

# 3-4 DIGEST



a monthly review of relevant news, cases and articles Vol 13 No 8 November 2007

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The long running and much publicised litigation between HRH Prince Jefri Bolkiah and Brunei appears to be moving to a conclusion. The Privy Council has determined that Prince Jefri had been given a fair hearing by the courts of Brunei and that it was, in the circumstances, entirely appropriate that he be ordered to comply with the terms of a settlement agreement. Under this agreement Prince Jefri had agreed to return billions of US\$ of assets to the Brunei Investment Agency (the acquisition of which assets had been funded by monies allegedly misappropriated by Prince Jefri while acting as Minister of Finance for Brunei). As has been the case throughout the litigation both in Brunei and before the English courts, the Brunei Investment Agency was represented by Martin Pascoe QC, Stephen Atherton QC and Richard Fisher.

This edition of the Digest was compiled by William Willson.

**Marcus Haywood**

## GENERAL NEWS

According to the Insolvency Service, there were 3,106 liquidations in England and Wales in the third quarter of 2007, an increase of 1.8% on the previous quarter and of 4.4% on the same period a year ago. This was made up of 1,264 compulsory liquidations, a decrease of 5.8% on the previous quarter and a decrease of 5.4% on the same period a year ago, and 1,842 creditors' voluntary liquidations (an increase of 7.7% on the previous quarter, but a decrease of 4.4% on the same period a year ago).

During the same period there were 26,072 personal insolvencies, a decrease of 3% on the previous quarter, and a decrease of 5% on the same period last year. Of these,

15,833 were bankruptcies (2.1% less than the previous quarter, 2.2% more than the same period last year), and 10,239 were IVAs, a decrease of 4.3% on the previous quarter, and a decrease of 14.3% on the same period last year.

## BANKING

**Law Debenture Trust Corporation plc v (1) Concord Trust (2) Acciona SA (3) Elektrim SA (in Bankruptcy) (4) Vivendi Holdings Corp [2007] EWHC 2255 (Ch) Ch D (Lewison J), 12 October 2007**

The Applicant trustee ("L") and company ("E") applied to continue anti-suit injunctions against the Respondent bondholder ("B"). L

was the trustee of eurobonds issued by E, a Polish company whose principal asset was a shareholding in a telecoms company. There had been a long-running dispute about ownership of that shareholding between a French company ("V") and a German company ("D"), leading to court and arbitration proceedings. While those proceedings were pending the bonds fell due for redemption. E did not pay. L, on the instructions of bondholders, began insolvency proceedings against E in Poland, which were later withdrawn. L had begun English proceedings against E alleging a breach of the provisions of the trust deed. L had also begun Part 8 proceedings seeking directions. B, a subsidiary of V, purchased a holding of bonds and issued US proceedings making claims against L and E. E argued that B's claim against it in Miami was an attempt to "enforce the performance of ... the provisions" of the trust deed and/or the bond conditions and that the relevant provisions of the deed and conditions conferred on L the sole and exclusive right to enforce performance. B argued that the Miami proceedings were not in breach of the relevant provisions because they were tort proceedings and not

proceedings to enforce the performance of the provisions of the trust deed. Held, the claim against L in Miami disclosed no arguable cause of action for breach of fiduciary duty or breach of a duty of care. Furthermore the allegations of causation of loss flowing from the alleged breaches were themselves fanciful. In any event one of the principal purposes of the Part 8 proceedings had been to determine whether there were any meritorious claims against L concerning the receipt from E of the 525m and the surrounding circumstances. In the course of those proceedings the representative bondholders argued that the receipt of the monies by L was lawful and that there was no impediment to distribution. Judgment was given to that effect. B as assignee was bound by that judgment. Its claim against L in Miami argued precisely the opposite. Its claim in Miami was therefore a collateral attack on that judgment. In addition the claim that B sought to advance in Miami was a claim that could and should have been raised in the course of the Part 8 proceedings. The claim against L was vexatious and should not be allowed to proceed further. Therefore the anti-suit injunction was continued.

## CIVIL PROCEDURE

### HRH Prince Jefri Bolkiah v (1) The State of Brunei (2) Brunei Investment Agency [2007] UKPC 63

#### Privy Council (Lords Bingham, Hope, Scott, Mance and Neuberger)

When enforcing the terms of a Tomlin Order, it is appropriate to adopt the procedure used for determining summary judgment applications in deciding whether to enforce the terms of the compromise made between the parties. Prince Jefri's purported defences to the Brunei Investment Agency's claim for specific performance were, variously, of no substance, devoid of weight, and hopeless. The fact that numerous contrived complications had been raised did not result in the case being unsuitable for determination on a summary basis and did not mean that the Brunei Investment Agency was not entitled to summary enforcement of its clear and simple claim.

As to the defences raised:

(1) It was impossible for Prince Jefri to establish any promissory estoppel or misrepresentation which varied the settlement agreement or otherwise made compliance with it subject to certain conditions based on a alleged collateral promise made by the Sultan. There

was no evidence that, but for the making of a clear and unequivocal representation (which itself was heavily disputed), Prince Jefri would not have complied with his contractual obligations. Any reliance on alleged oral agreements which contradicted or subtracted from the settlement agreement incorporated into the Tomlin Order was, in any event, inadmissible by reason of ss 91 and 92 of the Brunei Evidence Act. These sections are in substantially the same terms as equivalent provisions in the Indian Evidence Act, the Singapore Evidence Act and the Malaysian Evidence Act and were to be applied by reference to and in accordance with their plain terms.

(2) As regards undue influence, a ruler with ultimate power and authority could not be said to dominate the will of all of his subjects on all occasions and it had to be shown on the evidence (which Prince Jefri could not do) that the Sultan was in a position to dominate Prince Jefri.

(3) Approving the English Court of Appeal decision in *Price v. Strange* [1978] Ch 337, questions of mutuality of remedy (i.e. the availability of specific performance as against the Brunei Investment Agency) were matters which went to discretion and not

jurisdiction. In the circumstances, the case was clearly one which was appropriate for specific enforcement by summary procedure.

**[Martin Pascoe QC,  
Stephen Atherton QC,  
Richard Fisher]**

**Lexi Holdings plc v Shaid  
Lugman & Ors  
Ch D (Briggs J), 22 October  
2007**

The Applicant company ("H") applied for judgment in default of acknowledgment of service against the Respondent partnership ("M"). M consisted of a partnership between the first defendant ("L") and another individual ("B"). H purported to have served M with proceedings by postal service upon L successively at his two residences or former residences. M did not file an acknowledgment of service or a defence to the claim. It was common ground that L had, at the time when proceedings were sent to his two residences, been serving a substantial term of imprisonment as a result of committal proceedings taken against him by H. M contended that postal service on one partner of a firm was not, under the CPR, good service on all the partners, whereas personal service was. M further submitted that L had not been served

effectively where his last known residence was a prison at which he had been serving. Held, under the table in CPR r 6.5 (6), that provided one partner who was sued in the name of the firm had proceedings sent to his usual or last-known residence, that was good service on his firm, and therefore his co-partners. Service had not been effected on the partnership by serving on L's house when he was to the knowledge of H serving a substantial term of imprisonment.

**COMPANY LAW**

**Red River UK Limited v  
Sheikh  
Ch D (Briggs J)  
15 November 2007**

The Claimants and the Defendants had entered into a settlement agreement pursuant to which the Claimants had agreed to pay the Defendants an initial sum of £300,000 followed by a further payment of £900,000. The initial sum was to be funded by a refinancing of a property held by the First Claimant and the further payment to the Defendants was to be secured by a second legal charge over the property. Held that the settlement agreement, together with the terms of a consent order, imposed a duty on the defendants to act in good faith to achieve the

refinancing and that the conduct of the defendants in causing the proposed refinancing to fail had breached these obligations. The Defendants were therefore not entitled to relief in equity to require the Claimants to execute and deliver up the second legal charge but were limited to their remedies, such as they might be, at common law in debt and damages.

**[Tom Smith]**

#### **CONFLICT OF LAWS**

**Albon (T/A N A Carriage Co) v Naza Motor Trading Sdn Bhd**  
**[2007] EWCA Civ 1124**  
**CA (Civ Div) (Waller LJ (V-P), Longmore LJ, Sir Peter Gibson)**

The Appellant Malaysian company ("N") appealed against a decision to grant an injunction restraining N from pursuing arbitration proceedings. The Respondent ("Y") had provided agency services in respect of cars, disputes had arisen and Y had issued English proceedings and served them on N out of the jurisdiction. N had meanwhile commenced arbitration proceedings, relying on an arbitration clause in the agreement. Y claimed his signature on the agreement had been forged. N applied for a stay of the English proceedings, but the

court held that it was for the court, rather than the arbitrators, to decide on the genuineness of the agreement. N appealed. On appeal, it was held that the English court was to be the judge of the authenticity of the agreement rather than the arbitrators. In those circumstances, the continuation of the arbitration proceedings would be unconscionable. It would be a needless expense, and it would be difficult to avoid an over-proliferation of pleadings and disclosure if the parties did not know whether it would be ultimately determined that the agreement was genuine or not.

#### **CORPORATE INSOLVENCY**

**(1) John Stuart Condliffe**  
**(2) Derek Kosef Hilton v Felicia Sheingold**  
**[2007] EWCA Civ 1043**  
**CA (Civ Div) (Ward LJ, Arden LJ, Smith LJ), 31 October 2007**

The Appellant assignees ("C") appealed against a decision that the Respondent ("S"), in her capacity as a former director of a company ("B"), was not liable to account for the goodwill of a restaurant run by B before it went into liquidation. S was the lessee of the restaurant, and had entered into a business development agreement with

the landlord. S had granted B a licence of the premises. The shares in B were owned by S and another individual ("M"). B went into creditors' voluntary liquidation, and the liquidators sold the fixtures and fittings to a company owned by S. S and her company agreed to sell the restaurant business for a total consideration of £90,000, of which £71,837 was attributed to goodwill, £1 to the lease and the balance to fixtures and fittings. The business development agreement was novated in favour of the purchaser and S executed an assignment in his favour. C sued as assignees from the liquidators of B's claims. S's case, had been that she held the lease and business development agreement personally so that the goodwill of the restaurant business belonged to her. C submitted that the goodwill belonged to B, and that S, as director, was personally liable to account for the goodwill sold. Held, that the judge should have held that S was liable to C for the misappropriation of B's goodwill. S's duty not to misappropriate company property continued after the company went into liquidation. Once it had been decided that S was liable to account, it fell to her to raise any matter that could be raised as a proper deduction

from the profit she had received. On the judge's findings the value of the goodwill which S sold was no different from its value at the date B went into liquidation.

**Ian Franses (liquidator of Arab News Network) v (1) Somar Al Assad (2) Mounir Developments SA (3) Trustees of the Cayman Dolphin Trust (4) Trustees of the Opus Trust [2007] EWHC 2442 (Ch) Ch D (Henderson J), 26 October 2007**

The Applicant liquidator ("F") applied for a freezing injunction against the first Respondent ("S") and S applied for his costs on an indemnity basis. F was a liquidator of a UK company, and had obtained a judgment of £5 million plus interest and costs against S, a director of that company, in wrongful trading proceedings. F obtained a without notice freezing injunction in respect of the proceeds of sale of a London property by the second Respondent ("M"), having obtained information that these proceeds were to be remitted overseas to the trustees of the third Respondent ("T"), of which S was a beneficiary. Evidence served by M and T indicated that the trust was a discretionary trust, that S had no interest except as a discretionary beneficiary and

that F would not be able to enforce judgment against the proceeds of sale. Held, that F's case, accepted by the judge on a without notice application, was a good arguable case on its merits, but that the application should have been made on notice, and suffered from procedural flaws and a breach of the duty of full and frank disclosure in respect of the funding of the proceedings. The cumulative effect of those deficiencies justified an award of costs on an indemnity basis.

**Lomax Leisure Ltd (in liquidation) v Miller [2007] EWHC 2508 (Ch) Ch D (Mark Cawson QC), 12 October 2007**

The claimant ("L"), as assignee of some of its creditors, sought enforcement of a duty on the liquidator defendants ("D") to pay a declared dividend, and payment of and damages or compensation in equity in respect of the dividends declared. L had entered into administration and D were appointed administrators. D effected an asset sale resulting in what was thought to be a surplus. D were appointed liquidators and gave notice of their intention to pay a final dividend within four months of the last date for proving. The following month a company claiming to

be a creditor ("M") submitted a proof which was rejected by D. M later issued an originating application appealing this decision. In the meantime D, not aware that the application had been issued, resolved pursuant to r.11.5 (1) of IA 1986 to pay a dividend and sent letters to all creditors whose proofs had been admitted, enclosing notice of declaration and cheques. When the appeal application arrived at D's offices, they contacted the bank and stopped the cheques. Following M's appeal, an award was made to M. As a result L had insufficient funds to pay the creditors. L contended that the liquidator's power to postpone or cancel a dividend under r.11.4 was superseded once a dividend was declared pursuant to r.11.5 (1). Held, that r.11.5 provided for the declaration of a dividend, but did not impose a duty to pay it over and above the overriding duty of a liquidator under r.4.180 (1). A creditor's remedy where a dividend was not duly paid was r.4.182 (3), and applying for an order directing the liquidator to pay the dividend. If a liquidator, having declared a dividend, paid away assets so as to defeat such an application, then a personal claim might lie against a liquidator. L's claim for payment and damages or compensation in

equity failed on the basis that D owed no personal obligation to the creditors to pay the dividend. A good reason for postponing finality was to await the result of an appeal against the rejection of a proof whatever the circumstances of that appeal were, so long as it was properly constituted and there was some merit in it. The ordinary and natural meaning of "pending" in r.11.5 (2) was that an appeal against the rejection of a proof was on foot, without it being an additional requirement that the application should have been served on the liquidator. In the instant case there was no good reason to displace that natural meaning. The proper construction of r.11.5 (1) applied to the facts and D were under no duty to declare the dividend. As a matter of construction of r.11.4, it was open to D to postpone or cancel the dividend at any time prior to payment of monies to the creditors so long as they did so within the four month period.

**Re Eurolife Assurance (International) Limited  
Supreme Court of  
Gibraltar, 14 November  
2007**

In the first case involving the insolvency of a life assurance company incorporated and

regulated in Gibraltar, the Supreme Court of Gibraltar discharged the provisional liquidators, made a winding up order, appointed a liquidator and gave directions applying certain provisions of the UK's Insurers (Winding Up) Rules 2001 to the valuation of policies.

**[Glen Davis]**

**FREEDOM OF  
INFORMATION**

**Adlam v Information  
Commissioner and HM  
Treasury  
Information Tribunal, 15  
November 2007**

The provision of an honest and reasonably held but nonetheless erroneous answer to a request under the Freedom of Information Act 2000 will constitute non-compliance with section 1 (1) of that Act. In this case the public authority mistakenly believed it held no information in relation to the Appellant's initial requests. It informed him accordingly. Later, in preparation for the appeal, it uncovered two documents which fell within the scope of the request. The tribunal found the documents were subject to the exemption in section 42 of the Act dealing with legal professional privilege, but also found that there had been a non-culpable failure to comply with the primary

obligation to disclose whether it held the requested information or not.

**[David Marks]**

**PUBLIC LAW**

**HRH Prince Jefri Bolkiah v  
(1) The State of Brunei (2)  
Brunei Investment Agency  
[2007] UKPC 62  
Privy Council (Lords  
Bingham, Hope, Scott,  
Mance and Neuberger)**

When applying the common law test for apparent bias as established in *Porter v Magill* [2002] 2 AC 357 the Court must ascertain all the circumstances which bear on the suggestion that the judge was (or would be biased). It must then ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was (or would be) a real possibility that the judge was (or would be) biased. The fair-minded and informed observer must be taken to have a balanced approach, which is neither naïve or complacent nor unduly suspicious or cynical. An informed observer does not come to the matters as a stranger, and must be taken to have a reasonable working grasp of how things are usually done. That the Sultan could (although had never shown any inclination to do so) reduce the judge's salary or potentially refuse to

reappoint him at the end of his term was a fanciful basis on which to allege apparent bias. Similarly, the fact that legislative changes had been made so as to ensure that certain hearings with potential public implications (including those in relation to the case at hand) were heard in private could not possibly be equated by the fair minded and informed observer with a tendency on the part of the judiciary to favour one party or the Sultan to interfere with the outcome of proceedings.

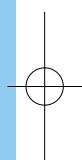
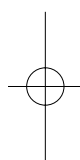
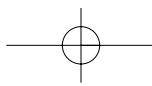
In all the circumstances, the Privy Council was satisfied that Prince Jefri had had a fair hearing before the Courts of Brunei and that there was no proper basis on which to allege that the judge dealing with the matter should have recused himself.

**[Martin Pascoe QC,  
Stephen Atherton QC,  
Richard Fisher]**

#### **SPORTS LAW**

In a dispute between Toyota F1, Timo Glock and BMW Sauber, the FIA's Contract Recognition Board ruled that Toyota's contract with Timo Glock was the prevailing contract, thereby enabling Timo Glock to take up a race seat with Toyota F1.

**[Mark Phillips QC]**



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