

3-4 DIGEST



a monthly review of relevant news, cases and articles Vol 13 No 3 June 2007

Michael Crystal QC
 Christopher Brougham QC
 Gabriel Moss QC
 Simon Mortimore QC
 Stuart Isaacs QC
 Marion Simmons QC
 Richard Adkins QC
 Richard Sheldon QC
 Richard Hacker QC
 Robin St. J Knowles CBE QC
 Mark Phillips QC
 Robin Dicker QC
 William Trower QC
 Martin Pascoe QC
 Fidelis Oditah QC
 David Alexander QC
 Antony Zacaroli QC
 Stephen Atherton QC
 Colin Bamford
 John Briggs
 David Marks
 Mark Arnold
 Lexa Hilliard
 Adam Goodison
 Hilary Stonefrost
 Lloyd Tamlyn
 Glen Davis
 Andreas Gledhill
 Roxanne Ismail
 Barry Isaacs
 Ben Valentin
 Felicity Toubé
 Jeremy Goldring
 Lucy Frazer
 David Allison
 Daniel Bayfield
 Tom Smith
 Richard Fisher
 Blair Leahy
 Stephen Robins
 Marcus Haywood
 Hannah Thornley
 Simon Fuller

Academic Members
 Professor Muir Hunter QC
 Professor Ian Fletcher
 Professor Sarah Worthington
 Dr Riz Mokal

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This month has seen members of chambers involved in a number of important cases. In *Mainstream Properties Ltd v Young* and two related appeals the House of Lords has clarified the scope of economic torts. Barry Isaacs appeared for *Mainstream Properties Ltd*.

In *Gamlestaden Fastigheter AB v. Baltic Partners Ltd*, a case dealing with an unfair prejudice petition under the Jersey equivalent of section 459 Companies Act 1985 the Privy Council allowed an “investor” to bring such a petition in circumstances where its only possible interest was qua creditor because the company was insolvent. Gabriel Moss QC and Felicity Toubé acted for the Respondents.

On 11 May 2007, Mr Justice Colman handed down judgment in proceedings between *National Westminster Bank plc* and *Rabobank Nederland* concerning a workout in 1996 to 1997 of loans made to *Yorkshire Food Group plc*. Antony Zacaroli QC, Ben Valentin and Jeremy Goldring acted for *National Westminster Bank plc*.

In *Dolphin Quays Developments Ltd v Mills* [2007] EWHC 1180 (Ch) the Chancellor dismissed an application for an order that receivers personally pay the costs of unsuccessful proceedings brought by them on the part of the mortgagor company. William Trower QC and Barry Isaacs appeared for the receivers.

On 1 May 2007, Mr Justice Etherton handed down judgment in *Prudential Assurance Company Ltd v PRG Powerhouse Limited* [2007] EWHC 1002 (Ch). The issues considered in the judgment will be of great significance to formal restructurings and of general importance to the commercial property market and to creditors with guarantees generally. Gabriel Moss QC and Daniel Bayfield appeared for the Prudential Applicants, Richard Sheldon QC and Blair Leahy appeared for the Luctor Applicants.

This edition of the Digest was compiled by Hannah Thornley.

Marcus Haywood

GENERAL NEWS

On 4 May 2007, statistics showing insolvencies in the first quarter of 2007 were published by the Insolvency Service. There were 3,113 liquidations in England and Wales in the first quarter of 2007 on a seasonally adjusted basis. This was a

decrease of 2.8% on the previous quarter and a decrease of 11.6% on the same period a year ago. There were 30,075 individual insolvencies in England and Wales in the first quarter of 2007 on a seasonally adjusted basis. This was an increase of 1.2% on the previous quarter and

an increase of 23.9% on the same period a year ago. This was made up of 16,842 bankruptcies and 13,233 Individual Voluntary Arrangements.

In May 2007, the Insolvency Service published a consultation document on proposed changes to the Individual Voluntary Arrangement regime. Responses are requested by 3 August 2007.

BANKING

National Westminster Bank plc v. Rabobank Nederland QBD Commercial Court (Colman J) [2007] EWHC 1056 (Comm)

In 1996, it was good practice for banks conducting a workout of corporate loans to disclose information that related to the debtor company and that had been obtained for the purposes of the workout. However, in the absence of an express contractual framework, there was no legal duty to adhere to that practice or to exercise reasonable care to do so. It was up to each co-workout bank to make its own enquiries and conduct its own due diligence in relation to the debtor company, since it was not entitled to assume that there would be disclosed to it each and every piece of information that either it or bankers generally might consider material. Rabobank's

claims that NatWest made implied misrepresentations (whether fraudulent or otherwise) by virtue of its failure to disclose information alleged to have been material to Rabobank during the course of the workout of loans made by both banks to the Yorkshire Food Group between 1996 and 1997 accordingly failed. There had in any event been no dishonest concealment of information by NatWest.

Rabobank's further claims (1) that NatWest was in breach of a "good faith" agreement by failing to disclose information and (2) that NatWest procured a breach of duty owed by investigating accountants to Rabobank also failed. NatWest's claim for damages for breach of a covenant not to sue succeeded. There was no principle of law or public policy that prevented NatWest from recovering the costs incurred by it in defending proceedings brought by Rabobank against it in California in breach of the covenant as damages.

COMPANY

Gamlestaden Fastigheter AB v. Baltic Partners Ltd [2007] UKPC 26 Privy Council (Jersey) (Lords Scott, Phillips, Rodger, Brown, Mance), 25 April 2007

The appellant (G) appealed against the striking out of its

application under the Companies (Jersey) Law 1991 art.141 alleging that the affairs of the first respondent company (B) had been conducted in a manner that was unfairly prejudicial to the interests of some of the members. G, held 22 per cent of B's shares and had lent it money. G criticised the way in which the second, third and fourth respondent directors (F) had conducted B's affairs and sought an order under Art.143 that F should pay damages to B for breaches of the duty they owed it as directors. It was common ground that B was insolvent and would remain so even if the order were made. Therefore, the remedy that G sought could confer no financial benefit on it as a shareholder, only as a creditor. As a result, F sought to strike out the application on the basis that G had no standing to bring it. For the purposes of the strike out application, it was assumed that the facts were proved. The Jersey Court held that since an Art.141 application was a remedy for shareholders not creditors, G's application should be struck out as an abuse of process. In allowing the appeal, the Privy Council held: (1) An Art.141 application required a company's affairs to be or have been conducted in a manner unfairly prejudicial to the applicant, which had to

be a member of the company. If the facts alleged by G were true; and since G was a member of B, both conditions for an Art.141 application were met. (2) The Court, if satisfied that the Art.141 application was well-founded, was empowered by Art.143 to make such order as it thought fit in respect of the matters complained of. Accordingly, in an unfair prejudice application, an order could be made for payment of damages to a company whose affairs had allegedly been conducted in an unfairly prejudicial manner, *Re Chime Corp Ltd* applied. (3) G had provided B with loans as an investor, and if F's mismanagement of B had led to loss, it was artificial to require that the qualifying loss for Art.141 purposes had to be loss that had reduced the value of G's equity capital rather than the recoverability of its loan capital, *R&H Electric Ltd v Haden Bill Electrical Ltd* (1995) BCC 958 approved. (4) It was not necessary in an Art.141 application to show that the relief had to be of some benefit to the applicant shareholder in his capacity as shareholder. The applicant would have locus standi as long as the relief would be of real value to him in facilitating recovery of some part of his investment.

[Gabriel Moss QC; Felicity Toube]

CONTRACT / TORT

OBG Ltd v Allen; Douglas v Hello! Ltd; Mainstream Properties Limited v Young [2007] UKHL 21

House of Lords (Lords Hoffman, Nicholls, Walker, Brown, Baroness Hale)

The tort of intentionally inducing a breach of contract is essentially different from the tort of inflicting harm by unlawful means, although in some factual situations they might overlap. If the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then it cannot be said to have been intended and the tort of inducing a breach of contract has not been committed, *Millar v Bassey* (1994) EMLR 44, CA overruled. There can be no liability for interference with contractual relations where there has been no breach of contract, *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570, HL overruled in part. Unlawful means consist of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party. Acts against a third party count as unlawful means only if they are, or would be if they caused loss, actionable at the suit of the third party. English law does not recognise a claim for conversion of

contractual rights, but only of tangible property. An invalidly appointed receiver who realised the benefit of the company's contracts did not convert those contracts.

[Barry Isaacs]

CONTRACT

Oxus Gold Plc v Templeton Insurance Ltd [2007] EWHC 770 (Comm)

QBD Commercial Court (Langley J)

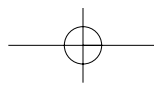
The Court was asked to assess damages following the defendant's failure to deliver shares pursuant to a warrant deed. The Court held: (1) the measure of damages for the failure to deliver shares was to be assessed by reference to the purchase not to the sale price of shares, notwithstanding that the claimant intended to sell not to buy (2) the claimant was not entitled to additional shares pursuant to an adjustments provision in the warrant deed. The construction contended for by the claimant was sufficiently unreasonable and so improbable that it was most unlikely that the parties could have intended it.

[Lucy Frazer]

The Organic Group Ltd v Charterhouse Macmillan Group Inc

QBD (Mackay J), 1 May 2007

Organic (the seller) exchanged contracts with



Charterhouse (the buyer) for the sale of a hotel. At the same time the parties entered into a consultancy agreement. The buyer refused to pay the sums claimed under the consultancy agreement on the basis that the agreement was void for uncertainty (the provision relating to the services was vague / an agreement to agree) or on the basis of a total failure of consideration (no services had been provided). The Judge held, allowing an appeal from the master, that the buyer had no prospect of successfully defending the claim as (a) on a proper construction of the consultancy agreement, no services had to be rendered in order for the sums to be payable to the buyer (b) the buyer could not rely on any uncertainty in relation to the services or any lack of provision of services in circumstances where it had not called for any services (c) in any event any uncertainty could be resolved by the Court by the implication of terms.

[Lucy Frazer]

INSOLVENCY - CORPORATE

Prudential Assurance

Company Ltd v PRG

Powerhouse Limited

[2007] EWHC 1002 (Ch)

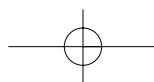
Ch D (Etherton J)

On a challenge to a CVA approved by the company's

creditors, the Judge held that: (1) The hypothetical agreement which results from a CVA is a bilateral agreement between each creditor and the company and it is the company, and not any third party, which has the benefit of, and can enforce, the rights and obligations conferred by the CVA. Accordingly, whilst a CVA could not directly release a third party from liability to certain creditors, it could oblige those creditors to treat the third party as having been released and the company would be entitled to enforce that obligation; (2) On the facts, there was no doubt that the CVA was unfairly prejudicial to the interests of those of the landlord creditors who had the benefit of guarantees provided by the company's solvent parent in circumstances where the CVA obliged the guaranteed landlords to treat the solvent parent as having been released from liability under the guarantees. [Gabriel Moss QC, Richard Sheldon QC, Daniel Bayfield, Blair Leahy] Dolphin Quays Developments Ltd v (1) Peter Mills (2) Robert Birchall (3) Barry Gilbertson [2007] EWHC 1180 (Ch) Ch D (Sir Andrew Morritt)

The successful defendant applied for an order under the Supreme Court Act 1981 s.51 that the receivers of the

unsuccessful claimant pay his costs of the proceedings. It was accepted that the litigation was paid for by funds under the control of the receivers and that there was no value in the claimant's equity of redemption. It was also accepted that the receivers had no personal interest in those funds or in the outcome of the action. The defendant had failed to apply for security for costs and had failed to join the bank that appointed the receivers as respondents to the s 51 application. The defendant submitted that the receivers had been the real claimants and had conducted the proceedings for the benefit of themselves and the bank who appointed them and that any order made would be payable from funds realised in the course of the receivership. The receivers submitted that they were only acting as agents, that the case was in no way exceptional and that there was no impropriety or unreasonableness to justify making a third party costs order against them. The Chancellor held that the proceedings involved an entirely normal case of receivers seeking to enforce a contractual right and no exceptional circumstances existed to warrant a third party costs order. He also concluded that, as there was



no element of impropriety or unreasonableness in the initiation and prosecution of the claim, there was no alternative justification for making the order sought. The receivers did not fund the initial proceedings, nor did they benefit from them in any relevant sense. They were merely agents of the claimant, which was solely responsible for their acts or defaults, (s.109(2) of the LPA 1925 and the clause in the charge under which they were appointed). The defendant could have avoided any hardship if he had pursued an application for security for costs against the claimant.

[William Trower QC and Barry Isaacs]

**Re Damovo Group SA
Ch D (David Richards J), 25
April 2007**

An application was made for administration orders in respect of two companies in a telecoms group, which had operating businesses in a number of European jurisdictions. The application was made to facilitate a restructuring which involved the sale of parts of the business to a new company controlled by existing bondholders. The companies had been incorporated in Luxembourg where their registered offices were located. However, the

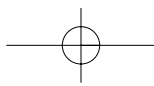
evidence showed that few substantive functions were carried out by the companies in Luxembourg and that prior to January 2007 the companies' centres of main interest (COMI) had in fact been in England or Scotland. Since January 2007, the companies had taken steps to establish more clearly the location of their COMI in England where, amongst other things, the majority of the companies' creditors were based and where dealings with those creditors had taken place. Therefore the English Court had jurisdiction to open administration proceedings in relation to the companies as main proceedings for the purposes of the EC Regulation.

[William Trower QC, Tom Smith]

**Swissport (UK) Limited (in liquidation) v Aer Lingus Limited [2007] EWHC 1089 (Ch)
Ch D (Peter Prescott QC sitting as a Deputy Judge of the High Court), 14 May 2007**

Aer Lingus accepted that it was liable to pay Swissport for ground handling services at Heathrow in the period prior to Swissport's administration, but maintained that Swissport should not be awarded summary judgment (or that enforcement of summary

judgment should be stayed) pending the ultimate determination of proceedings in the Employment Tribunal by former Swissport employees against Aer Lingus and others, in respect of which Aer Lingus had or would have claims against Swissport either under a contractual indemnity or as damages for breach of contract which would reduce and might extinguish the debt to Swissport. The Deputy Master had construed the contractual indemnity against Aer Lingus, and awarded Swissport summary judgment. Since that judgment, Swissport had entered voluntary liquidation, and automatic set off under Rule 4.90 of the Insolvency Rules applied. The Employment Tribunal had found against the employees on a preliminary issue, but an appeal to the Employment Appeal Tribunal had been heard and was pending. The Deputy Judge held that the Deputy Master was not entitled to reach the conclusion he had on construction of the Indemnity Clause. However, he considered that Aer Lingus' counter-claim depended on an "accumulation of contingencies", and that it was "pretty unlikely" that all the conditions would ultimately be satisfied. He considered it plausible that



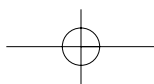
the amount of savings by Aer Lingus might well have exceeded the proper contingent value of the employment claims. It was not a black-letter rule of law that it would ordinarily be right to grant a stay of execution of summary judgment where the claimant was insolvent. Although automatic set-off would operate, the account was to be taken on the hearing of Swissport's application for summary judgment. Aer Lingus might have a cross-claim, but it was to be held in low esteem. The Deputy Judge required Swissport's liquidators to give an undertaking to hold money received from Aer Lingus on an escrow account until 14 days after the decision of the Employment Appeal Tribunal was handed down, and on that footing ordered Aer Lingus to pay the full amount claimed into that account as an "interim payment". Within that 14-day period, Aer Lingus had permission to apply to vary the Deputy Judge's order on the basis of a change of circumstances. The Deputy Judge stayed his order until 7 June but an application for further stay (pending determination by the Court of Appeal of an application for permission to appeal) was refused.

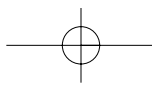
[Stuart Isaacs QC, Glen Davis]

Merrill Lynch v Winterthur Swiss Insurance Co (2007) [2007] EWHC 893 (Comm) QBD Commercial Court (Gloster J)

The applicant bank ("A") applied for summary judgment against the respondent insurance company ("R") in respect of A's claims for indemnity, payment and related declaratory and other relief against R pursuant to a credit indemnity insurance policy. A had entered into an ISDA master agreement with a company which was part of the Eurotunnel group ("C"). R had agreed to insure A under the policy with respect to financial loss in respect of A's credit exposure under the agreement with C. A number of Eurotunnel companies instituted safeguard proceedings in France. The Court needed to decide the following issues: (i) whether there was a counterparty bankruptcy for the purposes of the policy; (ii) whether A had been entitled to and did, validly terminate the agreement on the grounds of a bankruptcy "event of default"; (iii) as a matter of construction of the term "bankruptcy trigger event" in the policy, whether the bankruptcy had to be one that occurred prior to an actual termination of the agreement, which termination had occurred

following and by reason of a failure to pay; and (iv) whether A had provided R with a duly completed notification of loss as required under the policy. It was held that: (i) The institution of the French safeguard proceedings clearly satisfied the description of counterparty bankruptcy under the policy. The safeguard proceedings were instituted pursuant to French insolvency law and clearly affected the rights of creditors; (ii) As a counterparty bankruptcy had occurred pursuant to the policy, likewise a bankruptcy had occurred under the agreement and it followed that A was entitled to notify an event of default and to designate an early termination date, the effect of which was to terminate the agreement on that day and for all monies owed by C to A to become payable; (iii) Pursuant to the agreement, A was exposed to two separate and distinct events of default, against each of which it was reasonable to suppose that the policy was intended separately to protect, being the risk of payment default by C and the risk of bankruptcy in the Eurotunnel group. There had been a clear bankruptcy trigger event notwithstanding that there had been no prior failure to pay; (iv) The insurance policy did not state in any detail





what precise information had to be given in the notification of loss, so there was no reason why R should escape liability simply because details that it claimed should have been provided were not. Glen Davis: "The role of the Insolvency Rules Committee" Insolvency Intelligence vol 20 (5), p 65

[Glen Davis]

Professor Ian Fletcher: "COMI at the Relevant Time: a comment on the case of *Stojevic v. Komercni Banka AS*", in (2007) Insolvency Intelligence, Volume 20, Number 4, pp.60-62.

[Professor Ian Fletcher]

Professor Ian Fletcher: "Noticias desde Albión. Novedades de Derecho Concursal Internacional del Reino Unido: La Incorporación de la Ley Modelo de UNCITRAL sobre Insolvencia Transfronteriza" (2007) 6 Revista de Derecho Concursal y Paraconcursal 391-403. (Spanish translation by J.M. Delgado Cobos)

[Professor Ian Fletcher]

INSOLVENCY – PERSONAL
(1) Richard John Hill (2)
John Ivor Bangham v
Wendy Pearl Haines [2007]
EWHC 1012 (Ch)
Ch D (HHJ Pelling QC)

The trustees in bankruptcy ("A") of the bankrupt ("B") appealed against the

dismissal of their application to set aside a property adjustment order made in ancillary relief proceedings in favour of the Respondent ("R") who was the wife of the bankrupt pursuant to s339 of the Insolvency Act 1986. R and B had been married and were the joint owners of the property. In 2003, the Matrimonial Court ordered inter alia that B transfer all of his interest in the property to R. In 2005, B was made bankrupt. There was no issue raised as to the relevant time as set out in s 341. The Court held that a party who succeeds in obtaining a property adjustment order following a contested application can be in no stronger position than a person whose claim for such relief is resolved by approval following settlement. For the purposes of considering the applicability of s.339, the position is the same whether or not the Matrimonial Court made an order following a contested hearing or following a compromise agreement. In neither case did the receiving party give, nor the paying party receive, consideration. Such cases were therefore susceptible to attack by a trustee under s.339(3)(a).

TALKS, PUBLICATIONS AND APPOINTMENTS

Stephen Atherton QC is

advising the Government of Jordan in respect of the wholesale reform of the country's insolvency law and in April delivered the keynote address entitled "Corporate and Business Rescue – the UK Perspective and Cross-Border Considerations" to the "Workshop on the Draft Liquidation, Insolvency and Bankruptcy Code" jointly hosted in Amman by the Government of Jordan and the American Bar Association.

[Stephen Atherton QC]

On 18 May 2007, Gabriel Moss QC participated in the R3 panel discussion in Berlin: "Reconstruction in Europe".

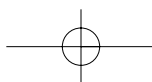
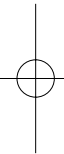
[Gabriel Moss QC]

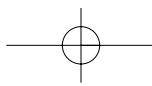
On 22 May 2007, Gabriel Moss QC gave the keynote address "Life after COMI: The New Fighting Ground for European Insolvencies" to C5 in London.

[Gabriel Moss QC]

On 15 May 2007, William Trower QC gave a lecture to the London Solicitors Litigation Association entitled: "The UNCITRAL model law on cross border insolvency and the decisions of the Privy Council in Navigator Holdings and the Court of Appeal in HIH. How will these developments affect the resolution of disputes in cross border insolvencies?"

[William Trower QC]





On 25 April 2007, William Trower QC gave a seminar to the ILA on Trident Fashions and administration expenses.

[William Trower QC]

On 24 May 2007, Colin Bamford gave a public lecture at the Institute of Advanced Legal Studies under the title "Financial Crimes and Financial Misdemeanours". A paper, produced for the lecture, will be published in September.

[Colin Bamford]

Professor Ian Fletcher delivered a paper at the Congreso de Derecho Concursal, held in Madrid from 30 May to 1 June. The title of his paper was: "Four Decades of Law Reform: The English Experience". The conference, attended by academics, practitioners and judges, was organised by the Universidad Rey Juan Carlos of Madrid, and the Universidad de Almeria.

[Professor Ian Fletcher]

Professor Ian Fletcher is to be a speaker at the 7th Annual International Insolvency Conference of the International Insolvency Institute, held at Fordham University in New York from 11-12 June. He will be speaking about recent developments in UK insolvency law including the enactment of the UNCITRAL Model Law.

[Professor Ian Fletcher]

On 6 July 2007 Gabriel Moss QC will take part in the R3/Insol Europe (Portman, London) debate "England should be the main centre for reorganizing commercial interests."

[Gabriel Moss QC]

On 11-14 October 2007, Gabriel Moss QC will give a talk and sit on a panel at the Insol Europe conference. The talk is entitled: "Races and finishing lines": how Eurofood moved the goalposts". The panel will be entitled: "Pre-insolvency processes and assistance outside the EU".

[Gabriel Moss QC]

Stuart Isaacs QC has been appointed to the International Panel of the Singapore Mediation Centre.

[Stuart Issacs QC]

Mark Phillips QC has been re-elected to the Council of R3 for a three year term.

[Mark Philips QC]

William Swadling, an Associate Member of Chambers, CUF Lecturer and Fellow of Brasenose College, Oxford, was recently elected to membership of the prestigious American Law Institute (ALI)

[William Swadling]

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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For further information please contact Sue Brown at 3-4 South Square on tel 020 7696 9900 or fax 020 7696 9911. E-mail may be sent to digest@southsquare.com

3-4 South Square, Gray's Inn
London WC1R 5HP

Telephone
+44 (0)20 7696 9900
Facsimile
+44 (0)20 7696 9911
E-mail
clerks@southsquare.com
Document Exchange
LDE 338
Website
www.southsquare.com

