

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 12 No 6 June 2006

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On 14 June 2006, the House of Lords held that the prohibition on torture in international law does not justify an exception to state immunity so as to allow the national courts of the UK to assume civil jurisdiction over other states or the officials of other states for alleged acts of torture. The torture of Mr Jones and three other men by Saudi Arabian officials was alleged to have taken place whilst they were imprisoned in Saudi Arabia in 2001. The House unanimously dismissed the appeal of Mr Jones in respect of the immunity of the Kingdom of Saudi Arabia and allowed the appeal of Saudi Arabia, reversing the Court of Appeal's decision on the lack of immunity of the officials. Michael Crystal QC and Hannah Thornley acted for Mr Jones.

On 20 May 2006, the Brunei Court of Appeal handed down judgments dismissing two appeals by Prince Jefri Bolkiah against decisions of the Chief Justice of Brunei. This brings to a close the latest chapter in the multi-billion dollar proceedings to recover state assets launched by the Sultan's Government against Prince Jefri, the former Minister of Finance. The effect of the judgments is to require Prince Jefri to transfer substantially all of his assets to the Sultan's Government. The Sultan's Government was represented by Martin Pascoe QC and Stephen Atherton.

This edition of the Digest was compiled by Riz Mokal.

Stephen Robins

GENERAL NEWS

The Liquidators of BCCI have agreed to pay £75,300,000 to the Bank of England in full and final settlement of the Bank's costs arising out of the proceedings discontinued by the Liquidators on 2 November 2005. The settlement follows an order by Tomlinson J in January 2006 that the

Liquidators pay the Bank's costs for the entire action since 1993 on the indemnity basis and his reasoned judgment in April 2006. The settlement means that the Bank has recovered 100 per cent of outstanding costs excluding interest. Mark Phillips QC, Ben Valentin and Tom Smith represented the Bank of England.

CONFLICT OF LAWS**Maccaba v Lichtenstein**

**Chancery Division
(Bankruptcy Registry)
(Mr Registrar Jaques).
Unreported, 5 May 2006.**

The respondent had served a statutory demand on the applicant in respect of the applicant's liability to pay interest pursuant to an English consent order. The applicant obtained an anti-suit injunction against the applicant from the Supreme Rabbinical Court in Tel Aviv on the basis that both parties were Jewish and that Rabbinical law rendered illegal the payment of interest between Jews. The applicant argued before the English court that the statutory demand should be set aside as based on a contract illegal under Jewish law. It was held that the statutory demand would not be set aside, since the consent order was not illegal under English law, and that therefore even if it were illegal between Jews and under Jewish law, this did not affect its enforceability in this jurisdiction.

[Felicity Toubé]

FREEDOM OF INFORMATION**Toms v Information**

**Commissioner
Information Tribunal
(Chairman: David Marks).
Unreported, 12 June 2006.**

The qualified exemption contained in section 30 of the Freedom of Information Act 2000 which dealt with criminal investigations could be relied on in a case where the Royal Mail was actively conducting investigations into the breaking into of mailboxes. It was therefore inappropriate to allow disclosure of information relating to the location of mailboxes which had been vandalised during the course of such investigations.

Roberts v Information

**Commissioner
Information Tribunal
(Chairman: David Marks).
Unreported, 12 June 2006.**

The claims of the Air Accident Investigation Board and the Civil Aviation Authority that they had no information regarding the alleged grounding of 147 aircraft at the time of the Lockerbie disaster were reasonable and the Information Commissioners had not erred in holding that in all the circumstances such information was not capable of disclosure.

INSOLVENCY – CORPORATE**Re Altitude Scaffolding Ltd;**

**Re T&N Ltd
Chancery Division (David
Richards J). [2006] EWHC
1401 (Ch).**

The Court was asked to consider whether the attendance of one creditor would constitute a "meeting" for the purposes of section 425 of the Companies Act 1985. The Court held that it was possible for there to be a meeting consisting of one person where there existed only one member of the relevant class. However, in the absence of evidence that there was only one creditor in any particular class, the attendance of one creditor would not constitute a meeting for the purposes of the section 425.

Re Cape plc & Ors

**Chancery Division
(David Richards J).
[2006] EWHC 1316 (Ch).**

The court has jurisdiction to sanction a scheme of arrangement which contains provisions for future amendment either of the scheme itself or of agreements and other documents to be made pursuant to the scheme. A scheme of arrangement is not

a contract or notice within the meaning of s 2(1) of the Unfair Contracts Terms Act 1977.

[Mark Phillips QC, Martin Pascoe QC, Richard Fisher]

Re Q3 Media

Chancery Division (Rimer J). [2006] All ER (D) 307 (May) (Ch D).

The company was subject to an interim receiving order under section 246 of the Proceeds of Crime Act 2002. The applicants, who claimed to hold restitutionary claims against it, applied for an administration order. The court accepted that, for the purposes of paragraph 11 of Schedule B1 of the Insolvency Act 1986, the company could be presumed to be insolvent, and that the applicants were its prospective creditors. However, the court could not be satisfied that the purpose of administration was likely to be achieved, since all of the company's assets were likely to be recoverable property pursuant to the Proceeds of Crime Act 2002, and thus would not be available to creditors. Therefore, the administration order would not be made.

Re Sovereign Marine & General Insurance Company Ltd & Ors
Chancery Division (Warren J). [2006] EWHC 1335 (Ch).

On an application to convene statutory meetings of creditors to consider schemes of arrangement concerning sixteen insurance companies, including two incorporated and regulated in France and Ireland respectively, it was held that the English court has jurisdiction to sanction a solvent scheme of arrangement for EU insurers which have a sufficient connection with England. It was further held that on the facts of the case, IBNR claimants constituted a separate class for voting purposes from creditors holding accrued claims. The court stated, obiter, that in an appropriate case, claimants holding IBNR and accrued claims might have rights sufficiently similar to be grouped together in the same class.

[Gabriel Moss QC, Richard Sheldon QC, Hilary Stonefrost, Jeremy Goldring, Daniel Bayfield]

Re T&N Ltd & Ors
Chancery Division (David Richards J). [2006] EWHC 1447 (Ch).

Proposed schemes of arrangement under section 425 of the Companies Act 1985 involved the compromise of creditors' claims against the scheme companies' insurers under the Third Parties (Rights Against Insurers) Act 1930 in return for rights to distributions from a trust fund created by the insurers. However, the proposed schemes would have no effect on the creditors' claims against the scheme companies themselves. It was held:

(1) the proposed schemes would not be rendered ineffective by section 3 of the Third Parties (Rights Against Insurers) Act 1930;

(2) the proposed schemes were "arrangements" within section 425 notwithstanding the fact that the creditors' claims against the scheme companies would be unaffected by the schemes;

(3) future dependents with potential claims under the Fatal Accidents Act 1976 were not "creditors" of the scheme companies within section 425; and

(4) the proposed schemes would not contravene the Employers' Liability (Compulsory Insurance) Act 1969. Therefore creditors' meetings under section 425 were convened.

**[William Trower QC,
Stephen Robins]**

INSOLVENCY – CROSS-BORDER

Re Collins & Aikman

Europe SA & Ors

Chancery Division

**(Lindsay J). [2006] EWHC
1343 (Ch).**

Ten companies incorporated in various European jurisdictions had been placed into administration in England as "main proceedings" under Article 3(1) of the EC Regulation. The administrators applied for directions to make distributions and payments to the creditors of the companies and that, in so doing, they should apply the priorities and rules of the foreign law where the company in question was incorporated rather than English law. In particular, the administrators had given assurances to creditors at the outset of the administrations that their rights under the relevant foreign laws would

be respected and wished to give effect to these assurances. The Court held that it had jurisdiction to give the directions sought pursuant to paragraph 66 of Schedule B1 of the Insolvency Act 1986 and that it should exercise its discretion to do so. It noted that further support for this conclusion came from the application of the rule in *Ex parte James*. The Court also held that, in addition to paragraph 66, there remained an inherent jurisdiction in the Court to give directions to the administrators as its officers. However, it was unnecessary to consider the ambit of that jurisdiction further in this case since the directions sought could be given under paragraph 66.

**[Gabriel Moss QC,
Tom Smith]**

**Re HIH Casualty and
General Insurance Ltd**

Court of Appeal

**(Sir Andrew Morritt C,
Tuckey and Carnwath LJJ).
[2006] EWCA Civ 732.**

The Australian court issued a letter of request seeking the assistance of the English court pursuant to section 426 of the Insolvency Act 1986 in respect of four companies which were incorporated in Australia and

in liquidation there and in provisional liquidation in England. The request sought, amongst other things, the turnover of assets collected in and to be collected in by the English Joint Provisional Liquidators to the Australian Liquidators. It was held that the English Court had jurisdiction to direct such turnover notwithstanding that the scheme for distribution to creditors which would apply in Australia was materially different from that which would apply in English liquidations. The statements of principle by the judge that the English court would not have jurisdiction in these circumstances went too far. However, the test was whether a countervailing advantage could be shown to offset the disadvantage which would be suffered by those creditors who would do worse in an Australian liquidation than in an English one. On the facts no such countervailing advantage had been shown and therefore the Court would not exercise its discretion to direct remission.

**[Simon Mortimore QC,
Richard Adkins QC, William
Trower QC, Jeremy
Goldring, Tom Smith]**

INSOLVENCY – INDIVIDUAL

Rey & Anor v FNCB Ltd

Chancery Division

(Lightman J).

[2006] EWHC 1386 (Ch).

A clause in a voluntary arrangement that precluded all creditors from commencing or continuing legal proceedings in respect of any personal liability of the debtor did not preclude a secured creditor from enforcing his security.

INTERNATIONAL LAW

Jones & Ors v Ministry of the Interior of the Kingdom of Saudi Arabia & Ors

**House of Lords (Lord
Bingham of Cornhill, Lord
Hoffmann, Lord Rodger
of Earlsferry, Lord Walker
of Gestingthorpe, Lord
Carswell). [2006] UKHL 26.**

The claimants commenced civil proceedings against the Kingdom of Saudi Arabia and officials of Saudi Arabia for compensation in respect of torture. The allegations of torture were denied by Saudi Arabia and it claimed immunity for both itself and its officials. Section 1(1) of the State Immunity Act 1978 ('the Act') provides that a

state is immune from the jurisdiction of the English Courts subject to certain exceptions set out in the Act. It was accepted that the claim did not fall within any of the specific exceptions. The claimants argued that the prohibition of torture in international law had achieved the status of a *jus cogens* norm and that the acts of torture could not be classified as official acts, with the result that there could not be immunity for Saudi Arabia or its officials in respect of the acts of torture. The claimants also argued that to apply the Act according to its natural meaning so that Saudi Arabia and its officials could claim immunity would be incompatible with the claimants' rights of access pursuant to Article 6 of the Convention on Human Rights. The House of Lords held that (notwithstanding the views of the European Court of Human Rights in *Al-Adsani v United Kingdom* (2001) 34 EHRR 273) Article 6 of the European Convention on Human Rights was probably not engaged in this case. However, if Article 6 was engaged, it was accepted by their Lordships that application of the Act would deny the claimants access to the

courts. It was considered that the denial of access by application of the Act would be legitimate and proportionate and was not shown to be disproportionate to the extent that it was inconsistent with a peremptory norm of international law. The *jus cogens* nature of the prohibition on torture does not "entail" a corresponding exception to state immunity and such an exception did not have a legal basis in international law. In respect of the individual officials, it was difficult for their Lordships to accept that torture cannot be a governmental or official act, since Article 1 of the Convention Against Torture 1984 provides torture may be committed by a public official or in an official capacity. A state will incur responsibility in international law if one of its officials, under colour of authority, tortures a national of another state, even though the acts were unlawful and unauthorised. Therefore, for the purposes of state immunity, to hold that the individual was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity. Although there may be some borderline cases in which a

state may not be able to claim immunity for an individual's conduct, such facts were not present in this case.

[Michael Crystal QC, Hannah Thornley]

The State of Brunei Darussalam v His Royal Highness Prince Jefri Bolkiah

Brunei Court of Appeal. Unreported (Civil Appeal No.17 of 2005).

Prince Jefri Bolkiah appealed against the decision of the Chief Justice of Brunei not to disqualify himself from hearing any further applications in the above proceedings on the grounds of apparent bias. The Brunei Court of Appeal dismissed that appeal and in doing so applied the test for apparent bias as enunciated by the House of Lords in *Porter v Magill* [2002] AC 357, rather than the test set out by the House of Lords in *R v Gough* [1993] AC 646. The Court of Appeal had applied the *Gough* test on a similar appeal made by Prince Jefri Bolkiah in 2000 in relation to the position of the previous Chief Justice. Pursuant to the Application of Laws Act, the Brunei courts are obliged to apply English common law, but only insofar as the circumstances of Brunei and

its inhabitants permit and subject to such qualifications as local circumstances and customs render necessary. The change in the test for apparent bias as articulated in *Porter v Magill* was the result of the need to bring the English common law into line with the jurisprudence of the European Court of Human Rights in respect of Article 6 of the European Convention on Human Rights. Although Brunei is not a signatory to the Convention (nor to any similar international convention), this did not entitle or require the Court of Appeal not to apply in Brunei the *Porter v Magill* test. That test now represented the common law of England, which was to be applied in Brunei.

[Martin Pascoe QC and Stephen Atherton]

TALKS AND SEMINARS

At R3's 16th Annual Conference, held on 1 to 4 June 2006 at Lake Maggiore, Italy, Stephen Atherton delivered a joint paper (with Mr Registrar Baister) entitled "Getting Paid".

Ronald DeKoven, associate member of 3/4 South Square, was a speaker at an Afrolease seminar in Accra, Ghana in June 2006. He reviewed the current status of a model law

of leasing that he is drafting for developing countries at the request of UNIDROIT. The seminar was attended by government officials from 14 African states.

Professor Ian Fletcher has given several talks recently on the implementation in Great Britain of the UNCITRAL Model Law on Cross-Border Insolvency. Two of these were at the offices of the law firm Herbert Smith (26 April 2006) and to a joint meeting of the Society of English and American Lawyers and the International Women's Insolvency and Restructuring Confederation (which latter talk was given together with Ronald De Koven and Felicity Toube) (11 May 2006). Professor Fletcher will be speaking about the same subject at the Sixth Annual Conference of the International Insolvency Institute at Fordham University Law School, New York City on 13 June 2006.

Professor Ian Fletcher was the Chairman of the recent conference of the INSOL Academics' group held in Scottsdale Arizona on 20 and 21 May 2006. There were papers by 24 speakers, drawn from 8 different countries.

FORTHCOMING EVENTS

At a meeting of the Chancery Bar Association to be held on 3 July 2006, Christopher Brougham QC will deliver a paper on 'Insolvency and Limitation Periods', and John Briggs will deliver one on 'Proceeds of Crime and Insolvency'. Those wishing to attend may contact the Practice Managers at 3/4 South Square.

Marcus Haywood and Dr Riz Mokal will be delivering papers on 6 July 2006 at an ILA London seminar on the new TUPE provisions and the valuation of distressed companies respectively. Those wishing to attend may contact the Practice Managers at 3/4 South Square.

BOOKS

A new book entitled 'EU Banking and Insurance Insolvency' edited 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 of 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. Readers of this Digest may obtain copies at a discounted price by contacting the Practice Managers at 3/4 South Square.

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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