

3/4 DIGEST



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Blair Leahy
Stephen Robins
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Hannah Thornley
Simon Fuller
Professor Sarah Worthington
Dr Riz Mokal

In this issue

case law 1 – 6
books
and publications 6

The European Court of Justice has finally handed down its long-awaited decision in the Eurofood case. The decision to a large extent adopts the views of the Advocate-General. It favours the Irish court's decision to open main proceedings, primarily on the basis that the Irish order appointing the provisional liquidator constitutes the opening of proceedings. The decision has much to interest practitioners in cross-border insolvencies in its pronouncements on COMI. Gabriel Moss QC appeared for the Italian office-holder.

This edition of the Digest was compiled by Simon Fuller.

Stephen Robins

CIVIL PROCEDURE

Dadourian Group International Inc v Simms & Ors

Court of Appeal (Ward LJ, Arden LJ, Moore-Bick LJ). [2006] EWCA Civ 399.

D obtained a worldwide freezing order against S. The terms of the order included the usual provision that the order could not be enforced in a foreign jurisdiction without the permission of the Court. S challenged a decision which gave D permission to enforce the order against property in Switzerland. The Court of Appeal provided eight guidelines to be applied in relation to the circumstances in which an English court would give permission to enforce a worldwide freezing order in a foreign jurisdiction: (1) the grant of permission should be just and convenient; (2) all the relevant circumstances and the options available to the applicant needed to be consi-

dered; (3) the interests of the applicant should be balanced against the interests of the other parties; (4) permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings that was superior to the relief given by the worldwide freezing order; (5) the evidence in support of the application for permission should include all the information necessary for the judge to reach an informed decision; (6) the court must be satisfied that there is a real prospect that the respondent holds assets in the relevant jurisdiction, as opposed to the test being whether there was a good arguable case that such assets were present; (7) there must be evidence of a risk of dissipation of the assets in question; and (8) the application should ordinarily be made on notice to the respondent. The judge had failed to take account of all the

relevant considerations and the Court's discretion had to be exercised afresh. On the facts it was reasonable and proportionate to allow enforcement to take place in Switzerland and it did not matter that the property in question was subject to a dispute involving a third party, since that dispute could be resolved in the course of the English proceedings without involving the third party.

COMPANY

It's a Wrap (UK) Ltd v Gula
Court of Appeal (Chadwick LJ, Sedley LJ, Arden LJ).
[2006] EWCA Civ 544.

A shareholder is liable under s.277(1) CA 1985 to repay unlawful dividends where he is shown to have possessed knowledge of facts which amounted to the unlawfulness. It is not necessary for the shareholder to have known in addition of the relevant rule which rendered the distribution unlawful.

[Stephen Robins]

Re McCarthy Surfacing Ltd
Chancery Division (Sir Francis Ferris QC sitting as a Deputy High Court Judge).
[2006] EWHC 832 (Ch).

Prior to the registration of a share transfer, both the transferor and the transferee have standing to present a

petition for unfair prejudice pursuant to s.459 CA 1985. The transferor remains a member of the company, and the sale does not inevitably prevent a finding that the transferor has been prejudiced. The transferee has a right to exercise any voting rights and receive any dividends that are payable in relation to the shares prior to registration. If the transferee were to be denied standing in these circumstances, s.459(2) CA 1985 would be meaningless.

Kinlan & Anor v Crimmin & Anor
Chancery Division (Philip Sales QC sitting as a Deputy High Court Judge).
[2006] EWHC 779 (Ch).

A company purchased its own shares from a director ("S") on terms that a lump sum was payable immediately followed by instalments for a period of five years. The company entered voluntary liquidation and proceedings were commenced by the liquidator who sought to challenge the transaction. The Court held:

(1) the required majority had approved the transfer and therefore the resolution, which had been described erroneously as an ordinary resolution, was in fact special resolution as required by s.164 CA 1985;

(2) the transaction failed to satisfy s.159(3) CA 1985 because the agreement had not provided for full payment upon acquisition and, as a result, was void pursuant to s.143(2) of the Act;

(3) on the facts, the money which had been received by S from the company could not be recovered because S had changed his position, or, alternatively, should be relieved from liability pursuant to s.727 CA 1985.

Re Wendy Fair
(Heritage) Ltd
Chancery Division (Peter Smith J). [2006] EWHC 5803 (Ch).

It was inappropriate to grant summary judgment in proceedings brought by a liquidator against former directors pursuant to s.214 IA 1986 or misfeasance pursuant to s.212 IA 1986 in circumstances where:

(1) the directors raised a credible argument relating to their belief that a release or settlement could be negotiated with the creditor whose claim gave rise to the alleged wrongful trading; and

(2) it was not possible to determine whether the directors would be entitled to relief from liability pursuant to s.727 CA 1985. The judge considered, however, that the defences raised by the directors were weak and made a

conditional order preventing the defence being advanced until a payment had been made into court. The liquidator applied for summary judgment in joined proceedings against another group company. There was no credible defence and judgment was entered accordingly.

[Lucy Frazer]

COMPETITION

Celsio AG v Office of Fair Trading & Ors

Competition Appeal Tribunal (Marion Simmons QC, Professor Andrew Bain, Vivien Rose).

[2006] CAT 9.

Celsio AG ("Celsio") applied for judicial review of the OFT's decision not to refer the acquisition of Alliance Unichem Plc ("Unichem") by Boots Group plc ("Boots") to the Competition Commission, pursuant to s.120 of the Enterprise Act 2002. The OFT had ruled that competition from supermarkets prevented the merger from substantially lessening competition within the retail pharmacy market at the national level. The OFT applied the "facia market test" when determining whether the merger would substantially lessen competition in the retail pharmacy sector at the local level. This measured the impact of the

merger on market concentration by assessing the change in number of competitors per square mile. The OFT determined that there would be a substantial lessening of competition in various geographic areas where the number of competitors reduced from two to one, and in some of the areas where the reduction was from three competitors to two. Boots undertook to divest itself of outlets in areas where the OFT determined there would be a substantial lessening of competition and, on that basis, the OFT decided not to refer the matter to the Competition Commission.

Celsio argued that:

(1) when determining the competitiveness of the local retail market, the OFT should have considered the market share of each outlet in addition to the facia market test;

(2) even if it was sufficient to consider the facia market test alone, the OFT had failed to justify its determination that there would not be a substantial lessening of competition in areas where the number of competitors would be reduced from four to three; and

(3) the OFT's ruling about the effect of the merger on competition at the national level should be reconsidered in view of the failure to appropriately determine the

competitiveness at the local level. The tribunal held, dismissing the application for review, that the OFT was entitled to disregard the market share of each outlet because it did not accurately reflect the impact on rivalry, which was the main consideration when determining whether there would be a substantial lessening in competition. Although there were aspects of the decision that could have been reasoned more fully, the OFT was entitled to conclude that there would not be a substantial lessening of competition in areas where the merger would result in a reduction of four competitors to three. As a result it was not necessary to consider the OFT's decision in relation to competition at the national level.

CONTRACT

Oxus Gold plc v Templeton Insurance Ltd

Queen's Bench Division (Commercial Court) (Cooke J). [2006] EWHC 864 (Comm).

O commenced proceedings seeking, inter alia, the return of warrants which it granted to T. O maintained that T's right to exercise the warrants was conditional upon obtaining a financial bond or performance guarantee. It was common

ground that all such attempts to obtain a bond or guarantee had been unsuccessful. It was held that T had only agreed to investigate whether it was possible to obtain the relevant security. On that basis T did not owe a contractual or tortious duty to obtain a bond or guarantee and was entitled to exercise the warrants without condition. T was not under a duty to advise O in relation to the viability of obtaining the relevant security and, in any event, had not breached any such duty. On the facts, the alternative claim advanced by O relating to fraud or mistake was not established.

[Lucy Frazer]

FREEDOM OF INFORMATION

Bellamy v Information Commissioner

Information Tribunal (David Marks, Ivan Wilson and Jenni Thomson). Unreported, 4 April 2006.

Although legal professional privilege constitutes a qualified exemption in favour of a public authority under the Freedom of Information Act 2000, the DTI's instructions to and advice from Treasury Counsel were not disclosable in a case where live issues involving ongoing commercial

activities and difficult questions of construction regarding competition law were involved.

Smith v Information Commissioner

Information Tribunal (David Marks, Peter Dixon and Suzanne Cosgrave). Unreported, 20 February 2006.

Where sufficient grounds exist and demonstrate to the satisfaction of the Information Commissioner that the information requested has never been in the possession or under the control of a public authority, a request for such information can justifiably be refused and a suitable Decision Notice granted.

INSOLVENCY – CORPORATE

Re Mall Corporate Entertainments Ltd

Chancery Division (Richard Sheldon QC sitting as a Deputy High Court Judge). [2006] EWHC 768 (Ch), [2006] All ER (D) 84 (Apr).

The Part 20 defendant ("T & Co") was a firm of licensed insolvency practitioners. MCE and ICM were suppliers of corporate hospitality packages for sporting events. S, D and C were the directors or de facto directors. T & Co advised that the companies could

continue trading if the directors believed the necessary sporting tickets could be obtained. Following difficulties with obtaining certain corporate hospitality packages, T & Co advised S that ICM and MCE should cease trading. The liquidator of the companies commenced proceedings against the directors for wrongful trading and misfeasance under ss.212, 214, 238 and 239 IA 1986. S, D and C brought Part 20 contribution claims under the Civil Liability (Contribution) Act 1978 against T & Co, alleging negligence. T & Co applied to strike out the Part 20 claim and sought, in the alternative, summary judgment. The Court held that T & Co could not be under a common liability with S, D and C to the liquidator as regards the claims brought under ss.214, 238 and 239 IA 1986. The Part 20 claims for contribution as regards these claims were bound to fail. The claims brought by the liquidator under ss.214, 238 and 239 could not be treated as claims brought by the companies. They were claims brought by the liquidator which had been conferred on him by statute. A wrongful trading claim under s.214 IA 1986 could only be brought by a liquidator against

directors (including shadow directors), and there was no suggestion that T & Co fell into this category of persons. Similarly, T & Co was not a person with whom MCE entered into the relevant transaction for the purposes of the liquidator's claim under s.238 IA 1986, nor a creditor of MCE (or a surety or guarantor for any of MCE's debts) for the purposes of the liquidator's claim under s.239 IA 1986. As for the contribution claim in respect of the liquidator's claims under s. 212 IA 1986:

(1) the Part 20 Particulars of Claim as they currently stood did not provide a sufficient basis for establishing a contribution claim;

(2) such a contribution claim was bound to fail in relation to acts occurring before T & Co first became involved;

(3) in relation to acts occurring on and after that date, the Part 20 Claims should not be struck out or dismissed without giving the Part 20 Claimants the opportunity to consider formulating amendments to the Part 20 Particulars of Claim and to apply for permission to amend.

Wild, L, "Spectrum & Leyland Daf: the spectre of new claims?" *Company Lawyer*, vol. 27, no. 5, p.151.

INSOLVENCY – PERSONAL

Goel v Pick

Chancery Division (Sir Francis Ferris QC sitting as a Deputy High Court Judge). [2006] EWHC 833 (Ch).

A short time before being made bankrupt, a debtor purported to transfer the right to a personalised vehicle registration mark ("VRM") to a creditor in full and final settlement. The Court held, upholding the decision of the registrar at first instance, that at the time the bankruptcy order was made the VRM had not been transferred in accordance with the formal requirements of the Retention of Registration Marks 1993 and therefore vested in the Trustee upon his appointment. To the extent that the VRM had been transferred, it constituted a preference pursuant to s.340 IA 1986.

Union Bank (UK) plc v Pathak

Chancery Division (Michael Briggs QC sitting as a Deputy High Court Judge). Unreported, 15 May 2006.

The registrar had erred in accepting that a debtor's two alleged defences to a statutory demand under r.6.5(4)(a)

and (b) IR 1986 had given rise to genuine triable issues sufficient to warrant the setting aside of the demand. In particular, the defence that the creditor bank had committed a breach of duty of care to the debtor by failing to reduce the outstanding debt through competent realisation of an assigned letter of credit should have been rejected, as there was no material sufficient to disclose a genuine triable issue. **[Fidelis Oditah QC, David Allison]**

INSOLVENCY – CROSS BORDER

Eurofood IFSC Ltd

European Court of Justice. Case C-341/04, 2 May 2006.

The ECJ delivered judgment on a reference for a preliminary ruling on the interpretation of Council Regulation (EC) No 1346/2000 on insolvency proceedings ("the Regulation"). The court ruled, following the opinion of the Advocate General:

(1) Where a debtor is a subsidiary company whose registered office is situated in a different Member State to that of its parent company, the presumption laid down in Article 3(1) of the Regulation, whereby the centre of main

interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that a different position exists. In particular, this may apply where a company does not carry out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that it is being or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.

(2) Article 16(1) of Regulation requires that main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State;

(3) A decision to open insolvency proceedings for the purposes of regulation 16(1) provision is a decision handed down by a court of a Member State which is made further

to an application based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation.

(4) On a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard.

[Gabriel Moss QC]

LIMITATION

Hill v Spread Trustee Company Ltd

Court of Appeal (Waller LJ, Arden LJ, Sir Martin Nourse). [2006] EWCA Civ 542.

The Court of Appeal held (Arden LJ dissenting) that the limitation period in respect of a claim by a trustee in bankruptcy under s.423 IA 1986 (transactions defrauding creditors) runs from the date of the bankruptcy order, not from the date of the transaction which the trustee is seeking to overturn.

BOOKS AND PUBLICATIONS

The readers of the Digest are invited to take advantage of a 20 per cent discount on all orders for EU Banking and Insurance Insolvency (Oxford University Press, 2006) edited by Gabriel Moss QC and Professor Bob Wessels.

Contributors to the book include Tom Smith and Marcus Haywood. All those interested in this offer are asked to send an e-mail to gabrielmoss@southsquare.com.

[Gabriel Moss QC, Professor Ian Fletcher, Tom Smith, Marcus Haywood]

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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