

# 3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 12 No 3 March 2006

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On 17 March 2006, at an induction ceremony at the National Building Museum in Washington DC, Michael Crystal QC was made an International Fellow of the American College of Bankruptcy. The College includes US judges, academics and bankruptcy professionals in the public and private sectors and a number of International Fellows. Michael is the first practising English Barrister to be elected to the Fellowship.

This edition of the Digest was compiled by Riz Mokal.

**Stephen Robins**

## NEWS

The Company Law Reform Bill, which is currently being considered by the House of Lords, is proving to be more controversial than anticipated. Clause 868 of the Bill, which seeks to reverse the decision of the House of Lords in *Re Leyland Daf, Buchler v Talbot* [2004] 2 AC 298, is being opposed by the Financial Law Committee of the City of London Law Society, which has written to the Insolvency Service about the matter. The letter, which sets out the reasoning of the Financial Law Committee, is available online: see [http://www.citysolicitors.org.uk/\\_word/finleylanddaf.pdf](http://www.citysolicitors.org.uk/_word/finleylanddaf.pdf). However, the Insolvency Law Committee of the City of London Law Society has taken the opposite view and has produced a paper which 'sets out the basis for the view of the Insolvency Law Committee that the Government is fully justified in seeking to reverse this unsatisfactory decision'. This paper is also available online: see [http://www.citysolicitors.org.uk/\\_word/insoleylandaf.pdf](http://www.citysolicitors.org.uk/_word/insoleylandaf.pdf).

The American Law Institute has announced the appointment of Professor Ian Fletcher to serve as one of the two Reporters to its newly established project on the International Dissemination of Principles of Co-operation in Transnational Insolvency Proceedings. The purpose of the project is to determine the extent to which the ALI Principles of Cooperation among the NAFTA Countries are capable of being accepted and applied at a global level.

## COMPANY

### *Irvine v Irvine*

**Chancery Division (Blackburne J).  
[2006] EWHC 406 (Ch).**

A shareholder presented an unfair prejudice petition under s.459 CA 1985 on the grounds that the first respondent had paid himself excessive levels of remuneration, with the result that the shareholders had received inadequate dividends. The petition was granted. In order to determine whether the

remuneration drawn by the first respondent was appropriate, the test was whether, applying objective commercial criteria, the remuneration taken was within the bracket that executives, bearing responsibilities and discharging duties of the same sort as the first respondent, would have expected to receive. On the evidence, the first respondent had conducted the affairs of the company in a manner which was prejudicial to the interests of the shareholders. Having regard to the breakdown in trust and confidence between the parties, the first respondent would be ordered to buy out the petitioner's shares at a price which took account of the excessive remuneration. *Re A Company* (No 004415 of 1996) [1997] 1 BCLC 479 applied.

**Re Metropolis Motorcycles Ltd  
Chancery Division (Mann J).  
[2006] EWHC 364 (Ch).**

The court dismissed a petition under s.459 CA 1985. Although the petitioner could legitimately have expected a proper share of the company's profits, his stake in the profits depended on the state of the business. Losses had been made by the company and unless the petitioner could establish that those losses should not have been made he could not complain about

a failure to pay him income on his investment. It followed that the failure to pay the petitioner any profits had not amounted to unfair conduct. On an overall assessment on the facts of the case, there was not a degree of unfairness which required or justified the intervention of the court. *Re Saul D Harrison & Son plc* [1995] BCLC 14 and *O'Neill v Phillips* [1999] 2 All ER 961 applied.

## COMPETITION

**Somerfield plc v  
Competition Commission  
Competition Appeal  
Tribunal (Sir Christopher  
Bellamy, Marion Simmons  
QC, Professor Paul  
Stoneman). [2006] CAT 4,  
[2006] All ER (D) 05 (Mar).**

The Competition Commission had ordered Somerfield plc to divest twelve named stores which it had acquired from Morrisons in favour of local grocery retailers approved by the Commission. Somerfield applied to the Competition Appeal Tribunal under s.120 of the Enterprise Act 2002 for a review of that decision. Somerfield contended: (1) that the Commission had erred in law and in fact by finding that Somerfield's acquisition of stores from Morrisons might be expected to result in a substantial lessening of competition in the twelve local grocery

markets identified; and (2) the Commission had acted unreasonably in not allowing Somerfield to choose which stores to divest, and in placing restrictions on the identities of those in favour of whom the stores might be divested. The Tribunal dismissed the application. The Commission's findings of fact were upheld. Further, the Commission was entitled to adopt the starting point that Somerfield should divest itself of the disputed acquired stores unless the Commission was persuaded that the divestiture of alternative stores would be equally satisfactory in remedying the substantial lessening of competition which the acquisition had created.

## DISQUALIFICATION

**Re Blackspur Group plc  
Chancery Division  
(Lightman J). [2006] All  
ER (D) 34 (Mar).**

In November 2000 the applicant applied to strike out the Secretary of State's claim against him on the grounds of delay. That application was dismissed. The applicant also applied for a declaration that the continuation of the disqualification proceedings would breach his rights under Article 6 of the European Convention on Human Rights. That application was also dismissed. In June 2001, the applicant signed a disqua-

lification undertaking which was accepted by the Secretary of State. In July 2004, the applicant obtaining a ruling in his favour from the European Court of Human Rights in respect of the Article 6 issue. The applicant subsequently applied to the English court for a declaration that the disqualification undertaking should not have been offered by the applicant or accepted by the Secretary of State. The application was dismissed. It was quite clear that the claimant had been legally entitled to offer the disqualification undertaking and the Secretary of State had been legally entitled to accept it. The Secretary of State had fairly and properly considered that the public interest had been given effect to by the prosecution of the disqualification proceedings and that it was expedient in the public interest.

## **EQUITY**

### **Lancashire Mortgage Corporation v Scottish & Newcastle Chancery Division (Manchester District Registry) (HHJ Howarth sitting as a Deputy Judge of the High Court).**

The doctrines of estoppel by convention and proprietary estoppel could apply in a case where the party estopped claimed to be in

ignorance of the state of affairs claimed to exist by the party relying on the estoppel. **[David Marks]**

## **INSOLVENCY – CORPORATE**

### **BCPMS (Europe) Ltd v GMAC Commercial Finance plc Chancery Division (Lewison J). [2006] All ER (D) 285 (Feb).**

The company contended that the appointment of an administrator by the holder of a qualifying charge was invalid because the chargeholder's claim against the company was disputed in good faith and on substantial grounds. It was held that the existence of such a dispute did not remove a right of the holder of a qualifying charge to appoint administrators under Schedule B1. The position prior to the coming into force of Schedule B1 was that the existence of a substantial dispute did not prevent a creditor from appointing receivers; *Rushingdale Ltd v Byblos Bank SAL* (1986) 2 BCC 99,509 considered. Schedule B1 had not changed that position. It would be a serious impediment to the realisation of assets if secured creditors could be precluded from appointing an administrator because of a disputed debt. **[Lloyd Tamlyn]**

### **Re E Squared Ltd; Re Sussex Pharmaceutical Ltd Chancery Division (David Richards J). [2006] EWHC 532 (Ch).**

Paragraph 83 of Schedule B1 to the Insolvency Act 1986, which provides a procedure whereby the administrator of a company may move the company into creditors' voluntary liquidation where he thinks the company's secured liabilities have been discharged or provided for and that a distribution will be made to unsecured creditors, is to be applied in accordance with its express and mandatory terms, so that on registration of a notice sent by administrators while still in office, the company should be wound up. If by the date of registration the administrators have already ceased to hold office, paragraph 83(6)(a) does not have any effect.

### **HM Revenue and Customs v Benton-Diggins Chancery Division (Michael Crystal QC sitting as a Deputy Judge of the High Court). [2006] All ER (D) 264 (Feb).**

HM Revenue & Customs brought a claim against the defendant ('D') under ss.216 and 217 IA 1986. D had been the director of a company called Williams Hair Studio Ltd, which carried on a

hairdressing business. The company went into insolvent liquidation in 2001. D subsequently became the director of a new company which carried on a hairdressing business under the name 'Williams Hair Studio'. The new company went into insolvent liquidation owing various sums to HM Revenue & Customs. The Court noted that there was no requirement under the statutory provisions that the second company be named in such a way as to cause customers to think it was the first company; it was sufficient that the names suggested an association between the companies. In the instant case, there were factors suggesting a real probability of association. Firstly, the two companies operated in the same field of business. Secondly, the defendant was a director of both companies. Thirdly, the business premises of the two companies were within a reasonable distance of one another. Fourthly, the business of the first company had been merged with the business of the second. In the light of this evidence, there was a real probability of association. HM Revenue & Customs was therefore entitled to the sum claimed together with interest.

Michael Crystal QC and Rizwaan Jameel Mokal,

'The Valuation of Distressed Companies: A Conceptual Framework – Part I' (2006) 3(2) International Corporate Rescue 63-68.

Michael Crystal QC and Rizwaan Jameel Mokal, 'The Valuation of Distressed Companies: A Conceptual Framework – Part II' (2006) 3(3) International Corporate Rescue 123-131.

## **INSOLVENCY – INDIVIDUAL**

### **Mohammed v Southwark London Borough Council Chancery Division (Peter Smith J). [2006] EWHC 3305 (Ch).**

A local authority presented a bankruptcy petition against the appellant in respect of an alleged liability for council tax. The appellant contended that no council tax was payable because at all material times he had been in full-time education at Greenwich University. The deputy registrar made a bankruptcy order. The appellant's appeal against the bankruptcy order was dismissed. The deputy registrar was entitled to come to the conclusion that the appellant was not a full-time student. Moreover, the deputy registrar's construction of the Council Tax (Discount Disregards) Order 1992 (SI 1992 No 548) was correct.

## **Monks v HM Revenue and Customs**

### **Chancery Division (Hart J). [2006] All ER (D) 44 (Mar).**

HM Revenue & Customs presented a bankruptcy petition against the debtor. The petition was heard on 9 January 2005, when it was adjourned to allow the debtor to file late returns. Three further adjournments were granted to allow for the filing and consideration of late returns, and the debt was subsequently reduced to £15,636.03. On 18 August, the debtor indicated that a mortgage application made by him had been accepted in principle by a mortgage lender and the matter was adjourned to 22 September, when the debtor informed the court that his mortgage application was still being processed. The matter was then adjourned to 28 October 2005, at which date the debtor indicated that a formal offer from the lender in the sum of £150,000 to remortgage his property had been made and the matter was further adjourned to 9 December 2005 for the remortgage to take place. However, on that date the remortgage had not taken place and the debtor requested an adjournment to complete the remortgage. The registrar held that there was no reasonable prospect

of the debt being repaid in reasonable time and made a bankruptcy order against the debtor. The debtor appealed against the registrar's decision. The appeal was dismissed. The question of whether to grant an adjournment to allow the debtor to pay a petition debt was essentially a matter for the registrar to decide on the material before him. It was impossible to fault the registrar's exercise of his discretion. There had been no convincing evidence before him to show that the debt would have been paid in a reasonable time. Re Gilmartin [1989] 2 All ER 835 and Re Micklethwaite [2002] EWHC 1123 (Ch) considered.

## INSURANCE

**Goshawk Dedicated Ltd v Tyser & Co Ltd**  
**Court of Appeal (Sir Anthony Clarke MR, Rix and Richards LJ).** [2006] EWCA Civ 54.

The Court held that a term was to be implied in the contracts between certain Lloyd's syndicates and the insured pursuant to which Lloyd's brokers were obliged to allow inspection of placing and claiming documents that had previously been shown to the syndicates now in run off, as well as premium accounting documents necessary to the operation

of the contract, where reasonably necessary.

**[Robin Knowles QC]**

## INTELLECTUAL PROPERTY

**Fields v Klaus Kobec Ltd**  
**Chancery Division**  
**(Richard Sheldon QC sitting as a Deputy Judge of the High Court).** [2006] EWHC 350 (Ch).

C and D2 went into the business of selling wrist-watches designed by C and manufactured by GS Ltd. A company ('KKIL') was incorporated for this purpose in December 1995 and the word trade mark 'Klaus Kobec' ('the mark') was registered on 29 August 1996, with C as the sole proprietor. On 28 January 1997, D1 was incorporated and took over all of the assets and liabilities of KKIL on 1 May that year. The mark was registered in C's name as a Community trade mark on 14 August 2001. In October 2004, D1 placed direct orders with another company for watches branded with the mark. C terminated D1's licence to use the mark on 25 December 2004 and subsequently brought proceedings against D1 and D2 on the grounds that his UK and Community trade marks had been infringed. Two statutory defences were

invoked: (1) that D1 held an earlier right in and attaching to the mark; and (2) that D1's use of the mark constituted the use of its own name. The Court rejected the first defence on the basis that KKIL had not generated sufficient goodwill in the mark to found an action for passing off by the date that the UK trademark was registered in C's name. The second defence was rejected on the basis that, on the facts, D1 had not acted fairly in relation to the legitimate interests of C as the owner of the trade mark.

## RATING

**Re Trident Fashions plc; Exeter City Council v Bairstow**  
**Court of Appeal (Rix, Maurice Kay LJ and Sir Martin Nourse).** [2006] EWCA Civ 203.

A local authority applied for a declaration that non-domestic rates which had accrued during the company's administration were payable as expenses of the administration within paragraph (a) or paragraph (f) of r.2.67(1) IR 1986. The administration of the company came to an end, and the administrators ceased to act as such. The administrators applied to be removed as parties to the application and for the claim

against them to be struck out. The Judge acceded to the administrators' application. The local authority appealed. The appeal was allowed. The administrators had paid themselves a substantial sum of money by way of remuneration, and it was arguable that the local authority was able to claim priority over the remuneration under r.2.67(1) or r.2.67(2) and (3).

**[Lloyd Tamlyn]**

## SECURITY

**Fanshawe v Amav Industries Ltd Chancery Division (Blackburne J). [2006] All ER (D) 246 (Feb).**

A debenture purported to create a fixed charge over book debts and created an obligation on the borrower company to pay the proceeds into a specified bank account. Once the proceeds were so deposited, they were to be released from this fixed charge and become subject to a floating charge instead. In practice the company had never opened such an account. Instead, an account was opened in the name of one of the debenture-holders some months after the execution of the debenture, into which the proceeds of book debts were paid. This account effectively operated as a blocked account. The debenture also purported to create a fixed charge over

'all plant, machinery, vehicles, computers, office and other equipment and the benefit of all contracts, licences and warranties related to the same'.

The company went into administrative receivership and the joint administrative receivers applied to the Court to determine the proper characterisation of the charges. The Court held that where a debenture purported to create a fixed charge over book debts but a floating charge over the proceeds of such debts, the debenture was properly to be characterised as having created a floating charge, since the chargor's ability freely to use the collected debts was inconsistent with the charge being fixed. In the instant case, the charge over book debts was to be characterised as floating even though the proceeds were deposited in the blocked account operated by one of the debenture-holders, on the basis that the money deposited in the account remained beneficially owned by the company. It followed that the debenture-holder merely held legal title to the right to withdraw money from the account as trustee for the company. The Court also characterised the charge over the plant, machinery and other equipment as floating, on the basis that it was wide enough to include circulating assets which the company

would have needed to put beyond the ambit of the charge in the ordinary course of its business.

**[Lexa Hilliard]**

## TAX

**Indofood International Finance Ltd v JP Morgan Chase Bank NA Court of Appeal (Sir Andrew Morritt C, Chadwick LJ and Sir Peter Gibson). [2006] EWCA Civ 158.**

The Court considered the interpretation of a double tax agreement between Indonesia and Mauritius. The Court of Appeal held that the terms 'beneficial owner' used in this agreement bore an autonomous meaning independent of the meaning which might be placed on it by the domestic laws of the contracting states. For that reason, the claimant, a company incorporated in Mauritius by its Indonesian parent in order for the latter to acquire the benefit under the double tax agreement of a reduction of withholding tax on the interest to be paid to the noteholders, was not the beneficial owner of the interest payable to it by the parent for onward transmission to the noteholders.

**[Richard Sheldon QC and David Alexander]**

## TALKS AND SEMINARS

Daniel Bayfield spoke at the Mealey's 'Solvent Schemes of Arrangement' conference which took place on 2 and 3 February 2006 in New York. Daniel also took part in a panel at Reynolds Porter Chamberlain's seminar on 'Schemes of Arrangement: latest developments and practical implications' which took place on 9 February 2006 at the London Underwriting Centre.

On 28 February 2006 Stephen Robins gave a talk to Weil Gotshal & Manges on employment law issues in insolvency and the insolvency provisions of the new TUPE Regulations.

Ron DeKoven delivered a lecture about UNIDROIT's proposed Model Law of Leasing at the Annual World Leasing Convention in Dubai. Ron is the chief draftsman of UNIDROIT's Model Law of Leasing and the Reporter to the project.

Dr Riz Mokal delivered a paper entitled 'Fixed and Floating Charges: Continuing Inconsistencies?' at the Insolvency Lawyers' Association Annual Conference 2006, held at the Bath Spa Hotel in Bath on 18 March 2006.

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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