

# 3-4 DIGEST



a monthly review of relevant news, cases and articles Vol 13 No 2 April 2007

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This month has seen what is believed to be the first case of its kind under the European Directive governing the insolvency of insurance undertakings. The Supreme Court of Gibraltar has followed the decision of the ECJ in Eurofoods and held that the appointment of a provisional liquidator of an insurance company subject to Gibraltar law constituted the opening of winding-up proceedings. Glen Davis is acting for the provisional liquidators.

On 2 March 2007, Mr Justice David Richards handed down his decision in *Exeter City Council v Bairstow & Others* (otherwise known as *Trident Fashions*). The Judge held that on the proper construction of r.2.67 of the Insolvency Rules 1986 non-domestic rates for retail premises occupied by a company whilst in administration rank as expenses of the administration. The Judge also held (obiter) that there was no basis for distinguishing the position in respect of non-domestic rates on unoccupied property. William Trower QC appeared on behalf of Exeter City Council.

Finally, we congratulate Ronald DeKoven, who has recently been inducted as an international fellow of the American College of Bankruptcy at a ceremony in Washington, DC.

This edition of the Digest was compiled by Hannah Thornley.

**Marcus Haywood**

## GENERAL NEWS

Part 36 of the Civil Procedure Rules has been entirely substituted by Civil Procedure (Amendment No.3) Rules 2006 (SI 2006 No.3435) r.7(1) and Sched.1. The new title of the part will be "Offers to Settle" and is supplemented by the Practice Direction with the same title. The texts of the new part and the practice direction will be contained in the 2007 edition of the White Book to be published on April 19, 2007 (and are presently reproduced at

pages 10-16 of Civil Procedure News, Issue 3, 2007). The new part applies to offers made to settle on or after 6 April 2007.

## COMMERCIAL LITIGATION

**Nomura International plc v Granada Group Limited Commercial Court (Cooke J), 23 March 2007**

The claimant, Nomura, was the defendant to claims by West LB

arising out of West LB's financing of the Box Clever group in 2000. It issued proceedings in turn against the defendant, Granada, seeking to recover all or part of such sums as it might be found liable to pay West LB. Its claim form asserted both contribution claims against Granada, and freestanding claims in contract and tort. At the date of issue, Nomura was unable to identify any specific wrongful acts committed by Granada. It accepted that it had issued for the purpose of protecting its freestanding claims from the accrual of limitation defences. Granada applied to strike out Nomura's claim form as an abuse of process. It relied on Nomura's inability to plead claims against Granada at issue, and until such time as West LB in turn pleaded claims against Nomura. Held, striking-out Nomura's claim: (1) To commence proceedings, a claimant must at issue be able to identify the essence of the tort or breach of contract complained of. If he is unable to do so, he commits an abuse of process by issuing sooner; (2) The pre-C.P.R. authorities on what counted for a sufficient general endorsement on a writ continue to be relevant post-C.P.R. Nomura's claim form failed to identify the specific acts or omissions relied on,

and it had failed to cure that defect subsequently by delivery of particulars of claim.

**[Andreas Gledhill]**

#### COMPETITION

Marion Simmons QC continues to sit as a member of the Competition Appeal Tribunal. Recent judgments include: *VIP Communications Limited (in administration) v Office of Communications* [2007] CAT 3; *Independent Water Company Ltd v Water Services Regulation Authority (formerly the Director General of Water Services)* [2007] CAT 6; *Makers UK Limited v Office of Fair Trading* [2007] CAT 11

**[Marion Simmons QC]**

#### CONFLICTS OF LAW

***IPOC International Growth Fund Limited v (1) OAO "CT-Mobile" and (2) LV Finance Group Limited Court of Appeal of Bermuda (Zacca P, Nazereth JA, Sir Murray Stuart-Smith JA), 23 March 2007***

IPOC appealed against an order whereby permanent anti-suit injunctions had been granted restraining IPOC from pursuing proceedings in the Courts of St Petersburg or elsewhere as against R1 and R2 in breach of certain arbitration clauses. The arbitration clauses provided for seats of arbitration in

Switzerland and Sweden respectively. Neither of the agreements (or arbitrations) were governed by Bermudian law. IPOC appealed on the basis inter alia that: (i) the Bermudian Court had no sufficient interest to grant the injunctions restraining it from pursuing the St Petersburg proceedings, enforcement of the arbitration clause being a matter for the supervisory courts of the seat of the arbitration or the forum in which the litigation was taking place; and (ii) it was wrong in principle to grant a blanket injunction in respect of any proceedings brought in breach of an arbitration clause. The Bermudian Court of Appeal held that: (i) a Court may issue an anti-suit injunction against a defendant on the basis of breach of an arbitration clause if that Court has in personam jurisdiction over the defendant. That is a necessary and sufficient condition, and no particular interest of the forum itself need be advanced by the grant of the injunction; and (ii) it was inappropriate to grant a wide anti-suit injunction preventing commencement of any proceedings in breach of the arbitration clauses, as opposed to the St Petersburg proceedings themselves. That aspect of the injunctions would be discharged in the

absence of any clear evidence of any other threatened proceedings.

**[Richard Hacker QC,  
Richard Fisher, Hannah  
Thornley]**

## **FINANCIAL SERVICES**

**Jersey Financial Services  
Commission v Alternate  
Insurance Services Limited  
Royal Court of Jersey  
(Commissioners Southwell  
QC and Jurats),  
16 February 2007**

On 16 February 2007, the Royal Court delivered its judgment in a ground-breaking action brought by the Jersey Financial Services Commission ("the JFSC") on behalf of investors for the recovery of losses suffered by those investors resulting from financial products purchased from a Jersey financial services company. The Commission commenced restitution proceedings against, amongst others, Alternate Insurance Services Limited (Alternate), for the benefit of certain investors. The application was made pursuant to Article 26 of the Financial Services (Jersey) Law 1998 which is in very similar terms to the old Section 6 of the English Financial Services Act 1986. The application sought relief against Alternate on the grounds that Alternate had been engaged in the making of recklessly

false and/or misleading statements which induced investors to enter into transactions relating to the purchase of certain financial products known as Traded Endowment Investment Portfolio Plans. In its judgment the Royal Court acceded to the JFSC's application against Alternate in respect of all but one of the investors whose cases were the subject of the application and awarded judgment in the JFSC's favour.

**[Tom Smith, Simon Fuller]**

## **GUARANTEES**

**Zenithoptimedia Ltd v Wall  
Group Ltd  
Queens Bench Division  
(Master Leslie),  
22 March 2007**

The Claimant applied for summary judgment on a guarantee. The Defendant had guaranteed the payment of liabilities of the principal debtor under a contract which was defined in the guarantee as "the contract with contract number 12345S dated on or about the date of this guarantee made between Powerhouse and the [the Claimant], entitled Letter of Agreement and Terms of Business Between [the Claimant] and Powerhouse." There was a contract dated on or about the date of the guarantee which was made between the Claimant and

Powerhouse and entitled Letter of Agreement and Terms of Business Between [the Claimant] and Powerhouse"; but the contract was not numbered 12345S. The Court held that there was no ambiguity in the guarantee, that the words "the contract with contract number 12345S" could be ignored, and granted summary judgment to the Claimant.

**[Barry Isaacs]**

## **INSOLVENCY - CORPORATE**

**Exeter City Council v (1)  
Vivian Murray Bairstow (2)  
James Patrick Martin (3)  
Trident Fashions Plc [2007]  
EWHC 400  
Chancery Division (David  
Richards J)**

The applicant, a local authority ("A"), applied for a declaration that non-domestic rates for retail premises occupied by the third Respondent company ("T") whilst it was in administration were payable as expenses of the administration. The Courts had not decided this issue since the introduction of the new rules for administrations contained in Schedule B1 of the Insolvency Act 1986 ("the 1986 Act"). None of the Respondents appeared. However, because the point in issue was one of general importance to local authorities and to companies

in administration, a special advocate was appointed by the Attorney General. It was held that: (i) Whether or not rates and other necessary disbursements were chargeable as an expense of an administration pursuant to paragraph 99 of Schedule B1 to the 1986 Act was a policy decision involving a balancing exercise of competing interests. That policy decision was not for the Courts to make, but was a decision for the rule-making authorities. By the adoption of the same language for r.2.67 as was used in r.4.218, that policy decision had been made. The effect of that policy decision was that non-domestic rates on occupied property should rank as expenses in an administration. The construction of r.4.218(1)(m) applied also to r.2.67(1)(f). (ii) The legal position in respect of non-domestic rates on unoccupied property was also a matter of general importance in administrations (although not specifically raised in this case). There was no basis for distinguishing the position in respect of non-domestic rates on occupied and unoccupied property. Therefore, unoccupied non-domestic property rates would also be payable under r.2.67(1)(f) as an expense of an administration.

**[William Trower QC]**

**Re Wright Consultancy Group Ltd  
Chancery Division (Lindsay J), 16 March 2007**

A winding up order was made against the Company on the basis of an undisputed debt. Three weeks later the shareholders of the company raised funds which they agreed to loan to the Company to enable it to pay the debt and costs of the petitioning creditor and the Official Receiver's costs of the winding up proceedings. The Company produced evidence that it would thereafter be solvent on a cash flow and balance sheet basis. Upon the application of the shareholders, the Court ordered an indefinite stay of the winding up proceedings.

**[Barry Isaacs]**

**Daniels v Deville  
Chancery Division (Master Jefferis), 30 March 2007**

Proceedings were brought by a number of claimants including a company which, after the proceedings were commenced, went into administration and then into liquidation. The directors of the company had instructed solicitors to act for the company and the solicitors had taken various steps in the proceedings after the company went in administration. The company's claims were struck

out on the basis that the solicitors had not had the authority of the administrators or the liquidators to act for the company. The solicitors were ordered personally to pay the defendants' costs of the company's claims on an indemnity basis.

**[Barry Isaacs]**

Professor Ian Fletcher:  
"Companies Act 2006:  
Reversal of Leyland Daf  
Ruling" (2006) 19 Insolvency  
Intelligence  
30- 31.

**[Professor Ian Fletcher]**

**INSOLVENCY - CROSS-BORDER**

**Eurolife Assurance  
(International) Limited  
Supreme Court of  
Gibraltar, 7 February 2007**

The appointment of provisional liquidators of an insolvent insurance undertaking constituted the opening of winding-up proceedings for the purposes of Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings, implemented in Gibraltar by the Insurers (Reorganisation and Winding Up) Act 2004. The notification to be sent by provisional liquidators to an

insurance creditor who is ordinarily resident in an EEA State pursuant to section 6 of the Reorganisation Act, implementing Articles 15 and 17 of the Reorganisation Directive, is to be translated and provided in the official language or one of the official languages of the EEA State in which the creditor has his normal place of residence or domicile. Certain provisions of the English Insurers Winding-Up Rules were applied as directions with appropriate modifications to supplement a lacuna in the Gibraltar procedure and facilitate the valuation of long-term business.

**[Glen Davis]**

Marion Simmons QC: "A New Insolvency Law in China" International Corporate Rescue, Volume 4, Issue 1 (2007)

**[Marion Simmons QC]**

## **INSOLVENCY - PERSONAL**

**Re Small (a bankrupt) (Registrar Derrett), 28 March 2007**

Mr Martin presented a bankruptcy petition against Mr Small, who then proposed a voluntary arrangement with his creditors. Mr Martin's solicitors wrote to the Court on the day of the hearing of the petition and asked for an

adjournment until after the proposal had been considered at a meeting of creditors. The petition was dismissed for non-attendance. Mr Martin then presented a second petition on the basis of the same debt, and Mr Small was adjudged bankrupt. Mr Small applied to annul the bankruptcy order. He contended that the petition was a nullity because Mr Martin had failed to appear on the hearing of the first petition, and because Mr Martin had not obtained leave to present the second petition, as is required by Rule 6.26 of the Insolvency Rules 1986. The Registrar held that, because the letter from Mr Martin's solicitors was before the Court at the hearing of the first petition, it could not be said that he had "failed to appear on the hearing" within the meaning of r 6.26. The Registrar also held that if this was wrong, leave to present a petition could be granted pursuant to r 6.26 even after a bankruptcy order was made, and that it was appropriate in all the circumstances to grant retrospective leave to Mr Martin to present the second petition.

**[Barry Isaacs]**

**Dubai Aluminium Company Limited v Salaam (Registrar Simmonds), 23 January 2007**

By reason of the terms of the Insolvency Act 1986 ("IA 1986"), subsections 267(2)(c),

269(2) and 268(1)(a), it would be fundamentally wrong to permit a petitioner to amend his petition so as to reduce the estimated value of his security below the value put upon it in his statutory demand, and so as consequently to increase the petition debt. Registrar Simmonds held that the consequences of such a proposed amendment could not satisfy the provisions of IA 1986, subs.267(2)(c), as the Petitioning Creditor could not demonstrate an inability to pay in relation to the "new" debt as required by IA 1986, subs.268(1).

**[Christopher Brougham QC, John Briggs]**

**Paul Simion v Tim Brown [2007] EWHC 511 Chancery Division (David Richards J)**

The applicant, a trustee in bankruptcy ("A") applied for an order that his remuneration should be charged on the basis of time spent. The respondent, a creditor who had petitioned for the bankruptcy ("R") also appealed against the dismissal of his prior application, for an order that A's remuneration be fixed by the Court. According to the Practice Statement on Remuneration: Fixing and Approval of the Remuneration of Appointees,

the task of the Court is to arrive at a level of remuneration that balanced certain criteria including (i) the value of the service rendered by the trustee, (ii) the proportionality of remuneration and (iii) a fair and reasonable remuneration for the work properly undertaken. In this case, the remuneration was reduced where it could not be justified.

**Surjit K Singla v (1) Rodney Thomas Lambton Brown (2) Amanda Jane Malden-Browne [2007] EWHC 405 Chancery Division (Thomas Ivory QC)**

The trustee in bankruptcy of R1 applied pursuant to section 339 of the Insolvency Act 1986 to set aside a purported severance of a joint tenancy of a property. The property had initially been conveyed into the joint names of R1 and R2 as joint tenants on the insistence of the mortgage company, although R2 had intended to purchase the freehold alone and R1 was only ever expected to have a nominal interest. After the purchase R2 served a notice of severance on R1 stating that the property would be held by the two as tenants in common in unequal shares. R2 would hold 99 per cent and R1 would hold 1 per cent. R1

signed a document acknowledging receipt and acceptance of the notice of severance. The Deputy Judge held that in the absence of any claim for rectification, the requirements of s 339 were made out in the instant case. However, the Court had an overall discretion under s.339(2) of the Act to make no order at all if justice so requires. In circumstances where: (i) the effect of the severance notice and receipt gave effect to the intentions of the parties; and (ii) the mortgage repayments were to be made only by R2, this case was exceptional and justice required that no order should be made, notwithstanding that the conditions for the application of section 339 were otherwise satisfied. Re Paramount Airways Ltd (No.2) [1993] Ch. 223 applied. The application was therefore dismissed.

**SPORT**

**FA v Adebayor**

Emmanuel Adebayor was charged with improper conduct for failing to leave the field having been shown a red card for throwing a punch at Frank Lampard. Under the FA's fast track disciplinary system, Adebayor's appeal against the red card had been heard and dismissed with Adebayor

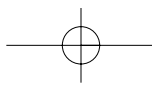
having no entitlement to a personal hearing. There was no right of appeal against that decision. In mitigation, evidence was adduced establishing that Adebayor had not thrown a punch at Lampard but had been pulling another Arsenal player away from Lampard. The FA was invited to depart from its guidelines that provide that the minimum sentence for failing to leave the field having been shown a red card is an additional 2 match ban and fine of 1 week's salary. The Disciplinary Commission decided that in view of the mitigation presented, they would impose a 1 match ban and a fine equivalent to half of 1 week's salary.

**[Mark Phillips QC]**

**FA v Arsenal and Chelsea**

Arsenal and Chelsea pleaded guilty to a charge of failing to ensure that its players and/or officials conducted themselves in an orderly fashion and/or refrained from provocative and/or violent behaviour arising out of the Carling Cup Final. Following a hearing at which mitigation was presented, both clubs were reprimanded and fined £100,000.

**[Mark Phillips QC]**



### **FA v Arsene Wenger**

Arsene Wenger pleaded guilty to a charge of improper conduct towards match officials at half time during the Arsenal v Portsmouth match on 16th December 2006. Arsene Wenger was warned as to his future conduct and fined £2,500.

**[Mark Phillips QC]**

### **TALKS AND PUBLICATIONS**

William Trower QC attended the recent INSOL conference in Cape Town. He spoke at the ancillary Insurance Insolvency meeting.

**[William Trower]**

Barry Isaacs made a presentation to members of the Texas State Bar on recent insolvency cases. The presentation was hosted by Baker and McKenzie on 23 March 2007.

**[Barry Isaacs]**

Professor Ian Fletcher presented the following paper at a conference of the Academics' Group of the Insolvency Lawyers' Association, Oxford (March 2007): "Insolvencies with an International Dimension: Opportunities and Pitfalls for Practitioners". He also chaired the conference of the Academics' Group of INSOL International, Cape Town,

March 17-18, 2007, and presented the following paper: "Challenge and Opportunity: the ALI/III Global Principles Project".

**[Professor Ian Fletcher]**

Felicity Toubé spoke on "Restructuring, Insolvency and New Start" in the context of Small and Medium Sized EU companies, at an ERA Conference in Trier held on 29-30 March 2007.

**[Felicity Toubé]**

The 13th edition of the leading banking law textbook, Paget's Law of Banking has been published. Mark Phillips QC and Tom Smith contributed to the chapter on Insolvency.

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

A new publication by Professor Muir Hunter QC entitled: "Going Bust? How to resist and survive Bankruptcy and Winding up" has been published by XPL law. The launch was held on 29 March 2007.

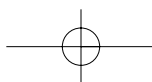
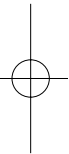
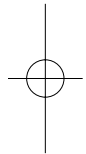
The Supplement to the Second Edition of "Insolvency in Private International Law" by Ian Fletcher was published in March 2007 (March, 2007), xiii + 139 pp. (Oxford University Press).

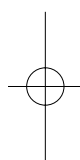
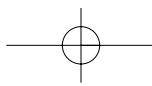
**[Professor Ian Fletcher]**

### **HONOURS**

On 23 March 2007, Ronald DeKoven was inducted as an international fellow of the American College of Bankruptcy at a ceremony in Washington, DC. The American College of Bankruptcy is an honorary professional and educational association of bankruptcy and insolvency professionals. Invitations to join are extended to professionals with a record of achievement in the insolvency process who distinguish themselves in their practice and in their contribution to the insolvency field.

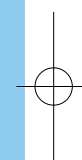
**[Ronald DeKoven]**





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