

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 12 No 2 February 2006

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Chambers is pleased to announce that a new book entitled *EU Banking and Insurance Insolvency* edited by Gabriel Moss QC and Professor Bob Wessels will be 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 and the implementation of these Directives in the EU's Member States. Contributors include Gabriel Moss QC, Professor Ian Fletcher, Tom Smith, Marcus Haywood and Cécile Dupoux. A special 20% discount is available on all pre-orders by e-mailing gabrielmoss@southsquare.com.

This edition of the Digest was compiled by Simon Fuller.

Stephen Robins

CIVIL PROCEDURE

State of Brunei v HRH Prince Bolkiah Unreported, 15 December 2005. Chancery Division (Etherton J).

The power in RSC Ord.45.7(7) can be applied retrospectively to dispense with the need for service of an order upon which committal proceedings are subsequently brought; *Davy International Ltd v Tazzyman* [1997] 1 WLR 1256 applied.

[Martin Pascoe QC, Stephen Atherton, Richard Fisher]

Hawley v Luminar Leisure plc & Ors [2006] EWCA Civ 30. Court of Appeal (Brooke LJ, Maurice Kay LJ).

A party who intends to accept a Part 36 offer during the hearing of the substantive dispute must seek a stay of the proceedings while permission to accept the offer is sought from a different judge of the same court. On the facts

the offer had been expressly withdrawn prior to the start of the hearing and could no longer be accepted. Further, it was an implied term of the Part 36 offer that it could not be accepted after the end of the hearing while judgment was reserved.

Kuenyehia v Enyonam & Ors [2006] EWCA Civ 21. Court of Appeal (Waller LJ, Dyson LJ, Neuberger LJ).

The Court's power to dispense with service under CPR r.6.9 where the time limit for service of a claim form had expired under CPR r.7.5 will only be exercised in exceptional circumstances. This will ordinarily require the applicant to have made an ineffective attempt to serve by one or more of the permitted methods specified in r.6.2 or to have served the respondent in a manner which involved only a minor departure from one of the permitted methods.

On the facts, the service of documents by fax was not a minor departure from an accepted form of service where the respondent's permission had not been obtained to service by this method. The absence of prejudice to the respondent was not sufficient justification to dispense with the usual rules as to service, particularly in circumstances where the application was made after the time limit had expired.

COMPANY

Button & Anor v Phelps & Ors

Unreported, 3 February 2006. Chancery Division (Robert Englehart QC sitting as a Deputy Judge of the High Court).

The first defendant signed an agreement with the claimants to use his best endeavours to enable one company to acquire the business and assets of another company. The claimants alleged that the first defendant breached that agreement. The claimants contended that: (a) the first defendant owed a fiduciary duty to the other parties to the agreement not to launch a bid in competition with them; and (b) the first defendant should account for any profits made by him by reason of the success of the rival bid. The Judge held that the first defendant did not owe any

such fiduciary duty to the other parties. Further, the profits made by the first defendant from the success of his bid were not, on the facts, subject to a constructive trust. *Pallant v Morgan* [1953] Ch. 43 and *Banner Homes Group plc v Luff Developments Ltd* [2000] 2 WLR 772 considered. In the circumstances, the claimants' appropriate remedy was the ordinary remedy of damages for breach of contract.

[Lexa Hilliard]

Kingsley IT Consulting Ltd v McIntosh & Anor

[2006] All ER (D) 237 (Feb). Chancery Division (Terence Mowschenson QC sitting as a Deputy Judge of the High Court).

A company sued a former director alleging a diversion of a corporate opportunity. The claim was allowed. The duty of a director not to divert a corporate opportunity was well established. It arose out of two sources. The first was the 'no conflict rule' which applied whilst a director was a director. The alternative ground of liability was the 'no profit rule'. It was also well established that a director could not set the groundwork for diverting a corporate opportunity whilst a director and then take it for himself after he had ceased to be a director. Further, it was clear that it did not matter whether a company was in a position

to exploit the opportunity. Applying these principles to the facts of the instant case, the former director was liable to account in relation to all benefits received by them from the three contracts. *Boardman v Phipps* [1966] 3 All ER 72 and *Regal Hastings v Gulliver* [1942] 1 All ER 378 applied.

Jafari-Fini v Skillglass Ltd & Ors

[2006] All ER (D) 93 (Jan). Chancery Division (Stuart Isaacs QC sitting as a Deputy Judge of the High Court).

The court was required to determine preliminary issues relating to J's purchase of a majority shareholding in a company ("C") through another company ("P"), which J incorporated specifically for that purpose. P's acquisition of C was funded by a loan facility ("the Facility") granted by S which, in turn, was secured against the shares P acquired in C. The terms of the Facility provided that the consolidated profit before tax of P and its group must not vary more than 15% from projections provided to S ("Clause A"). It also provided that the loan sums were not payable until a fixed percentage of C's shareholders approved the acquisition ("Clause B"). J bribed a director of S to waive a shortfall relating to Clause B. Upon discovering the bribe S sought

to terminate the Facility by serving a notice of default based on a breach of Clause A and, relying on its security rights, removed J from the board of C. J commenced proceedings seeking damages and other relief against S arguing that Clause A had been varied by a side-letter with the effect that there had been no breach of the Facility. J argued that as there had been no breach S was not entitled to terminate and was therefore not entitled to rely on its security rights to remove J. Held: (1) the terms of a side-letter agreed between P and S prevented S relying on a breach of Clause A but, on the facts, P was estopped from relying on the side-letter with the effect that there had been a breach; (2) the breach of Clause A was not a major default, but P was required to disclose the bribe to S and the failure to do so amounted to a major default allowing S to serve the notice of default; (3) even if the default notice was invalid, it did not constitute a repudiation of the Facility but rather had no contractual effect, *Concord Trust v Law Debenture Trust Corp plc* [2005] UKHL 27 considered; (4) the removal of J was not the consequence of S relying on its security rights but was the action of C's board of directors acting in the best interests of the company; (5) the Court of

Appeal's direction to consider preliminary issues could not be interpreted as requiring the Court to determine J's general entitlement to damages or equitable compensation.

Sahota v Bains & Anor
[2006] EWHC 131 (Ch).
Chancery Division (Thomas Ivory QC sitting as a deputy judge of the High Court).

The Court considered whether the claimant was or had ever been a registered shareholder of a company or had any beneficial interest in shares in the company. Pursuant to s.22 CA 1985, a person only became a shareholder with legal title when his name was registered on the register of members. The register of members no longer existed; when it had existed, the claimant's name did not appear on it. There was no evidence that any stock transfer forms in favour of the claimant and C had ever been signed and delivered, nor had any share certificates been handed over. Therefore the claimant had not been a shareholder of the company.

Strahan v Wilcock
[2006] EWCA Civ 13. Court of Appeal (Mummery LJ, Arden LJ, Richards LJ).

The existence of a quasi-partnership will make it appropriate to recognise equitable obligations between

shareholders that are broader than the rights contained in the company's constitution; *O'Neill v Phillips* [1999] 1 WLR 1092 applied. Where a company was in effect a quasi-partnership between two or more individuals, the exclusion of one of those individuals from the management of the company entitled them to a buy-out order pursuant to s.459 CA 1985 pursuant to which the majority would be obliged to buy the minority shareholding at full value without any discount.

Re Top Marques Car Rental Ltd
[2006] EWHC 109 (Ch).
Chancery Division (Michael Furness QC sitting as a Deputy Judge of the High Court).

An order under s.404(1) CA 1985 extending time for registration of a charge is beyond recall once registration had been effected in reliance upon it, and once those steps had been taken the operation of the order could not be undone retrospectively. The claimant's charge had been properly registered from the time of the issue of a certificate under s.401(2) CA 1985. The charge took priority in accordance with the order which authorised its registration, thus giving it priority over the unsecured creditors in the administration. *Re Eric*

Holmes (Property) Ltd [1965] Ch 1052; *Re (CL) Nye Ltd* [1970] 3 All ER 1061; *Exeter Trust Ltd v Screenways Ltd* [1991] BCLC 888 applied. *Wilde v Australian Trade Equipment Co Property Ltd* (1981) 5 ACLR 404 considered.

DAMAGES

R+V Versicherung AG v Risk Insurance & Reinsurance Solutions SA & Ors
[2006] EWHC 42 (Comm).
Queen's Bench Division (Commercial Court)
(Gloster J).

As a matter of principle, damages were recoverable in respect of wasted time spent by employees investigating and/or mitigating actual torts committed against a claimant employer. It was not essential to establish loss of revenue, loss of profit, or additional expenditure; *British Motor Trade Association v Salvadori* [1949] Ch 556 applied. It was, however, essential to demonstrate some significant disruption to the business, such as staff being significantly diverted from their usual activities; *Standard Chartered Bank v Pakistan National Shipping Corp* [2001] CLC 825 applied. Where the employer had created a separate department to investigate and mitigate the torts it was entitled to recover damages

on the same basis as if no such department had been established; *Admiral Management Services Ltd v Paraprotect Europe Ltd* [2002] EWHC233 (Ch) disapproved.

Aerospace Publishing Ltd & Anor v Thames Water Utilities
[2005] EWHC 2987 (QB).
Queen's Bench Division (Holland J).

A substantial archive of books was damaged by a flood at a museum. The owners of the archive commenced proceedings against the water company seeking the cost of restoring the archive and the loss of revenue from ticket receipts. The water company maintained that, at most, the owners were entitled to the market value of the archive which (on the basis of both parties' expert evidence) was significantly less than the cost of restoration. The Judge held that on the balance of probability the owners had an intention to restore the archive, funds permitting, which made it appropriate to allow the cost of restoration. As the books were to be restored it was also appropriate to allow consequential damages reflecting the owners' temporary loss of income pending restoration based on a loss of ticket receipts.

DIRECTOR'S DISQUALIFICATION

Green v Secretary of State for Trade & Industry
[2005] All ER (D) 255 (Dec).
Chancery Division (Etherton J).

When determining whether an individual is unfit to be concerned in the management of a company under the CDDA 1986, the Court is not required to restrict its enquiry to the conduct of the individual in relation to the insolvency of the company that gave rise to the proceedings but may also consider his conduct relating to the management of any other company of which he is or was a director, provided it is relevant to the issue of fitness to be a director and not merely of prejudicial value.

Secretary of State for Trade & Industry v Jonkler & Anor
[2006] EWHC 135 (Ch).
Chancery Division (Hart J).

On an application under s.8A of the CDDA, the applicant contended she was free to challenge the statement of facts agreed at the time of a disqualification undertaking as the basis on which the undertaking was given. The Secretary of State contended that the agreed schedule of facts had the status of a private law contract between the

parties, with the consequence that the applicant should not be entitled to rescind from it unless she was able to show some conventional ground for impugning a contract. It was held that there was no good reason why the court should not, in the exercise of its jurisdiction under s.8A, treat the agreement as binding on the applicant unless either some ground of public interest was shown which would be sufficient to discharge a private law contract or some ground of public interest was shown which outweighed the importance of holding a party to his agreement. In this case, there were special circumstances. The discovery that, in the light of evidence presented by the alleged perpetrator, the Secretary of State no longer believed that it was in the public interest for the perpetrator to be subject to a disqualification order was a new event that entitled the director to ask the court to consider whether she should remain subject to the undertaking she had given. Although that jurisdiction should be used sparingly, the only director who remained subject to disqualification was the one who had no active part in the insolvency of the company and there was no public interest in maintaining that disqualification. The undertaking against the director would therefore cease to be in force.

INSOLVENCY – CORPORATE

Re T.T. Industries & Anor Unreported, 26 April 2005. Chancery Division (Birmingham District Registry) (HHJ Norris QC).

The court was required to consider whether the appointment of an administrator under the new regime could be extended pursuant to para.76 of Schedule B1 IA 1986 (“Schedule B1”) after the expiry of the administrator’s term of office, notwithstanding that para.77(1) of Schedule B1 states that any application for an extension “may not be made after the expiry of the administrator’s term of office”. Held, the court has jurisdiction to extend an administration after the expiry of the term of office where (1) the application for an extension had been made before the expiry of the administration, and (2) there was a real possibility the delay in hearing the application was due to the fault of the court staff. It was an accepted principle that delays caused by the Court should not affect the administration of justice; *Re Keystone Knitting Mills Trademark* [1929] Ch 92 applied. Paragraph 77(1) of Schedule B1 had to be construed with this principle in mind. In these limited circumstances it was appropriate for the Court to allow an extension. The Judge highlighted

that administrators facing the same position should make a paper application to a judge of the Chancery Division seeking a short extension of the administration pending the hearing. Further, the Judge warned that a failure to make an application for an extension until the final days of an administration would (in the absence of a satisfactory explanation) be considered as due to the default of the administrator.

Investment Invoice Finance Ltd v Limehouse Board Mills Ltd [2006] EWCA Civ 9. Court of Appeal (Tuckey LJ, Moore-Bick LJ).

P presented a petition to wind-up L on the basis of a debt that was disputed. The petition was dismissed and a costs order was made against P. Subsequently P commenced a claim against L to recover the same debt that was subject to the winding-up petition. Upon the application of L, the claim was stayed pending payment of the costs order by P. P assigned part of the disputed debt to Y who was joined as a claimant and, upon the further application of L, also made subject to the stay. Y appealed. Held, dismissing the appeal, the court has an inherent jurisdiction to prevent a claimant subjecting a defendant to a second claim that is substantially the same

without meeting all obligations under the first action. Both the petition and the claim were substantially the same, namely to obtain payment for the goods delivered by P to L. This applied equally to Y as the successor in title to P. In these circumstances it was fair to require Y to pay the costs of the petition before the stay would be removed.

INSOLVENCY – PERSONAL

Burton v Gulamali
[2006] All ER (D) 44 (Feb).
Chancery Division (Philip Sales QC sitting as a Deputy Judge of the High Court).

The respondent was the assignee of a debt which was alleged to have arisen between the assignor and the applicant. A statutory demand was served on the applicant. The applicant applied to have the statutory demand set aside. At the hearing of that application, the applicant served an additional witness statement in which he disputed the existence of the underlying debt allegedly owed to the assignor. The registrar refused to admit that evidence, or even to read it, on the grounds that it had not been served in accordance with certain directions made at an earlier stage in the proceedings. He dismissed the applicant's application and the applicant appealed. The appeal was allowed. A fair balance must

be struck between the interests of the party putting in the new evidence at a late stage and the interests of the party likely to suffer prejudice as a result of that evidence being allowed in, having regard to all of the circumstances of the case. The registrar had failed to read the new evidence prior to deciding not to allow it and, accordingly, had failed to weigh the parties' competing interests fairly. Exercising its decision afresh, the court would direct that the additional evidence be admitted.

Customs and Revenue Commissioners v Coverdale
[2006] All ER (D) 221 (Feb).
Chancery Division (Etherton J).

The debtor appealed against the registrar's dismissal of an application to set aside a statutory demand based on a judgment for unpaid capital gains tax, penalties and costs. The appeal was dismissed. The registrar had acted within the proper exercise of his judicial discretion in refusing to go behind the judgment or to set aside the statutory demand.

Donohue v Ingram
Unreported, 18 January 2006. Chancery Division (Stuart Isaacs QC sitting as a Deputy Judge of the High Court).

Whether circumstances are "exceptional" within s.335A

IA 1986 must be considered in accordance with Article 8 of the ECHR. On the facts, however, the judge at first instance had adequately considered all the circumstances raised the appellant and was entitled to conclude that those circumstances were not exceptional. *Re Holliday* [1981] Ch 405, *Barca v Mears* [2005] BPIR 15, and *Harrow LBC v Qazi* [2004] AC 983 considered.

Demarco v Perkins & Anor
Unreported, 23 January 2006. Court of Appeal (Sir Anthony Clarke MR, Tuckey LJ, Jonathan Parker LJ).

Where a bankrupt lost the opportunity to obtain an annulment order pursuant to s.261(1)(a) IA 1986 due to the careless failure of an insolvency practitioner to seek the approval of the creditors prior to the bankrupt's discharge from bankruptcy, it was appropriate to award modest non-pecuniary damages. The damages would be discounted in order to reflect the overall risk that the proposals would not have been accepted. It was not appropriate, however, to award damages for the subsequent cost of obtaining an annulment under s.282(1)(b) (payment of bankruptcy debts and expenses in full). The bankrupt had not lost the opportunity to obtain an annulment under this route.

Further, this was outside the scope of the original retainer agreed between the parties.

Pathak v Union Bank UK plc

Unreported, 9 December 2005. Chancery Division (Bankruptcy Registry) (Chief Registrar Baister).

A bank (“K”) presented a statutory demand against an individual (“P”) to recover a shortfall due under a back-to-back letter of credit facility provided to a company (“R”), which K maintained was recoverable under a personal guarantee provided by P. P applied to set-aside the statutory demand. Held, allowing the application: (1) P’s contention that a representative of K had informed him that the guarantee would not be enforced, thereby giving rise to an actionable misrepresentation, estoppel by convention or collateral agreement, was to be rejected as incredible notwithstanding the absence of cross-examination given the lateness with which P raised the relevant factual issues, *Long v Farrer & Co* [2004] EWHC 1774 (Ch) considered; (2) there was, however, a triable issue whether K’s failure to collect an inward letter of credit, which operated as security for the debts of R, was negligent and entitled P to a discharge from the guarantee, *Standard Chartered Bank Plc v Walker*

[1982] 1 WLR 1410 considered; (3) the Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999 were not applicable on the facts; (4) the failure to state the full name of R as the principal debtor in the guarantee raised a legally complex issue of general importance relating to the application of the Statute of Frauds which should only be determined by a judge following a full trial as opposed to a registrar in the insolvency jurisdiction, *Cale v Assiudoman KPS (Harrow) Ltd* [1996] BPIR 245 considered.

[Gabriel Moss QC, Fidelis Oditah QC, David Allison, Simon Fuller]

LIMITATION

Aer Lingus v Gildacraft Ltd & Anor

[2006] EWCA Civ 4. Court of Appeal (Sir Anthony Clarke MR, Rix LJ, Moore-Bick LJ).

The limitation period relating to a joint tortfeasor’s right to contribution under s.10(3) of the Limitation Act 1980 (being a period of two years) runs from the date of the judgment or award which ascertained quantum, as opposed to the date on which liability was determined. The “judgment or award” referred to in s.10(3) is a judgment or award which ascertains the quantum, and not merely the existence, of the tortfeasor’s liability.

WILLS AND PROBATE

Goodwin v Goodwin

Unreported, 26 January 2006. High Court (Leeds District Registry) (HHJ Langan QC).

Even where there was a prospect of two executors successfully completing a protracted administration in circumstances where there was a deep degree of personal animosity between them, the Court’s discretion under s.50 of the Administration of Justice Act 1985 was invariably best exercised by the appointment of fresh personal representatives. One element that would generally weigh in the balance was where one or both had initially not properly fulfilled his or their respective legal responsibilities as executors.

[David Marks]

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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