

# 3-4 DIGEST



a monthly review of relevant news, cases and articles Vol 12 No 10 November 2006

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The Companies Bill received Royal Assent on 8 November 2006. The Companies Act 2006 represents the largest reform to the laws affecting corporations in the UK in two decades. The provisions relating to company communications to shareholders and others (including electronic communication) will be brought into force in January 2007. The Government intends all parts of the Act to have been brought into effect by October 2008. This edition of the Digest was compiled by Simon Fuller.

**Marcus Haywood**

## GENERAL NEWS

A record number of individuals were made bankrupt or entered IVAs with their creditors between July and September 2006. This included 15,416 bankruptcy orders and 12,228 IVAs representing an increase of approximately 25% and 100% respectively for the same period last year. Both sets of figures have been rising at an increasing rate since 2004. Meanwhile the number of liquidations totalled 3,235 for the same period, which was a slight decrease compared to last year. A total of 675 administrations were commenced under the new regime and this continues the trend in figures from earlier in the year which are marginally higher than 2005. The

number of CVAs remained relatively stable at 157.

## CIVIL PROCEDURE

### **Crystalmews Ltd (in Liquidation) v Metterick and others** **ChD (Lawrence Collins J). [2006]** **EWHC 2653 9 (Ch).**

A provisional liquidator obtained a freezing order against various individuals. A number of transactions were made by the individuals in breach of the freezing order. The provisional liquidator commenced contempt proceedings. The individuals admitted the breach but denied that they had been served with the order at the relevant time. There was a dispute as to whether the individuals had

attempted to avoid service. The Court held that the individuals were aware that the freezing order existed at the time of the various transactions. As a result the transactions constituted a serious contempt. It was not sufficient for the individuals to rely upon an alleged misunderstanding as to the meaning or scope of the freezing order. On the facts it made no difference whether or not the order had been formally served.

**Weston v Gribben and another**  
**CA (Civ Div) (Sedley LJ, Lloyd LJ, Hallett LJ). [2006] EWCA Civ 1425.**

The claimant ("W") commenced proceedings against the Foreign and Commonwealth Office ("the FCO"). Subsequently, after the expiry of the limitation period, W applied to amend the particulars of claim to add another party ("G") as an additional claimant pursuant to CPR r.19.5. At first instance the Court gave permission to join G but only to the extent of allowing G to claim a beneficial interest in certain property. W appealed against the restrictions imposed upon G's participation in the

proceedings. The FCO cross-appealed against the grant of permission. The Court of Appeal held, inter alia, that when deciding whether to allow an amendment outside the limitation period under CPR r.19.5(3)(a) a convenient test was to ask whether the identity of the claimant could be changed without significantly altering the claim. On the facts the proposed amendments were too substantial to make it appropriate for G to be joined.

**Phillips v Symes**  
**ChD (Peter Smith J).**  
**Unreported, 16 October 2006.**

L brought proceedings against a number of defendants to determine the assets of a partnership. The proceedings were complex and led to a large number of applications. Upon the agreement of the parties the Court ordered a two-year stay of the proceedings in order to allow negotiations to take place. The stay prevented all parties from commencing new proceedings or making any application on a related issue without the permission of the Court. Subsequently L entered liquidation. The

liquidator applied to vary the order on the grounds that it constituted a civil restraint order that should not have been made. The Court dismissed the liquidator's application. The Court held that the original order had been made pursuant to the Court's case management powers under CPR r.3.1(2)(f). These gave the Court jurisdiction to order a stay where it was just and convenient. At the time the order was made there was a general concern that further litigation was disproportionate and unnecessary. The proceedings had taken up a lot of judicial time and might do so again if the order was varied. The stay could not be categorised as a civil restraint order with the effect that the usual conditions in respect of such orders did not have to be established.

**Latimer Management Consultants Ltd and others v Ellingham Investments Ltd and another**  
**ChD (Bernard Livesey QC).**  
**Unreported, 30 October 2006.**

L commenced proceedings against a company, E, and one of its directors, P. The

claim was successful against E but failed against P. L applied for a costs order against both defendants but was only awarded costs against E. In coming to that decision the Judge determined that E was a valuable company which was able to satisfy the costs order and that P's role in E's conduct of the litigation had been no more extensive that would ordinarily be expected of a director. Following the hearing L discovered that E's main asset was charged to another company and that P had funded the litigation. L applied to vary the original costs order to make P liable to pay the costs ordered against E pursuant to CPR r.3.1. P opposed the application on the basis that that no order for costs should be made against him unless it could be demonstrated that he had stood to financially benefit from E's conduct of the litigation. The Court held that a costs order could be varied like any other order where there had been a change of circumstances or the original evidence had been misleading. In the present case it was appropriate to order P to pay the costs originally ordered against E. The new evidence disclosed

that P had conducted the litigation in circumstances where E was on the brink of insolvency. P had engaged in a personal battle with L. While this was not of financial benefit to P it was sufficient to justify an order for costs against him.

#### **COMPANY**

**Balvinderjit Singh Nagi v Bhupinderjit Singh Nagi and another ChD (Companies Court)(Robin Knowles QC). Unreported, 17 October 2006.**

A and B traded through a company, C, on the basis they would enjoy equal rights and benefits. Following a breakdown in their relationship B removed A as director without notice and transferred C's business to a new company without making any payment for the value of its goodwill. A commenced proceedings alleging unfair prejudice contrary to Section 459 of the Companies Act 1985. Giving judgment following the trial of the matter, the Judge held that a flexible interpretation should be given to the expression "unfair prejudice" to take account of the

particular circumstances of each case. On the facts it constituted unfair prejudice to remove A as a director without giving him any notice. After taking the parties' conduct into account B was ordered to purchase A's shareholding in C without any discount for its minority status. C was ordered to transfer an interest in a property to A.

**[Robins Knowles QC]**

#### **FREEDOM OF INFORMATION**

**Department of Trade and Industry v Information Commission Information Tribunal. Unreported, 10 November 2006.**

The Department of Trade and Industry was not obliged under the provision of the Freedom of Information Act 2000 to reveal to those who were subject to a company investigation brought pursuant to section 447 of the Companies Act 1985 the reasons for the investigation. In the present case, the public interest in maintaining the exemption set out in Section 30 of the Freedom of Information Act 2000, which included the treatment of

certain information as exempt if it might lead to possible criminal prosecutions, outweighed any public interest favouring disclosure.

### [David Marks]

## **INSOLVENCY - CORPORATE**

### **Jacob and Ruddock v UIC Insurance Company Ltd and Equitas Limited ChD (Peter Smith J). [2006] EWHC 2717 (Ch).**

The joint provisional liquidators ("JPLs") of UIC appealed against the decision of Registrar Nicholls fixing their remuneration at approximately 80% of the sum claimed. The JPLs also appealed against the costs order. Following the original hearing but prior to the appeal a scheme of arrangement was approved providing for the payment in full of all creditors. As a result the creditors had no interest in the conduct of the appeal but appeared in order to assist the Court. Following extensive submissions Peter Smith J held:

(i) It was not necessary to determine an allegation that the Registrar had been biased against the office-holders throughout the proceedings.

The JPLs did not seek a re-hearing of the application and in the circumstances it was sufficient to order that any future matters be listed before a different Registrar. (ii) The Registrar had been entitled to make general deductions in respect of the amount of time spent drafting the scheme, being time that was not supported by full narrative explanations in the JPLs' contemporaneous time sheets. The fact that the assessor appointed by the Court had recommended lower deductions was not decisive. The Registrar had also been entitled to make a general reduction of 1% of the fees on the grounds, inter alia, that the staff of the JPLs were more senior than necessary.

(iii) The Registrar had not ignored the success of the provisional liquidation. Where an appointment is successful the Court is more likely to fix remuneration at the sum which is claimed but it has to remain fair and reasonable.

(iv) The Registrar had been right to reduce the hourly rate that was claimed in respect of an independent insurance consultant that had been engaged by the JPLs in the course of their appointment.

In this respect the sums claimed by the JPLs were based on the hourly rates of staff within the JPLs' firm rather than the lower hourly rates that the JPLs had been invoiced by the specialist. He was not a member of "staff" within the meaning of rule 4.30(2)(a). Although there is no legal definition for the meaning of "staff" it does not extend to individuals who are independent contractors. The fact that the JPLs could be liable for his advice was not material and any suggestion that the uplift in hourly rates reflected the overheads of the JPLs could not be substantiated. The fees of the specialist amounted to a disbursement which were payable as an expense. Peter Smith J stated, obiter, that the Registrar had been wrong to express the view that disbursements were not capable of being assessed prior to the office-holder seeking approval of the final accounts. The Judge supported the contrary view that a disbursement could be assessed under rule 4.30(3) in the course of a remuneration application.

(v) It was understandable that the Registrar was concerned about previous occasions on

which the JPLs' remuneration had been approved on the basis of the hourly rates charged out by the JPLs for the independent insurance consultant. However, the Registrar was wrong to order that all previous decisions fixing the remuneration of the JPLs should be re-opened.

This contradicted an earlier indication that he had given to the parties that he would not re-open past orders. It also had the potential to make the JPLs and a provisional liquidator who had previously held office liable to repay the sums personally. The profits of the relevant firms to which the JPLs (and the provisional liquidator who had previously held office) belonged had already been distributed. Further, it would not be appropriate given that the creditors had always had sufficient information to challenge the payments but had failed to do so.

(vi) The Registrar had been wrong to disallow sums claimed in respect of a tax consultant. There was sufficient material to establish that he performed the work which was now claimed. Although the work related to an earlier period of the

provisional liquidation, the JPLs had only received the invoices from the tax consultant after that period had ended. The Registrar should not have refused to allow the sums on the basis that they should have been claimed in the previous year's remuneration.

(vii) In the future it would not be appropriate for the Court to make an order that the office-holders be entitled to fix their remuneration by reference to the hourly rates of partners in their firm. It is the office-holders who are appointed rather than their firm. The hourly rates of the firm should provide a starting point but it will remain necessary to determine whether they are appropriate in all the circumstances of the particular case.

(viii) As to costs, the Registrar had been entitled to disallow the JPL's costs of obtaining statements in support of their application from members of the informal creditors committee. However, the Registrar had been wrong to order that the JPLs personally bear the trial costs of their application in view of their recovering approximately 80% of the sum claimed. It was therefore ordered that,

save in respect of the costs of the witness statements from members of the informal creditors' committee, and save in respect of 20% of the costs of the trial itself, the JPLs should recover their costs of the remuneration application from the estate in full.

**[Stuart Isaacs QC, Lexa Hilliard, Lloyd Tamlyn]**

**Re Oval 1742 Ltd; Customs and Excise Commissioners v Royal Bank of Scotland ChD (Susan Prevezer QC) Unreported, 6 November 2006.**

The Court determined a preliminary issue as between the Royal Bank of Scotland PLC ("the Bank") (as the holder of a floating charge of a company's assets) and the Commissioners of Customs & Excise as preferential creditors.

The Bank had received the proceeds of sale of a company's assets which had been sold to two of its subsidiary company's by way of hive-down. The Bank had received the monies from the company's solicitors (pursuant to an undertaking from the solicitors to the Bank that they would account for the proceeds only to the Bank)

and on receipt of those monies the Bank had released its security over the relevant assets. The company's solicitors had, in turn, received the monies directly from the purchasing companies.

The Court held that the Bank had nevertheless taken possession of the assets subject to a floating charge within the meaning of Section 196 of the Companies Act 1985 and were therefore liable to account for the sums received by it to the preferential creditors. The Court determined that the primary focus of Section 196 was on acts which amount to the realisation of a security interest. It was the substance of the transaction which was important and not the form when trying to determine whether a debenture holder had taken possession for the purposes of the section. On the facts of the case the Court considered that the Bank had, in effect, realised its security and that in this respect the circumstances were almost indistinguishable from *IRC v Goldblatt* [1972] Ch 498. The Bank was granted leave to appeal.

**[Stephen Atherton QC]**

**INSOLVENCY - PERSONAL**  
**Re Viren Rastogi (a bankrupt)**  
**ChD (Registrar Jaques).**  
**Unreported, 27 October 2006.**

A bankrupt's discharge would not be suspended in circumstances where his Trustee was alleging breach of the bankrupt's duty to co-operate, on the basis that findings of fraud against the bankrupt in earlier civil proceedings were inadmissible in the application to suspend the discharge and where the Trustee had failed to establish on a balance of probabilities by independent evidence that such fraud existed.

**[David Marks]**

**Howcutt v G S Property Developments Ltd (2006)**  
**ChD (David Richards J).**  
**Unreported, 26 October 2006.**

A builder, G, entered an oral agreement with an individual, H, to construct a property. G built the property and submitted invoices to H who disputed parts of them. G accepted that there were errors in some of the invoices and submitted new invoices for a reduced amount which H agreed to pay. G served a

statutory demand on H for the amount claimed in the invoices. H applied to set aside the demand, stating that G had made fraudulent or negligent misrepresentations that the sums claimed in the invoices were properly due. H claimed he was entitled to rescind the contract and to refuse payment of the agreed sum. The application was dismissed and G appealed. The Judge refused the appeal. It was not sufficient to rely upon an inference of fraud. There was evidence to suggest that G had made negligent misrepresentations when submitting some of the invoices but they related to a small part of the overall debt. The negligent misrepresentations alleged to have been made by G were not sufficient to entitle H to rescind the agreement in its entirety.

**Holtam v Kelmanson**  
**ChD (Evans-Lombe J).**  
**[2006] EWHC 2588 (Ch).**

H was made bankrupt in 1995. At the time he did not own any assets of substantial value. By 2005 H's interest in a leasehold property that he had purchased some time before the date of the

bankruptcy order had increased to an extent where there was sufficient equity to pay all the bankruptcy debts and expenses. The Official Receiver appointed a Trustee who applied for and obtained an order for sale and possession of the property pursuant to Section 14 of the Trusts of Land and Appointment of Trustees Act 1996 ("the TLATA"). H appealed the order on the basis that the ten-year delay constituted a violation of his right to a fair and expeditious administration of the bankruptcy estate under to Article 6 of the European Convention on Human Rights ("the ECHR"). Dismissing the appeal, Evans-Lombe J held, that: (i) Article 6 of the ECHR was not engaged. The administration of a bankrupt's estate was not a process that resulted in the determination of the civil rights and obligations of the bankrupt within the meaning of Article 6; (ii) even if Article 6 was engaged, H's remedy would be to seek compensation from the United Kingdom. This would not prevent T from realising the property for the benefit of the creditors; (iii) the Trustee's application should have been made

under Section 363(2) of the Insolvency Act 1986 not Section 14 of the TLATA. The property was in the sole name of H and was not held under a trust of land. Even if the property had been held under a trust of land the application should have been made under Section 335A of the Insolvency Act 1986 as opposed to Section 14 of the TLATA. The failure to state the correct jurisdictional basis for the application was not a sufficient basis to allow the appeal.

## PROPERTY

### **Akhtar and another v Arif ChD (Stuart Isaacs QC). Unreported, 25 October 2006.**

A property was held in the joint names of A and B. B brought proceedings seeking an order that the property be sold or that it be vested in his sole name. Separate proceedings were commenced by A seeking a declaration that the property was held on trust for C. The claims were joined. At trial it was held that B had purchased his interest in the property from A at full value and that contrary to A's allegations there was nothing

to support the creation of a constructive trust in favour of C. A held a half-interest in the property that had not been relinquished at any time since B acquired an interest in the property. As a result the beneficial ownership of the property was split equally between A and B. Further submissions were necessary to determine whether there should be an order for sale in the circumstances.

### **[Stuart Isaacs QC]**

## TALKS AND SEMINARS

Richard Sheldon QC will be speaking at the Jordan's Insolvency Conference on 29 November 2006, which is to be held at the Copthorne Tara Hotel, Kensington. Richard's talk is entitled, "Insolvency Litigation Update".

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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