

# 3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 12 No 4 October 2006

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On 11 October 2006, the House of Lords gave judgment in the latest of the T&N saga. Their Lordships reversed the Court of Appeal, and held that priority pursuant to section 19(5) of the Insolvency Act 1986 should not be given in the administration of T&N Ltd to payments to claims handlers made by insurers acting under the claims handling rights conferred by an asbestos liability policy. Lord Hoffman, with whom the other members of the House of Lords agreed, held that the provisions of sections 19(4) and 19(5) of the Act gave the administrators the power (subject to the supervision of the Court), to decide what expenditure is necessary for the purposes of the administration and should therefore receive priority. There was no reason to extend that priority to expenditure that neither the administrators nor the Court had specifically approved. Gabriel Moss Q.C. acted for the administrators of the company, the successful Appellants.

This edition of the Digest was compiled by Hannah Thornley.

**Marcus Haywood**

## GENERAL NEWS

### *Insolvency Appeals*

As from 2 October 2006 there is no longer any automatic appeal from the decision of a County Court (whether made by a District Judge or a Circuit Judge) or of a Registrar of the High Court in insolvency proceedings. Paragraph 17.6 of the Practice Direction on Insolvency Proceedings has been replaced and now provides that "A first appeal is subject to the permission requirement in CPR Part 52, rule 3". This means that permission to appeal is now necessary. The time limit for filing an appellant's notice is 21 days, which is also now in line with the recent amendment of Part 52.

### *Insolvency Statistics*

The insolvency statistics for the second quarter of 2006 were as

follows:

**(1) Company Liquidations** There were 3,265 liquidations in England and Wales in the second quarter of 2006 on a seasonally adjusted basis. This was a decrease of 4.9% on the previous quarter and a decrease of 3.3% on the same period a year ago. The figures were made up of:

- 1,226 compulsory liquidations, a decrease of 13.7% on the previous quarter and a decrease of 7.4% on the corresponding quarter of the previous year;
- 2,038 creditors' voluntary liquidations, an increase of 1.4% on the previous quarter and a decrease of 0.6% on the corresponding quarter of the previous year.

0.7% of active companies went into liquidation in the twelve months ended Q2 2006, the same as the

previous quarter and the same as the corresponding quarter of 2005.

## (2) Individual Insolvencies

There were 26,021 individual insolvencies in England and Wales in the second quarter of 2006 on a seasonally adjusted basis. This was an increase of 10.0% on the previous quarter and an increase of 66.3% on the same period a year ago. The figure was made up of 14,915 bankruptcies, a decrease of 3.3% on the previous quarter and an increase of 32.5% on the corresponding quarter of the previous year, and 11,105 Individual Voluntary Arrangements (IVAs), an increase of 34.9% on the previous quarter and an increase of 153.2% on the corresponding quarter of the previous year.

For further information, please see the Insolvency Services website at: <http://www.insolvency.gov.uk/otherinformation/statistics/200608/index.htm>

## CIVIL PROCEDURE

**National Westminster Bank PLC v Rabobank Nederland Queen's Bench Division (Commercial Court) (Simon J) [2006] EWHC 2332 (Comm).**

Legal advice privilege applies

only to communications passing between a client and its legal advisers. Accordingly, documents passing between a company's employees, which are not lawyer-client communications, are not covered by the privilege, even if created for the purpose of enabling the company's in-house legal department to prepare a report designed to provide the company with legal advice. The Court will not exercise its discretion to inspect documents in respect of which a party claims privilege unless there is credible evidence that its legal advisers have either misunderstood their duty or are not to be trusted and where there is no reasonably practicable alternative.

**[Mark Phillips QC, Ben Valentin, Tom Smith]**

## CONTRACT

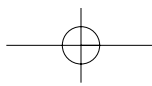
**BCM Group PLC v Visualmark Ltd & Anor [2006] EWHC 1831, Queen's Bench Division (Commercial Court) (Irwin J)**

Amongst other preliminary issues, the Court was asked to consider a restraint of trade clause in an agency agreement. The interpretation of the agreement between the parties was governed by the usual principles in *Investors Compensation Scheme Ltd v West Bromwich*

*Building Society* [1998] 1 WLR 896. If the clause could be shown to be reasonable, then it could be enforced. The Court would, however, approach that question with great care. Two relevant policy considerations must be taken into account: (i) the fundamental policy that the law should not act in restraint of trade unless it is fully justified; and (ii) that fact that such clauses represent a temptation on the part of employers to include very wide powers restricting employees' activities and then to use their financial and legal muscle to fight the issue out afterwards, hoping to retain as much of an advantage as possible from such a clause. The Court should take into account the connection between the individual who is sought to be restrained and the ambit of the restraint. In the absence of authority on the point, and considering it from first principles, it was very unlikely that an agent should have more onerous restrictive covenants sustainable against him or her than in the case of an employee. On the facts the clause was unenforceable.

**Nearfield Limited v (1) Lincoln Nominees Ltd (2) Lincoln Trust Company (Jersey) Ltd [2006] EWHC 2421 (Ch) (Peter Smith J)**

C sought to enforce a



particular clause of a joint venture agreement (“JVA”), which provided that D2 would procure the repayment of a £3 million loan together with all outstanding interest thereon on written demand by C. C contended that the word “procure” imposed an obligation upon D2 to see to it that D1 repaid the £3 million together with outstanding interest on written demand by C and that in the event of a failure by D1 to make the payment it was liable to pay damages equal to the amount payable but not repaid by D1. D2 submitted that the clause did no more than place an administrative and ministerial function upon it in keeping both with its facilitative and non-participatory role in the joint venture and in keeping with its other administrative obligations under the agreement. It was held that the normal meaning of the word procure was to “see to it”. Therefore, a person agreeing to “procure” that someone else performs a contractual obligation first, is required to attempt to procure that that person complies with the obligation and in the event that he fails to comply to pay damages calculated by the amount that ought to have been paid by the third party: *Barnicoat et al v Knights et al* [2004] 2 BCLC 464 and para 1-004 of

*Andrews & Millett “Guarantees”* (4th ed) applied. There was nothing in this JVA to displace the conclusion that “procure” meant “see to it”. Therefore, it was held that D2 was liable to procure that D1 repaid the loan liability to N.

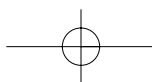
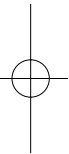
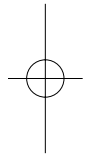
**West Bromwich Albion Football Club Limited v Mohamed El-Safty [2006] EWCA Civ 1299 CA (Mummery LJ, Rix LJ, Peter Smith J)**

A former premier league football club (“C”) sued a consultant orthopaedic surgeon specialising in sports injuries (“D”) on the basis that he owed duties to it in both contract and tort and was in breach of such duties by advising C negligently about the injury of one of C’s players, Michael Appleton (“A”). C claimed millions of pounds in damages for the loss of the value of A’s contract, the cost of replacing him and lost wages. The Court considered the following issues (1) Whether a contract existed between C and D. The Court held that the principle of intention to create legal relations was an inappropriate concept to answer that question in the context of the provision of private medical healthcare. Instead, the test of necessity should be used in order to determine whether

or not a contract can be implied in such a situation: *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 applied. On the facts it was not necessary to imply a contract.

(2) Whether D owed a duty of care to C not to cause it financial loss. The Court held that the necessary elements for liability were not satisfied. There was no assumption of responsibility by D to advise C. The relationship was quite unlike the typical case where an adviser knows that his advice will be relied on by the third parties with relevant financial interests. The immediate interest in this case was medical, not financial. C had an interest principally as a good employer and not as an investor in player contracts. The dominant relationship was that of doctor and patient and the dominant context was A’s health, not C’s financial security. Further, it would not have been fair, just and equitable to impose liability for financial loss on D in favour of C. If C had wanted D’s advice for the purposes of its own interests, it could have made that plain to D.

(3) Where the relevant insurance obligations for such losses naturally lay. The Court held that whereas insurance against liability to patients for the consequences of negligent medical advice or



treatment would naturally lie with treating doctors, insurance against financial loss arising from the ill-health of employees, even where that is increased or exacerbated by third parties, naturally lies with their employers.

## EVIDENCE

### **Whitehead Mann Ltd v Cheverny Consulting Ltd [2006] EWCA Civ 1303 (CA Civ Div) (Sir Andrew Morritt C, Carnwath LJ, Moses LJ)**

The appellant "A" appealed against the decision of Mr Nicholas Davidson QC sitting as a deputy High Court Judge of the Chancery Division that the terms of a consultancy agreement had been varied by a side letter. It was contended that the Judge's conclusion could not stand, as he had placed substantial reliance on the written witness statement of a particular witness ("R"), which that witness himself had materially qualified in his oral evidence. The Court held that there was no doubt that where one party had so qualified and departed from parts of his witness statement in his oral evidence, such qualification and departure would deprive those parts of any evidential value. It was not open to the Judge to put any weight on those parts

unless he explained why, notwithstanding all the qualifications and withdrawals, he considered that he could. The Judge had made no attempt to do so. It followed that the conclusions of the Judge based on those paragraphs could not stand unless they were justified by other evidence. It was not possible to infer, from an objective assessment of the probabilities, that both parties agreed that all agreements should take effect once some of them had been signed. The Judge regarded R's evidence as central to his conclusions and the Court of Appeal could not say what conclusion the Judge would have come to had he not wrongly relied on the evidence of R. Accordingly, there had to be a retrial to determine what contracts had been concluded and when.

## INSOLVENCY - CORPORATE

### **Freakley & Ors v Centre Reinsurance International Co & Ors [2006] UKHL 45 HL (Lord Hoffmann, Lord Hope of Craighead, Lord Phillips of Worth Matravers, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood)**

The appellant administrators appealed against the decision of the Court of Appeal, in respect of the priority to be

given in an administration to payments to claims handlers by insurers acting under the claims handling rights conferred by an asbestos liability policy, following the occurrence of an insolvency event. The issue in dispute was whether or not such payments should properly be treated as liabilities incurred by the administrators in carrying out their functions for the purposes of section 19(5) of the Insolvency Act 1986 ("the 1986 Act"). The purpose of administration under the Act is to impose a moratorium in order to find a way of saving the business of a company or realising the assets in order to achieve better results than in a liquidation. Administration and the moratorium were not intended to alter substantive contractual rights or priorities more than was necessary to enable the purpose of administration to be achieved. The provisions of s.19(4) and s.19(5) of the Act give the administrator the power (subject to the supervision of the Court), to decide what expenditure is necessary for the purposes of the administration and should therefore receive priority. There was no reason to extend that priority to expenditure that neither the administrator nor the Court had specifically approved. Therefore, the appeal was

allowed and the decision of Blackburne J at first instance was re-instated.

**[Gabriel Moss Q.C.]**

**Caring Together Limited (In Liquidation) v (1) Catherine Anne Bauso, (2) Kenneth Neil Bauso, (3) Fundraising Initiatives Limited, unrep. Briggs J, 13 July 2006**

C applied to continue an international freezing order with a financial limit of £11m over the assets of D1 and D2, which had been granted without notice by Hart J on 12 April 2006. D1 was the sole director of C, which was owned by a registered charity. The issues were as follows: first, whether the materials adduced by C, disclosed a good arguable case against either D1 or D2; secondly, whether those materials disclosed a real risk that either D1 or D2 would dissipate their assets prior to trial; thirdly, whether there was a sufficiently serious non-disclosure on 12 April 2006 or thereafter to warrant the discharge of Hart J's order and, if so, the refusal of further relief; fourthly, whether the application was an abuse of process, it having being alleged on the grounds that the true intention of the applicant was to carry out a process of investigating D1 and D2's assets rather than freezing them; and fifthly, whether in any event in the

Court's discretion a freezing order should be made over until trial (that issue turning essentially on an allegation of delay). It was held that C had a good arguable case against D1 for breach of fiduciary duty and that D2 had dishonestly assisted D1 in the breach of fiduciary duty.

There was a real risk that D1 and D2 would dissipate their assets. Therefore, the freezing injunction was continued until trial.

**[Stuart Isaacs QC and Lexa Hilliard]**

**HM Revenue & Customs v (1) Clayton Egleton, (2) Trade Eazy Limited, (3) Shaheed Vali, (4) Frakhameed Rahman [2006] EWHC 2312 (Ch) (Briggs J)**

HM Revenue and Customs ("A") applied to continue certain freezing injunctions against the respondents ("Rs"). A's case was that Rs were improperly implicated in a large scale VAT missing trader and/or carousel fraud along with another company ("C&E"). A had presented a petition for the winding up of C & E based upon unpaid VAT of over £35 million. A had obtained freezing injunctions against the respondents on a without notice application in anticipation of the presentation of the petition. This was on the basis that Rs had all been improperly

implicated in the fraud with the consequence that C & E had substantial claims against them which would be likely to be pursued by a liquidator of C & E. The liquidator would also have his own claims against Rs under statute if C & E was ordered to be wound up, in particular pursuant to s.213 of the Insolvency Act 1986. A did not allege that it had any claims of its own against any of the respondents, and although a cross-undertaking in damages was given, A did not propose to commence any proceedings against Rs. It was submitted on behalf of Rs that the freezing injunctions had been made without jurisdiction, or ought not to have been made as a matter of discretion. This was because (i) A was not pursuing any cause of action for a money judgment for the effective enforcement of which a freezing order would preserve a fund and (ii) Rs were not alleged to hold or to have custody over any assets belonging to C & E. The Court held that there was no reason why the grant of appropriate interim relief, including if necessary orders freezing the assets of the company itself in order to prevent dissipation, should not in a proper case be made so as to ensure the effective enforcement of any order which might be made by the

Court on the hearing of the winding up petition. It is also well established that a freezing injunction may also be made against persons in relation to whom a claimant asserts no cause of action and seeks no money judgment, but in relation to whom there is an arguable case that assets held in their name or under their control are in truth beneficially owned by the defendant against whom the claim was made: *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 and *C Inc v L* [2001] 2 Lloyds Law Reports 459 applied. The jurisdictional borderline for the grant of freezing orders against third parties is not strictly confined by the *Chabra* requirement to show an arguable case that the third party already has or controls assets belonging to the defendant. The Court had jurisdiction to make a freezing order against a third party as the potential debtor of a company against which the claimant had a cause of action since enforcement of a judgment against the company might lead to its liquidation and an action by the liquidator against the third party. As a matter of discretion the Court would only continue the freezing orders until a liquidator had the opportunity to consider taking proceedings and himself apply for freezing

orders. If freezing orders were to be obtained against potential judgment debtors of the company pending the making of a winding-up order, it should be a provisional liquidator rather than a petitioning creditor who sought and obtained them.

**INSOLVENCY - PERSONAL**  
**Nicholls v Lan [2006] EWHC 1255 Ch (Mr Paul Morgan QC sitting as a Deputy Judge of the High Court)**

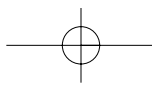
At first instance, the district judge had found that there were exceptional circumstances pursuant to section 335A of the Insolvency Act 1985 ("the Act") but had nevertheless made an order for possession and sale of the jointly owned home of the bankrupt's wife in any event. It was submitted on behalf of the wife that the district judge had given too much weight to the interests of the creditors as there was no evidence as to the identity of the creditors or the amount of their individual debts. On appeal, it was held that although the interests of creditors and the interests of the bankrupt's spouse must be balanced, each of those interests has a different character or quality. It is taken to be almost axiomatic that what the creditors want is to be paid their money and they

want to be paid sooner rather than later. In view of the normal approach of the Court to the interests of creditors, it is not necessary for a Trustee to give very much by way of positive evidence as to the interests of the creditors. In particular, the interests of creditors are not to be dismissed as having no weight in a case where there is little or no evidence as to their concerns. It may however be open to a party to investigate the circumstances of creditors with a view to persuading the judge, as part of the balancing exercise, to give less than the conventional weight to the interests of creditors.

**PROPERTY**

**Peaceform Limited v. (1) Gordon Clifford Cussens, (2) Patricia Cussens, (3) Roy Sydney Greengrass, 16 October 2006 (Mr Stuart Isaacs QC (Sitting As A Deputy Judge Of The High Court))**

C was the tenant of a property under a 25 year lease. By clause 11.1 of the lease, the Claimant was given the option to buy the freehold reversion of the premises. By a letter dated 27 August 2003 from the Claimant's then solicitors to the Defendants ("the Notice"), the Claimant



exercised or purported to exercise its option to buy the freehold in accordance with clause 11.1 of the lease. This was the trial of a preliminary issue of whether or not the Notice validly exercised that option. Applying *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, the question was whether the Notice was sufficiently clear and unambiguous to have left a reasonable recipient, with knowledge of the terms of the lease and, in particular clause 11, in no doubt as to the terms of the Notice. On the facts, the letter dated 27 August 2003 did not validly exercise the option to buy the freehold in accordance with clause 11.1 of the lease. *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 and *York v Casey* [1998] 2 EGLR 25 applied.

**[Stuart Isaacs QC]**

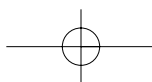
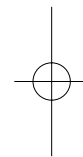
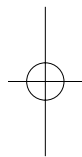
## TRUSTS

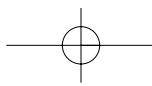
### **In The Matter Of Horley Town Football Club Sub Nom (1) Howard Frederick Hunt (2) Victor Clyde Barfoot V Graham McLaren & 5 Ors [2006] EWHC 2386 (Ch) (Lawrence Collins J)**

The Claimants (“Cs”) were the present trustees of Horley Football Club (“the Club”). Cs sought the directions of the Court with regard to

certain questions concerning the basis on which they held the assets vested in them as trustees of the Club. The Club is an unincorporated association which is not a legal person and is not an entity capable of holding property. In 1948 the President of the Club had settled some land on trust to secure it a permanent ground. Notwithstanding the use of the word “permanent” in the recitals, the trust deed defined a perpetuity period. The deed was supplemental to a conveyance of land to the original trustees on trust for sale. The statutory power of sale of trustees was prima facie not limited by perpetuity. The land was sold in May 2002 to a developer for almost £4m and the proceeds were used by the trustees to acquire another site and construct a club house and ancillary facilities. Questions arose as to the validity of the underlying trust and, on the assumption that the trust was valid, the proper interpretation of the club rules. The general rule is that a gift on trust must have a cestui que trust and must be for the benefit of individuals, unless charitable. It must have a definite object, and there must be an ascertainable beneficiary. The law does not regard the promotion of any particular sport, for its own sake, as charitable, therefore

gifts to unincorporated sporting associations are subject to: (i) the rule against remoteness of vesting, (ii) the beneficiary principle and (iii) the general principle of trust law that the object of the trust must be sufficiently certain. The deed in this case was construed as a “contract-holding” gift to the Club and its members for the time being within the second category of gifts to unincorporated associations set out in *Neville Estates Ltd v Madden* [1962] Ch 832, in that it was a gift to the existing members but subject to their respective contractual rights and liabilities towards one another as members of the association. In such a case each member cannot sever his share and it will accrue to the other members on the death or resignation of the existing member, even though such members include persons who became members after the gift took effect. If the gift were construed in the way set out in the second category, perpetuity was not a problem because the gift to the members was not contingent. Their interests vested immediately and devolved with the other Club property pursuant to the Club rules. The Court should take a broad approach to position of members and the interpretation of the Club





rules by applying fairness and common sense: Re GKN Bolts & Nuts Ltd etc Works Sports and Social Club [1982] 1 WLR 774 applied. On the facts, members could unanimously or by AGM call for the assets to be transferred. Adult and senior members would be entitled to share in a distribution on a per capita basis.

### TALKS AND SEMINARS

At the recent INSOL Europe Annual conference held in Bucharest between 28 September and 1 October 2006, David Marks delivered a paper entitled: "Reforms of the 2nd EC Directive on Company law, Instruments of Creditor Protection and Development relating to the transfer of a Company's Registered Office".

#### [David Marks]

William Trower QC sat on the panel at a Chancery Bar Association seminar on Private Examinations which took place on 9 October 2006 in the Great Hall, Lincolns Inn. Mr Justice Lightman chaired the seminar.

#### [William Trower Q.C.]

### PUBLICATIONS

EU Banking and Insurance Insolvency edited by Gabriel Moss Q.C. and Professor Bob Wessels was published earlier

this year by Oxford University Press. The work provides detailed analysis of the EU Directives on 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 Q.C., Professor Ian Fletcher, Tom Smith, Marcus Haywood and Cecile Dupoux. A special 20% discount is available on all orders by e-mailing [gabrielmoss@southsquare.com](mailto:gabrielmoss@southsquare.com)

A special discount is also available on orders of a new work by Getzler and Payne: Company Charges. Gabriel Moss QC wrote the first chapter of this work and can be contacted on the email address above for those who wish to order a copy.

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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