

# 3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 12 No 8 September 2006

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Chambers is delighted to announce that David Alexander, Antony Zacaroli and Stephen Atherton will be appointed Queen's Counsel at a ceremony in Westminster Hall on 16 October 2006.

This edition of the Digest was compiled by Simon Fuller.

**Stephen Robins**

## ARBITRATION

### **Maccaba v Lichtenstein**

#### **Queen's Bench Division (Davis J).**

#### **[2006] EWHC 1901 (QB).**

Mr Maccaba ("M") applied to the court for recognition of an arbitration agreement concluded in a court in Israel ("the Beth Din") ousting Dayan Lichtenstein ("L") from enforcing his rights under an English consent order relating to interest on costs due from M to L after unsuccessful litigation. M and L were both Orthodox Jews. Following the consent order, M had raised the issue that an Orthodox Jew could not agree to make a payment of interest to another Orthodox Jew and challenged not only the award of interest but also the entirety of the consent order as being vitiated by illegality. The Supreme Rabbinical Court in Israel granted an anti-suit injunction preventing L from enforcement of the consent order in England. L disputed the jurisdiction of the rabbinical courts in Israel to deal with the English court order. M contended that exchanges between himself and L at the Beth Din constituted an agreement for arbitration, in that it had been agreed that all matters would be remitted to a Beth Din and sought a stay on all proceedings in England on that basis. M also appealed against the decision of an English judge who had refused to set aside service of

a statutory demand on M, served by those acting on behalf of L by way of partial enforcement of the English consent order. The Court rejected all of M's arguments. For there to be an arbitration agreement, there had to be an agreement evidenced in writing between the two prospective parties to the arbitration. In the instant case, no such enforceable agreement as argued for by the applicant had been proved on the evidence placed before the court. In the circumstances, the judge, having found that the enforcement of an English consent order could not be validly attacked by a subsequent legal challenge raised in an entirely separate jurisdiction, had been entitled to refuse to set aside the statutory demand. Accordingly, M's appeal against that decision was dismissed.

**[Felicity Toubé]**

## CIVIL PROCEDURE

### **National Westminster Bank Plc v Rabobank Nederland**

#### **QBD (Comm) (Colman J).**

#### **[2006] EWHC 2108 (Comm).**

R sought permission to rely on a statement of case which included a number of new allegations of misrepresentation by way of substitution for and partial amendment of its defence and counterclaim against N. The Court held that it

was not appropriate to allow the introduction of allegations to the extent they did not involve a substantially co-extensive factual investigation because there was a risk it would disrupt the trial, which was imminent. The allegations could have been introduced at an earlier stage and it would be contrary to the overriding objective to introduce them at such a late stage. It was appropriate to allow the introduction of other allegations of misrepresentation that were factually co-extensive to the existing allegations, subject to the condition that R file supplemental evidence in support.

**[Antony Zacaroli]**

**Vaughan v Jones & Ors**  
**Ch D (David Richards J).**  
**[2006] EWHC 2123 (Ch).**

J was made bankrupt. The debts and expenses of the bankruptcy totalled £61,000. F purchased an option to buy land from J for the same amount. The proceeds of the option were used by J to obtain an annulment order. The terms of the option required F to loan the further sum of £30,000 to J for the purposes of commencing litigation against V. The litigation was unsuccessful and V sought a third party costs order against F pursuant to Rule 48.2 of the CPR. The Court refused to make the order. The loan was a condition imposed by J as part of the option to purchase the land. F was not involved in the litigation and had no interest in its outcome. F did not act with an ulterior motive but merely to secure the purchase of J's land. If

F had acted with an ulterior motive then a loan to support litigation may have been sufficient to justify a costs order; *Petroleo Brasileiro SA v Petromec Inc* [2005] EWHC 2430 (Comm) considered.

**Habib Bank Ltd v Central Bank of Sudan**

**QBD (Comm) (Field J).**  
**[2006] EWHC 1767 (Comm).**

Where the Court is considering an alternative method of service abroad within Rule 6.24 of the CPR, it is not necessary to adopt a form of service that is recognised within the foreign jurisdiction provided it does not constitute an illegal act under local law.

**Fairwood Ltd v Champagne Cattier SA**

**Court of Appeal (Tuckey LJ, Moore-Bick LJ, Richards LJ).**  
**[2006] EWCA Civ 1105.**

It was appropriate to order a retrial in circumstances where the trial judge had wrongly rejected the evidence of an expert which was central to the issue of whether the defendant had provided champagne to the claimant that was of a satisfactory quality pursuant to section 14(2) of the Sale of Goods Act 1979.

**COMPANY**

**Airey v Cordell & Ors**

**Ch D (Warren J). Unreported, 24 August 2006.**

When determining whether to give a minority shareholder permission to commence derivative proceedings on behalf of a company, the Court should consider the view of a hypothetical and independent board or direc-

tors. It is not necessary for the Court to be satisfied that the hypothetical board would approve the derivative action but merely that it could reasonably take the decision to approve the proceedings. It was also relevant to take into account whether there was an alternative remedy available to the minority shareholder. On the facts, it was appropriate to allow the shareholder a period of time in order to determine whether a settlement could be reached in the derivative proceedings relating to an alleged breach of fiduciary duty by the directors of the company.

**Irvine & Anor v Irvine & Anor**

**Ch D (Blackburne J).**  
**[2006] EWHC 1875 (Ch).**

P successfully brought proceedings against O establishing unfair prejudice contrary to s.459 CA 1985. The Court ordered O to purchase P's interest in the company (which traded as an insurance brokerage) and held a separate valuation hearing. P owned 49.6% of the shareholding and O owned the balance. P maintained that the company should be valued on the basis of a multiplier relating to maintainable gross commission and that his shareholding should not be discounted as a minority interest. It was held that, although it was usual for a company trading as an insurance brokerage to be valued on the basis of maintainable gross commission alone, it was more appropriate in the instant case to apply a method that also took into

account a multiplier relating to profit before tax. P's shareholding was substantial but gave no more control than an interest of 30% and had to be discounted on the basis that it constituted a minority interest.

## COMPETITION

### **Floe Telecom Limited (in administration) v Office of Communications**

#### **Competition Appeal Tribunal (Marion Simmons QC as Chairman). [2006] CAT 18.**

F appealed against Ofcom's decision that Vodafone had not abused a dominant position contrary to Article 82 of the EC Treaty by disconnecting services that it provided to F for use in GSM gateways. The tribunal held that, although the reasons provided in support of Ofcom's decision were inadequate in a number of respects, in particular its analysis of the regulatory framework, this was not sufficient to vitiate the overall finding that Vodafone had not abused a dominant position.

### **London Metal Exchange v Office of Fair Trading**

#### **Competition Appeal Tribunal (Marion Simmons QC as Chairman). [2006] CAT 19.**

LME applied for an order that the OFT pay its costs of an appeal against an interim measures direction made by the OFT. The tribunal held that it was appropriate for OFT to pay LME's costs of the appeal on the basis that its investigation was flawed and that the interim measures direction, which had later been withdrawn by OFT, was ill-founded.

### **Celesio AG v Office of Fair Trading**

#### **Competition Appeal Tribunal (Marion Simmons QC as Chairman). [2006] CAT 20.**

The OFT applied for a costs order against Celesio following an unsuccessful attempt to challenge the OFT's decision to allow the merger between Boots and Unichem subject to certain undertakings. The OFT maintained that the challenge had been made out of commercial interest and that Celesio, as a well resourced litigant, should be made to pay the substantial costs that had been incurred. The tribunal held that it was not appropriate to make an order for costs against Celesio. There was no general presumption that a successful litigant before the Competition Appeal Tribunal would be entitled to their costs. On the facts, the great extent to which the OFT had to rely on a lengthy witness statement prepared following the commencement of the appeal in order to elucidate its reasons for the decision was particularly significant. The fact that the appellant acted for reasons of commercial interest to challenge the activities of a competitor was not a relevant consideration.

## CONFLICT OF LAWS

### **Orams & Anor v Apostolides**

#### **QBD (Jack J). [2006] EWHC 2226 (QB).**

M obtained default judgment against O in Cyprus relating to O's trespass of land located in the Turkish Republic of Northern Cyprus ("TRNC"). The judgment of the Cypriot

Court was registered and declared enforceable in England pursuant to EC Regulation 44/2001 ("the Regulation"). On appeal the Court held that the law of the European Community did not apply to disputes relating to territory in TRNC due to Article 1 of Protocol 10 to the Treaty of Accession which suspended the operation of EC law in that region. It followed that the Regulation did not apply and could not be used to seek enforcement of the judgment.

## CONTRACT

### **Maggs v Marsh & Anor** **Court of Appeal (Smith LJ, Moses LJ, Hallett LJ).**

When construing the meaning of an agreement which is partly written and partly oral, the trial judge is permitted to consider the subsequent conduct of the parties. The construction of an oral agreement is a question of fact and subsequent conduct may help to determine the parties' original intentions. On the facts the judge had wrongly excluded evidence relating to interim invoices that were issued after the contract was entered. The evidence was likely to have had an impact on the judge's findings as to the credibility of one of the parties, which went to the heart of the case. As a result it was appropriate to order a retrial.

## DISQUALIFICATION

### **Re Mea Corporation Ltd** **Ch D (Companies Court)** **(David Richards J).**

#### **[2006] EWHC 2110 (Ch).**

Where a director deliberately misled the board of directors of T for a sustained period in

relation to a substantial claim against the company which he settled for the sum of US\$18m, and where he permitted the accounts to be materially misleading by failing to reflect the claim, the appropriate starting point for a disqualification order was 10 to 15 years. However, the period of disqualification was reduced to nine years and six months to take account of the fact that T did not resist the application and the fact that he had not been involved in the management of a company since the collapse of T in 1999.

## **INSOLVENCY – CORPORATE**

### **Chirkinian v Larcom Trustees Ltd**

**Ch D (Michael Furness QC sitting as a Deputy Judge of the High Court). [2006] EWHC 1917 (Ch).**

X Ltd established an employee benefit trust in respect of which L was the trustee. X Ltd made substantial payments to the trust and, in turn, L made substantial interest-free loans to C who was the sole director and shareholder of X Ltd. A winding up order was made against X Ltd. L demanded full repayment of the loans from C. When C failed to make repayment L served him with a statutory demand. C applied to set aside the demand. The application was dismissed and C appealed. The Court held that there were serious grounds to believe that a properly advised trustee in the position of L would not have called in the funds. L had only considered the interests of the liquidation and had not considered the

interests of the beneficiaries of the trust for whose benefit the fund had been established. The loan should only have been recalled if it was in the interests of the debtor beneficiary or the other beneficiaries to do so. There was no evidence that a claim had been made by the liquidator in relation to the trust or that any such claim was likely to be made. Further, L's decision had taken into account an improper consideration, namely the interests of the liquidator, which made it appropriate to set aside the demand.

### **Jacob & Anor v UIC Insurance Company Limited & Anor**

**Ch D (Companies Registry) (Mr Registrar Nicholls). Unreported, 19 May 2006**

The First Applicant ("A1") and the Second Applicant ("A2") made an application as the Provisional Liquidators of the First Respondent ("UIC") seeking an order of the Court for the fixing of their remuneration for the period from 22 September 2003 to 26 September 2004 ("the Relevant Period") and to approve the payments on account of such remuneration in respect of the Relevant Period. The Second Respondent opposed the application and was critical of the management and efficiency of the UIC estate. An assessor had been appointed on 25 July 2005 in order to assist the Court with the application and to provide a report to the Court. The Registrar rejected the contention of the Second Respondent that the time

properly given by A1 and A2 to the affairs of UIC within the meaning of Rule 4.30(2)(a) marked an "upper limit" on the level of remuneration which the Court might fix, and that the factors set out in Rules 4.30(2)(b)-(e) could thus serve only to reduce the amount to be fixed. Although the potential outcome for creditors of the provisional liquidation was likely to be significantly greater than the expectations that existed when UIC was placed into provisional liquidation in 1996, such an outcome would not change the overall concerns regarding the effectiveness of the tasks carried out during the relevant period. The Registrar directed that deductions which amounted to an overall reduction in the sum claimed of just less than 20%. Part of the deductions included remuneration charged in respect of consultants employed by A1 and A2, and the Registrar purported to re-open Court Orders fixing the remuneration of A1 and A2 in previous years in this respect. The decision is subject to appeal.

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

### **LCP Retail Ltd v Segal Ch D (Companies Court) (David Richards J). [2006] EWHC 2087 (Ch).**

A landlord ("L") executed a warrant for distress against its tenant ("P Ltd"). A winding-up order was made against P Ltd. L requested the liquidator to hand over the proceeds of property which had been located at the premises. The

liquidator sought directions from the Court. The Court held that L's failure to specify the right to levy distress as a form of security in L's proof of debt constituted a surrender of any such rights pursuant to rule 4.96(1) IR 1986. The Court was not satisfied that the failure was inadvertent or the result of an honest mistake justifying relief under Rules 4.96(1) and (2), particularly given that L had written to P Ltd shortly before the winding-up order requesting that the company vacate and remove all goods from the premises.

**Re MG Rover Deutschland GmbH (in administration) Ch D (Birmingham District Registry) (HHJ Norris QC). Unreported, 10 August 2006.**

MG Rover Germany was one of eight national sales companies which distributed the vehicles produced by MG Rover Group. A short time after MG Rover Group entered administration each of the national sales companies also entered administration in England. The appointments constituted main proceedings within Article 3.1 of the EC Regulation. The Joint Administrators of MG Rover Germany convened a general meeting of creditors. A creditors committee was constituted but the meeting failed to approve a resolution as to the Joint Administrator's remuneration. The Düsseldorf Court subsequently appointed Mr P as a "preliminary administrator" of MG Rover Germany in an appointment that was considered to be outside the

scope of the EC Regulation. Mr P and the Joint Administrators attempted to negotiate a protocol governing the involvement of Mr P in the conduct of the company's affairs. A number of creditors requested that the Joint Administrators reduce the number of staff handling the appointment following the introduction of Mr P. Further meetings of the creditors failed to produce a resolution as to the remuneration of the Joint Administrators. The Düsseldorf Court then appointed Mr P as an insolvency administrator in secondary proceedings within the EC Regulation. Subsequently the Joint Administrators applied to the Court for an order that their remuneration be fixed on a time basis and in the amount of a specified sum. The creditors committee and Mr P sought an assessment of the fees by a registrar or district judge sitting with an assessor or costs judge. They also raised a number of objections to the sum claimed by the Joint Administrators. The Court held:

(1) It was not fair, just or appropriate to adjourn the assessment to come before a judge and an assessor. The contested issues related to the duplication of tasks by the Joint Administrators following the appointment of Mr P, as opposed to matters that are usually considered by an assessor such as the rates charged, the grade of person that was engaged, or whether the task was completed within a reasonable time. The evidence was complete and complied with the Practice Direction.

(2) It was appropriate to assess the remuneration on a time basis. The creditors had not rejected the approval of fees using this method.

(3) As to the reasonableness of the remuneration sought by the Joint Administrators:

(a) The Joint Administrators remained under a responsibility to the English Court for the administration following the appointment of Mr P. It was not permissible for the Joint Administrators to delegate their powers and responsibilities to Mr P and it was unrealistic to maintain that they should have reduced their input to one part-time member of staff thereafter. Any duplication of tasks was due to the decision of the creditors to appoint a preliminary administrator in Germany.

(b) The Joint Administrators were entitled to recover the costs of negotiating a protocol with Mr P to govern their relationship notwithstanding that they had failed to reach a final agreement, since the Joint Administrators were obliged to attempt to communicate and co-operate with Mr P.

(c) There should be a reduction to take account of the time spent by the Joint Administrators in opposing the opening of the secondary proceedings, the handling of certain proceeds of a bank account, and part of the time spent in relation to a claim against MG Rover Exports, as these steps were taken to protect the value of their statutory charge over the assets of the company rather than to benefit the creditors

of the company as a whole.

(d) The decision to install a new IFS system and steps taken towards the compromise of various claims were reasonable and reflected an acceptable use of the Joint Administrators commercial judgement.

(e) Overall, it was a large, complex and novel administration that was made more difficult by a large number of disaffected creditors. A substantial dividend was due to be received by the creditors and there was no reason for any substantial reduction to the Joint Administrator's remuneration and the remuneration was approved in the sum of in excess of 97% of that sought.

**[Stuart Isaacs QC, Hilary Stonefrost, Daniel Bayfield, Tom Smith]**

### **Re Territory Enterprises Ltd, *Bezant v Cork***

**Ch D (Companies Court) (Thomas Ivory QC sitting as a Deputy Judge of the High Court). Unreported, 3 August 2006.**

T entered liquidation and L was appointed as liquidator. After L had vacated office, a former employee of T ("B") applied for an order against L pursuant to s.212 IA 1986. L challenged B's right to make the application on the basis that B was not a creditor. It was held that B's sex discrimination claim against T had been settled, so B was no longer a creditor of T. As a result, B did not have standing to pursue L under s.212. Further, the claims that were advanced by B were inadequately particularised

and unsustainable making it appropriate to strike out the application.

## **INSOLVENCY – PERSONAL**

### **Gotham v Doodles**

**Court of Appeal (Sir Andrew Morritt C, Carnwarth LJ, Moses LJ). [2006] EWCA Civ 1080.**

In 1988 D was made bankrupt. In 1990 the Trustee in bankruptcy obtained a charge against D's interest in a property pursuant to s.313 IA 1986. In 2004 the Trustee applied for an order for sale and possession pursuant to s.335A IA 1986. D maintained that the application was statute barred pursuant to s.20(1) of the Limitation Act 1980. The Registrar disagreed but D was successful on appeal to a single judge on the basis that the order under s.313 created a charge and the right to receive the sum of money specified in the order had accrued at that date. The Trustee appealed to the Court of Appeal. The Court of Appeal held that the "right to receive" the amount specified in the order was a future right, as opposed to an existing right, and time did not start to run under the s.20(1) of the Limitation Act 1980 until the court made an order for sale of the property.

### **Smurthwaite v Simpson-Smith & Anor**

**Court of Appeal (Chadwick LJ, Longmore LJ, Jacob LJ). Unreported, 25 July 2006.**

In circumstances where a creditor had successfully challenged the validity of an

IVA on the basis of a material irregularity, the Court of Appeal upheld an order that the insolvency practitioner who acted as nominee pay 50% of the creditor's costs in respect of all issues on which the creditor had been successful. The challenge to the approval of the IVA was successful due to the insolvency practitioner's erroneous and determinative decision to admit the claim of the debtor's cohabitee as a creditor of the estate based on a beneficial interest in their joint property when, following the approval of the IVA, she remained free to rely upon her interest instead of proving as a creditor. The decision was so obviously wrong that the judge was entitled to form the view that it fell far below the standard expected of a reasonable insolvency practitioner when deciding the appropriate order as to costs. The creditor's cross appeal in relation to an unsuccessful application for disclosure was misconceived but, as it was clear that not all documents had been disclosed, the original costs order that was made against the creditor in respect of the unsuccessful application was set aside.

## **PROPERTY**

### **Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd**

**Ch D (Gabriel Moss QC sitting as a Deputy Judge of the High Court). Unreported, 4 September 2006.**

F redeveloped a single storey building into a three storey building with a pitched roof.

The owner of a neighbouring property ("T") commenced proceedings seeking a mandatory injunction to demolish a substantial part of F's building based on a violation of T's prescriptive right to light. It was held: (1) the dominant land owned by T had not acquired a right to light in respect of two entrance lobby windows because they had been blocked by internal panels such that there was no "user of the light" for the prescriptive period; *Smith v Baxter* [1900] 2 Ch 138 applied. Even if there was such a right, the erection of the new building did not cause a substantial injury or nuisance. Further, a mandatory injunction requiring the substantial demolition of the structure would have been wholly disproportionate. (2) There was a prescriptive right to light in respect of the windows in the basement staircase. Although the injury was sufficient to constitute a nuisance, it would in any event have been necessary to light the stairs by artificial light at all times for reasons of safety which made the complaint relatively trivial. T did not suffer any present harm from the reduction of light and had failed to apply for an interlocutory injunction at an earlier stage. In the circumstances damages were an adequate remedy; *Jaggard v Sawyer* [1995] 1 WLR 269 considered.

## SECURITIES

### **Bank of Scotland v Neath Port Talbot Borough Council Ch D (Richards J). Unreported, 11 August 2006.**

In the context of proceedings by the Bank as claimant seeking to enforce a fixed charge over plant for recycling waste situated on the Council's land at Neath Port Talbot, and where the Council continued to use the plant but had paid nothing to the Bank for the plant, and where trial of the dispute as between the Bank and the Council was to take place in November 2006, the Council applied to Court for an order for sale of the plant under Rule 25.1(1)(c)(v) of the CPR so the Council could start a new procurement process to appoint a new provider to bid to process the Council's waste.

David Richards J refused the initial application of the Council which was a proposal by the Council to sell or dispose of the plant to its creature company for an unspecified sum. David Richards J held the Court had no power to make any order which amounted in substance to little more than an extinction of the Bank's charges (if they were still extant) confining the Bank to a remedy in damages. David Richards J also refused a further application of the Council to dispose of the plant to its creature company for £2.7m to be paid into Court because such proposal would not test the price which the Council would, in fact, be prepared to bid.

During the hearing David Richards J suggested that the appointment of a court appointed officer might be considered. The Council on the last day of the hearing made an application for the appointment of a sales agent. David Richards J held that the appointment of a sales agent was appropriate and thus made the appointment to carry out a sale process of the plant pending trial with the sale proceeds to be held in Court. **[Adam Goodison]**

## TALKS AND SEMINARS

On 20 September 2006, William Trower QC addressed the International Association of Insurance Receivers' London market seminar on "Topical Legal Issues in Relation to Schemes of Arrangement and Part VII Transfers". William is due to address the Chancery Bar Association on 9 October in relation to Private Examinations. He is also due to speak at the Cameron McKenna LLP seminar on current issues in the schemes world on 2 November, and the Lawrence Graham 2006 insolvency conference on 13 November.

The annual Hawksmere conference on current issues in insolvency will be held on 5 October 2006. The speakers include Gabriel Moss QC, Christopher Brougham QC, Richard Sheldon QC, Professor Ian Fletcher, Stephen Atherton, Felicity Toubé, Daniel Bayfield, Tom Smith and Ron DeKoven.

At the C5 Advanced Insolvency Law and Practice Conference in London on 25 September, Dr Riz Mokal will be addressing the valuation of distressed companies for the purposes of schemes and voluntary arrangements. On 27 October, at the 36th Annual Workshop on Commercial & Consumer Law in Alberta, Canada, he will deliver a paper on the role of public interest in corporate insolvency law.

John Briggs is speaking to R3 in Cambridge on 2 October in relation to proceeds of crime and insolvency.

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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