

# 3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 12 No 1 January 2006

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On 18 January 2006, the Court of Appeal dismissed the appeal in the SSSL Realisations (2002) Ltd case. In summary, the Court of Appeal held that a subordination agreement will ordinarily be valid and enforceable notwithstanding that its effect is to benefit the general body of unsecured creditors to the detriment of the subordinated creditor. The Court of Appeal also considered the meaning of the term “unprofitable contract” in s.178(3)(a) IA 1986 and held that a subordination agreement will not ordinarily be disclaimable as an unprofitable contract. Gabriel Moss QC and Richard Fisher acted for the liquidators of SSSL Realisations (2002) Ltd.

Chambers is pleased to announce that Robin Knowles QC was awarded a CBE in the New Year’s Honours List for services to pro bono legal services.

This edition of the Digest was compiled by Hannah Thornley.

**Stephen Robins**

## GENERAL NEWS

Following Gordon Brown’s announcement that the Government will no longer require quoted companies to produce an Operating and Financial Review, regulations repealing the requirement came into force on 12 January 2006. The requirement to produce a Business Review in the Directors’ Report remains. The Government is now inviting views on whether any particular requirements of the Business Review need to be clarified. The closing date for responses is 15 February 2006. Further information on the Business Review and the invitation can be obtained from the DTI website at: <http://www.dti.gov.uk/cld/hottopics.htm>.

The recently released Financial Markets Law Committee paper Issue 113 – Insurance Contracts, Rome I (Response of the FMLC to a Consultation by the European Commission

on the Insurance Provisions of a Proposed Rome “I” Instrument) is available at their website [www.fmlc.org](http://www.fmlc.org).

## CIVIL PROCEDURE

### **Ewing v Office of the Deputy Prime Minister & Anr**

#### **[2005] EWCA Civ 1583. Court of Appeal (Brooke LJ, Dyson LJ and Carnwarth LJ).**

The Court of Appeal gave guidance on the procedure to be adopted in respect of case management and costs where a vexatious litigant makes an application for leave to bring proceedings at the same time as an application for permission to seek judicial review.

Marion Simmons QC, “What makes an Expert”, Association of Regulatory & Disciplinary Lawyers Quarterly Bulletin, November 2005.

**COMPANY****Wilkinson v West Coast Capital & 7 Ors****[2005] EWHC 3009 (Ch).****Chancery Division (Warren J).**

The petitioner brought a petition against the respondents under s.459 CA 1985. Warren J held that the shareholders of the company had not caused unfair prejudice to a fellow shareholder by acquiring another company, since, inter alia: (a) the company in which the shares were held had not been able to purchase and would not have purchased the acquired company; and (b) no financial loss had been suffered as a result of the acquisition.

**[Michael Crystal QC, David Alexander, Marcus Haywood]**

Timothy Mayer, "Personal liability for trading in a prohibited name: sections 216-217 Insolvency Act 1986", *Company Lawyer* (2006) vol.27, no.1, pages 14-18.

Mads Andenas, "Member States, courts and free movement of companies", *Company Lawyer* (2006) vol.27, no.1, page 1.

**CONFLICT OF LAWS****Re T&N Ltd****[2005] EWHC 2990 (Ch).****Chancery Division (David Richards J).**

On an application for directions by the Administrators of T&N in relation to the treatment of the claims of asbestos personal injury claims arising from torts said to have been committed in the United States, David Richards J held that: (1) where the acts or omissions took place before 1 May 1996 (as was always or almost always the case) the common law applied, not the Private International Law (Miscellaneous Provisions) Act 1995; (2) the consequence was that the double actionability rule applied, unless in a particular case it was appropriate to apply the exception in *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, but there was no need to make a declaration to

that effect; (3) when assessing the damages claimed by US asbestos claimants, the English court or a liquidator would exercise their judgment or discretion under English law and evidence of awards in foreign courts would not be relevant (*Hulse v Chambers* [2001] 1 WLR 2386 applied; *Harding v Wealands* [2005] 1 WLR 1539 considered).

**[Simon Mortimore QC]**

**INSOLVENCY – CORPORATE****Cabvision Ltd v Feetum & Ors****[2005] EWCA 1601. Court of****Appeal (Ward LJ, Jonathan Parker LJ, Sir Peter Gibson).**

At first instance, the Judge found that the project was not a "financed project" within the meaning of s.72E(2)(a) IA 1986 and that the power to appoint an administrative receiver did not amount to "step-in rights" within para.6 of Sch.2A IA 1986. Accordingly, the Judge held that the administrative receivers' appointment was invalid. On the debenture holder's appeal, the Court of Appeal held: (1) As a matter of construction, s.72E(2)(a) IA 1986 applied to an agreement "under" or by virtue of which a project company incurred a debt of at least £50 million or, when the agreement was entered into, was expected to incur such a debt. The words "expected to incur" related merely to the expected quantum of the obligation that was assumed by the project company under the relevant agreement. On that construction the judge had been right that the relevant agreement had been the facility agreement and not the licence agreement and that the date for determining whether the requisite expectation existed was the date when the facility agreement was entered into. (2) A power for a financier to appoint an administrative receiver did not amount to step-in rights within para.6 of Sch.2A IA 1986. (3) Since the project did not include step-in

rights it did not fall within the exception in s.72E. It followed that the general prohibition on the appointment of administrative receivers in s.72A applied and the receivers' appointment was invalid. The appeal was dismissed.

**Preston & Duckworth Ltd****Chancery Division (Mr Recorder Hodge QC sitting as a Judge of the High Court).**

The administrators ("A") of a company ("P") applied for an order to make a distribution to unsecured creditors and for an order that after the distribution they could dissolve P pursuant to para.84 of Sch.B1 IA 1986. It was held that it would be contrary to the statutory wording and legislative intention of Sch.B1 to interpret para.84 as restricted to cases in which the company had never had any property which would permit a distribution to creditors: *Re Ballast Plc* (In Administration) [2005] 1 WLR 1928 considered. The Court directed that once A formed the view that there was no further property to distribute to creditors, they could dissolve P pursuant to para.84.

**Secretary of State for Trade & Industry v London Citylink Ltd & Anr****[2005] EWHC 2875 (Ch).****Chancery Division (Pumfrey J).**

The Secretary of State petitioned for the winding up the Respondent companies ("C") on grounds of public interest pursuant to s.124A IA 1986. C had been used to incorporate more than 300 companies on behalf of individuals who did not wish to appear on the register of directors. In respect of each of these companies, the sole director of C ("W") would be appointed as the director of the newly incorporated company instead. The beneficial owners of such companies were thereby able to trade without appearing on the books of the company as

directors, secretaries or members. As W was the director of hundreds of companies it was difficult to see how it would be possible for him to discharge his duties and responsibilities, especially in relation to the regulations under the Companies Act and the money laundering legislation. As the purpose of C was to obscure and hide the real operator behind each company, undertakings given by W that he would resign as director of all of the companies were not compelling, therefore it was in the public interest for C to be wound up.

**Squires & Ors (Liquidators of SSSL Realisations (2002) Ltd v AIG Europe (UK) Ltd & Anor; Robinson & Anor (Liquidators of Save Group Plc) v AIG Europe (UK) Ltd & Anor [2006] EWCA Civ 7. Court of Appeal (Chadwick LJ, Jonathan Parker LJ, Etherton J).**

The liquidators appealed against the first instance decision concerning a standard form multi-party subordination agreement entered into by a group of companies and AIG. The issues on the appeal were, inter alia: (1) whether it was possible for the liquidators of the parent company ("P") to disclaim the subordination agreement under s.178(3)(a) IA 1986; (2) whether P could prove in the liquidation of a subsidiary ("S") at a time when the debt to AIG remained unpaid; and (3) whether P would be required to contribute to the assets of S under the rule in *Cherry v Boulton* (1839) 3 My & Cr 442 in a sum in excess of the distribution which it would otherwise be entitled to receive. The Court of Appeal held: (1) A contract was not an unprofitable contract for the purposes of s.178(3)(a) IA 1986 merely because it was financially disadvantageous or because the company could have made or could make a better bargain. The critical feature was that the performance of future obligations would prejudice the liquidator's obligation to

realise the company's property and pay a dividend to creditors within a reasonable time; *Transmetro Corporation Ltd v Real Investments Pty Ltd* (1999) 17 ACLC 1314 and *Global Television Pty v Sportsview Australia Pty Ltd* (2000) 35 ACSR 484 applied. As the subordination agreement did not impose any future obligations or prospective liabilities on P, the liquidators of P could not disclaim the subordination agreement. (2) The subordination agreement was enforceable in insolvency (by injunction if necessary) by each company against the other even if to the detriment of the senior creditor. (3) The application of the right of quasi-retainer derived from the rule in *Cherry v Boulton* could be applied to inter-company proofs in liquidation, even if set-off was prevented by the rule against double proof. The amount to be brought into account by the contributing creditor was the full amount of its liability to the fund; *In re Melton* (1918) 1 Ch 37 and *In re Leeds and Hanley Theatres of Varieties Ltd* (1904) 2 Ch 45 applied. If P were to prove in the liquidation of S, it would be required to bring into account the whole of S's claims for indemnity as a contribution to the whole fund distributable in the liquidation of S. On the facts, that would mean that the dividend payable on P's proof would be less than the amount of the contribution and P would receive nothing in the liquidation of S.

**[Gabriel Moss QC, Richard Fisher]**

**Re Treasure Traders Corporation Ltd**

**[2005] EWHC 2774 Ch D. Chancery Division (Michael Furness QC).**

In view of the fact that the company was carrying on a business that was unlawful under the Fair Trading Act 1973 and an unlawful lottery, it was a virtual certainty that the company would be wound up pursuant to s.124A IA1986 on public interest grounds. In the

light of this finding, it was appropriate to appoint a provisional liquidator in order to secure the company's assets and prevent further unlawful activity.

Riz Mokal and Look Chan Ho, "The pari passu principle in English ancillary proceedings: *Re Home Insurance Company*", (2005) 21(6) *Insolvency Law & Practice* 207

Alan Berg, "The cuckoo in the nest of corporate insolvency: some aspects of the *Spectrum* case", *Journal of Business Law*, January 2006, pages 22-51

Mohammed B. Hemraj, "Winding up of the company: what constitutes public interest and just and equitable grounds?" *Company Lawyer* (2005) vol.26, no.12, pages 372-374

**INSOLVENCY – PERSONAL**

**Re Oomerjee**

**[2005] BPIR 1320. Bankruptcy Registry (Ms Registrar Derrett).**

A trustee in bankruptcy ("T") applied to extend the time for service of a notice of after-acquired property on the bankrupt pursuant to s.307 IA 1986. The time limit for service without leave of the court under s.307 is 42 days. In respect of such an application, the court must consider the following factors: (1) the period of delay both in serving the notice under s.307 and seeking an extension of time, (2) the merits of the application having regard to the overall position of the bankrupt, (3) the prejudice caused to the bankrupt by the lateness of the application and the reasons for the delay. The delay between the property coming to the attention of the Official Receiver and the serving of the notice by T amounted to seven and a half years. No explanation of the delay was available from the Official Receiver. Considerable prejudice had been caused to the bankrupt

by the delay due to improvements to the property, but there was a considerable deficit in the bankruptcy and considerable equity in the property. Balancing the various factors and taking into account of the fact that the time limit for service of the notice of after-acquired property was not simply a procedural time limit but a substantive provision laid down by the Insolvency Act 1986, T had not made out a substantial case for it being just and proper for the court to exercise its statutory discretion to extend time.

Solomons v Williams [2001] BPIR 1123, Warley Continental Services Ltd v Johal [2004] BPIR 353 and Vickers v Mitchell [2004] All ER (D) 414 applied.

**[Hannah Thornley]**

### **Doodes v Gotham and Perry** **[2005] EWHC 2576 (Ch).**

#### **Chancery Division (Lindsay J).**

In 1992 a trustee in bankruptcy ("T") had gained a charging order over the bankrupt's home in his favour. In 2004 he made an application for an order for the sale of the property and for directions as to whether or not the payment of the proceeds of sale was statute-barred given that T's "right to receive the money" pursuant to s.20(1) of the Limitation Act 1980 had accrued more than 12 years previously at the time the charge had been made. It was held that a chargee's role was entirely passive. Therefore the only time at which the chargee's "right to receive the money" could accrue was the time at which the charge was made; Hornsey Local Board v Monarch Investment Building Society (1890) LR 24 QBD 1 followed. T's "right to receive the money" had arisen in 1992 when the charge was made, despite the fact that, immediately before the charge, D did not owe any debt to T. Neither did T's position

fall within the boundaries of the "bankruptcy exception" which can, in some circumstances, be applied in respect of delayed claims against the estate of the bankrupt.

## **TRUSTS**

### **Abou-Rahmah & Anr** **v Abacha & Ors**

**[2005] EWHC 2662 (QB).**

#### **Queen's Bench Division** **(Treacy J).**

In a claim for dishonest assistance, the following principles are relevant to the state of mind of the person alleged to have assisted in the breach: (1) the person's knowledge of the relevant transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct; (2) such a state of mind may have involved suspicions combined with a conscious decision not to make enquiries; (3) it was not necessary to show that the person assisting knew of the existence of the trust or fiduciary relationship and/or that the transfer of funds involved a breach of that trust; (4) it was sufficient that the person assisting had a clear suspicion that the money was held in trust. Royal Brunei Airlines Sdn Bhd v Tan (1995) 2 AC 378, Twinsectra Ltd v Yardley (2002) UKHL 12 and Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd (2005) UKPC 37 considered. On the facts the claim for dishonest assistance failed.

## **TALKS AND SEMINARS**

Daniel Bayfield will be speaking at "Mealey's Solvent Schemes of Arrangement Conference" on 2-3 February 2006 at The Ritz-Carlton Battery Park, New York. See: [http://www.mealeys.com/con\\_agendas/Solvent0206.html](http://www.mealeys.com/con_agendas/Solvent0206.html) for full details including a link to the complete conference brochure.

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