of claims outside of the US and Canada) that are to be entered into pursuant to the plan of reorganisation. Schemes of arrangement are also to be

proposed in respect of 58 of the group companies. These were the subject of separate applications. Unlike schemes of arrangement, CVAs may be proposed, approved and implemented without any court involvement. However, directions were sought in connection with issues arising out of the convening of the proposed meetings for approval of the CVAs. Those responsible for convening a meeting to consider a CVA or an IVA ought to take proper steps to summon the meeting and their duty is to give notice to every creditor of the company of whose claim and address they are aware (as required by s.3(3) IA 1986 and r. 1.11 IR 1986). In cases in which notice has been duly sent but has not been received, r. 12.16 IR 1986 will apply, so that in such a case the meeting is presumed to have been duly summoned and held and there will not be any irregularity of which complaint can be made under s. 6 IA 1986. It was argued by the administrators and the US plan proponents that r. 12.12 does not apply to notices of meetings for CVAs, or indeed to any meetings. It was held that rr. 12.10 and 12.11 are applicable to notices of meetings, although it was accepted that some of the provisions of Part 6 of the CPR are inapplicable to notices of meetings and that the remaining provisions must therefore be read with necessary modifications. It was held that r. 12.12 does not apply to notices of meetings, because: (1) provision is made in the CPR for the permission

of the Court to be required for service of documents in court proceedings out of the jurisdiction, since at common law the court has no jurisdiction over a party who is not served within England and Wales or does not submit to the jurisdiction of the Court. Service abroad involves the interference with the sovereignty of other countries. The giving of notice of a meeting involves no such considerations; (2) s. 3(3) IA 1986 dealing with meetings clearly applies as much to foreign creditors as to domestic creditors; (3) the very idea that giving notice of such meetings should require the prior leave of the Court is absurd; and (4) the terms of r. 12.12 contemplate court proceedings. Therefore the Court was satisfied that there is no requirement for an application to the court, or for the permission of the Court, in order for notice of the CVA meetings to be given to creditors outside England and Wales.

[Robin Dicker QC, Richard Fisher]

INSOLVENCY – PERSONAL

Gareth Miller, "Bankruptcy and the Family Home," N.L.J. (2006) Vol. 156, No. 7218, pp. 534-535

PARTNERSHIP

Gorne v Scales & Ors
Court of Appeal (Ward LJ, Arden LJ, Moore-Bick LJ).
[2006] EWCA Civ 311.

It was held by the majority (Ward LJ and Moore-Bick LJ, Arden LJ dissenting) that the master, in his judgment on an

inquiry as to damages suffered by a partner due to the misuse by former partners of confidential information of the partnership after dissolution, had been wrong to accept the evidence of the respondent's expert witness in respect of the method of valuation of the confidential information of the partnership. The correct measure of damages in cases such as this was the market value of the confidential information at the time of the dissolution. The Master's decision was therefore set aside.

PROPERTY

Warnborough Ltd v Garmite Ltd

Chancery Division (Richard Sheldon QC sitting as a Deputy Judge of the High Court). [2006] EWHC 10 (Ch).

C sought specific performance of a contract for the sale of a property pursuant to the exercise of an option to repurchase the property. D had purchased the property from C for £130,000 payable by instalments over 12 years. The purchase price had been left outstanding secured by a charge on the property. At the same time C was granted an option to repurchase the property at the same price if the principal sum outstanding was not less than £65,000 and any payment covenanted to be made by D was in arrears and unpaid for 35 days. D submitted that: (1) the option was unenforceable as a clog on the equity of redemption; (2) C was estopped from enforcing the option on the basis

of assurances or representations given by C that C would not enforce its strict rights under the agreements if payments were made late; (3) the conditions for the exercise of the option had not been satisfied; (4) the option was in the nature of a penalty or provision for forfeiture, and that the court should grant relief from forfeiture. The court held: (1) the substance of the transaction was a sale and purchase, and not a mortgage, and therefore the rule against 'clogs' did not apply. (2) There was no basis for the estoppel defence. The indulgences granted by C were not assurances or representations that C would not rely on its strict rights. (3) An instalment was overdue by 35 days when the notice was served. D's cheque had been sent in time but had not arrived in time and in the circumstances it bore the risk of delay in the post since C had never authorised the sending of cheques by post, although that was the method usually adopted, and no method of payment had been agreed expressly or impliedly. Any authority to pay by cheque had in any event been withdrawn by a letter from C's solicitors. (4) Provisions of the kind contained in the option were capable of operating as a forfeiture. However the object of the options and of the insertion of the right to forfeit was not essentially to secure the payment of money. The true nature of the transaction as a whole was that of sale and purchase. Therefore the option agree-

ment did not fall within one of the recognised heads of the court's jurisdiction to grant relief from forfeiture. The underlying object of the option was, in the event of the conditions for its exercise being satisfied, to restore the property to C to deal with as it wished as owner, and that result could not be attained by way of the court granting relief from forfeiture on terms. No question of unjust enrichment by improvements to the property arose. The provisions of the option agreements were not in the nature of a penalty.

RESTITUTION

Blue Haven Enterprises Ltd v Tully & Anor

Privy Council (Lord Nicholls of Birkenhead, Lord Steyn, Lord Hope of Craighead, Lord Scott of Foscote, Lord Brown of Eaton-under-Heywood). [2006] UKPC 17.

A made a claim for unjust enrichment against R2. An argument of proprietary estoppel by acquiescence was not pursued. It was contended by A that R2 stood by while the officers of A developed an estate on some land on the misapprehension that A would in due course on the completion of the contract become registered owner of the estate. It was argued that R2 should have taken effective steps to correct that misapprehension and that his failure to do so gave rise to an equitable obligation to compensate A. R2 contended that A had not satisfied the last of the five probanda set

out by Fry J in *Willmott v Barber* (1880) 15 Ch D 96. It was held by the Privy Council that Fry J's probanda remain a highly convenient and authoritative yardstick for identifying the presence, or absence, of unconscionable behaviour on the part of a defendant sufficient to require an equitable remedy, but they are not necessarily determinative.

The concentration of Oliver J on unconscionable behaviour of the defendant in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, rather than on the five probanda, was approved by their Lordships to be the most important authoritative modern statement of the doctrine. On the facts, however, the behaviour of R2 could not be shown to be unconscionable, and the appeal would be dismissed. *Ramsden v Dyson* (1886) LR 1 HL 129, *Willmott v Barber* and *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* considered.

TRUSTS

Kean v McDonald Chancery Division (Michael Crystal QC sitting as a Deputy Judge of the Chancery Division). Unreported, 23 March 2006.

C alleged that he had an interest in the property of D. It was accepted by both parties that there had been no contract in writing. Instead K relied upon a "common intention" constructive trust as discussed in *Lloyds Bank plc v Rosset* [1991] 1 AC 107 and *Yaxley v Gotts* [2000] Ch 162. A

common intention constructive trust requires the claimant to establish an agreement, arrangement or understanding actually reached between the parties and relied upon and acted upon by the claimant. The absence of a contract in writing is not fatal to the claim. On the facts, C made out his claim that he was the sole beneficial owner of the property.

TALKS AND SEMINARS

On 13 March 2006 Marion Simmons QC gave a lecture at the Academy of European Law in Trier, Germany, titled "Problems on the Standard of Proof and Judicial Evaluation".

On 5 April 2006 Hannah Thornley gave a talk entitled "Directors' Duties: Welcome Reform or Further Confusion?" to the Inn Group at the offices of Bird & Bird on the proposed reforms of the general duties of directors in the Company Law Bill 2005.

On 6 April 2006 Marion Simmons QC gave the Keynote Address at the Government Regulatory Lawyers' Conference. The title of the Address was "Reflections on the early years of the Competition Appeals Tribunal".

Gabriel Moss QC will be talking at the following conferences over the coming months:

- On 26 April 2006 he will be on a panel discussing the Eurofood case and the EC Regulation on insolvency proceedings at the Euro-money conference.

- On 22-23 May 2006 he will be on a panel discussing the co-operation between courts in international insolvency cases at the Insol International conference in Scottsdale Arizona.

- On 12-13 June 2006 he will be co-chairing and speaking on panels on (1) communications between courts in cross-frontier insolvency cases and (2) EC Regulation and Directives on reorganisation and insolvency proceedings at the International Insolvency Institute in New York.

BOOKS

'EU Banking and Insurance Insolvency' by Gabriel Moss QC and Professor Bob Wessels was published by Oxford University Press in March 2006. The work provides detailed analysis of the EU Directives on the Reorganisation and Winding-up of Insurance Undertakings and Credit Institutions. A special 20 per cent discount is available by e-mailing 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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