

3-4 DIGEST



a monthly review of relevant news, cases and articles Vol 13 No 7 October 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
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 Hilary Stonefrost
 Lloyd Tamlyn
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 Lucy Frazer
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 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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Cheyne Finance plc, a public company with approximately \$8 billion of asset-backed securities, has become the first structured investment fund to stop paying its short term debt, following a hearing in the Chancery Division. The terms of the judgment remain private for the time being. The following members of chambers appeared at the hearing: Simon Mortimore QC, Stuart Isaacs QC, Richard Sheldon QC, William Trower QC, Martin Pascoe QC, Hilary Stonefrost, Barry Isaacs, David Allison, Daniel Bayfield and Richard Fisher. A further judgment relating to the proper construction of a Security Trust Deed and a Common Terms Agreement is publicly available and is summarised below.

We congratulate Felicity Toubé on her winning the award of Insolvency Junior Barrister of the Year 2007 at the Chambers and Partners Bar Awards.

This edition of the Digest was compiled by William Willson.

Marcus Haywood

GENERAL NEWS

Substantial parts of the Companies Act 2006 came into force on 1 October 2007. Further information on commencement dates can be found at <http://www.berr.gov.uk/files/file40844.doc>.

BANKING

Ife Fund SA v Goldman Sachs International [2007] EWCA Civ 811 CA (Civ Div) (Waller (V-P), Gage LJ, Lawrence Collins LJ), 31 July 2007

The appellant investment fund ("A") appealed against a decision dismissing its claim for damages against the respondent bank ("R") for misrepresentation and breach of duty of care. R had arranged the

syndication of credit provided to a French company ("F") to acquire shares in an English company ("T"), and had prepared a memorandum, to be distributed to possible participants including A. A then purchased bonds issued by F from R in reliance on the memorandum and two accountants' reports. Between the memorandum and A's investment, R had received other information from the accountants giving rise to the possibility that the information previously supplied was or might have been incorrect in a material way. T later went into receivership and F was restructured. A was party to a bondholders' agreement whereby it could not bring proceedings of any kind. On appeal, it was held that there had been no assumption of responsibility, and, where the

Misrepresentation Act 1967 did not provide a remedy, A would not be able to succeed on some other case of negligent misstatement. The only implied representation made by R arising out of the memorandum was one of good faith. It was only if R actually knew that it had information in its possession which made the memorandum misleading that it could be liable. The judge had been entitled to conclude that R had not demonstrated that A had actual knowledge which caused the two accountants' reports to be misleading.

CIVIL PROCEDURE

ED&F Man Sugar Ltd v Lendoudis
[2007] EWHC 2268 (Comm)
QBD Commercial Court
(Christopher Clarke J), 10
October 2007

The claimant obtained an arbitration award against the defendant in 1994. In 1995, the claimant obtained a judgment against the defendant in the Greek courts for the purpose of enforcing the arbitration award. The Greek judgment was appealed by the defendant to the Greek Court of Appeal. The appeal was dismissed, so the defendant appealed to the Greek Supreme Court. The Supreme Court dismissed the appeal in 2001. In 2007, less than six years from the date of the Supreme Court's decision, the claimant's

solicitors commenced proceedings in England to enforce the award and/or the Greek judgment. Mistakenly, they framed the claim as an arbitration application under section 26 of the Arbitration Act 1950 or alternatively an application to register the Greek judgment under Council Regulation (EC) No 44/2001 ("the Judgments Regulation"). This approach was wrong because an application to enforce the award was statute barred under section 7 of the Limitation Act 1980, and the Judgments Regulation was inapplicable because the Greek judgment related to arbitration, which was excluded from the scope of the Judgments Regulation. However, unaware of the mistake, Steel J granted an order on an ex parte basis giving the claimant permission to serve the claim form outside the jurisdiction. Subsequently the defendant applied for Steel J's order to be set aside on the grounds that the claimant's claim was framed in an unsustainable way. On the hearing of the defendant's application, the claimant conceded that the original claim had been pleaded on a mistaken basis. However, the claimant contended that the claim should be permitted to proceed as an action on the Greek judgment at common law (with the claim form being amended accordingly if necessary). The Judge held:

(1) the Court of Appeal's guidance in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 remained good law and meant that permission to amend pleadings should not be given at the hearing of an application to set aside permission to serve out; and (2) in any event, although there was a conflict of expert evidence on the issue, it appeared that the Greek judgment was merely executory in nature and not of a type which could be enforced in England at common law (*Stolp & Co v Browne & Co* [1930] 4 DLR 703 not followed). In the circumstances, permission to amend was refused, and the order of Steel J was set aside.

[Stephen Robins]

COMPANY LAW

Frederick Hawkes v (1)
Simone Cuddy (2) Michael
Cuddy (3) Neath Rugby
Club Ltd; Simone Cuddy v
(1) Frederick Hawkes (2)
Neath Rugby Club Ltd
[2007] EWHC 1789 (Ch)
Ch D (Judge Havelock-
Allan QC), 23 August 2007

The proceedings concerned applications under s 459 of the Companies Act 1985. The petitioner ("P") was the owner of one of two issued shares in the third respondent ("R3"), a company which owned and managed a rugby club. The first respondent ("R1") owned the other issued share, and claimed to

hold it on trust for her husband, the second respondent (“R2”). R2 was prohibited from being concerned in the management of R3, but nominated R1 as a director. P and R1 were the only directors of R3. P complained that R2 had been concerned in the management of R3 contrary to s 216 of the Insolvency Act 1986 (“IA”). P applied for summary judgment in respect of part of the relief sought. R1, R2 and R3 issued a cross-petition, seeking an order that the petition be struck out on the grounds that it failed to plead any unfair prejudice, and that the inclusion of claims for relief under s 216 and 217 of IA was objectionable. P applied to strike out the cross-petition. The court held that the jurisdiction existed to grant declaratory relief on a s 459 petition, and that, on the application for summary judgment, a declaration would be granted to the effect that, in contravention of s 216 (3) of IA, R2 had been directly or indirectly concerned in the management of R3 by performing the acts of a director in R1’s name, and using R1’s name to conceal the fact he had been a de facto director. R1, R2 and R3’s application to strike out would therefore be dismissed, and P’s application to strike out the cross-petition granted.

[Hilary Stonefrost]

Hill Street Services Ltd v. National Westminster Bank plc
[2007] EWHC 2379 (Ch)
Ch D (Peter Smith J), 19 October 2007

The word ‘instructions’ in a standard form mandate for a company bank account was not confined to written instructions, but allowed the sole director of the company to give oral instructions to the bank. In any event, the giving of oral instructions by the sole director accepted by the bank would amount to a variation of the mandate. On the facts, the sole director had given such oral instructions so that the company’s claim for breach of mandate was dismissed.

[Jeremy Goldring]

CORPORATE INSOLVENCY
Cheyne Finance plc (in receivership)
[2007] EWHC 2116
Ch D (Briggs J)

The Receivers applied for declaratory relief in relation to the proper construction of a Security Trust Deed and a Common Terms Agreement. Clause 12 set out a detailed table of priorities to be applied by the Receivers in paying creditors out of monies coming into their hands. The second priority provided as follows: “Any moneys received by the ... Receiver after the occurrence of an Enforcement Event shall, subject to the payment of any claims have priority to the security

constituted by the Security Trust Deed and to sub-clause 11.11, be applied in the following order of priority ... secondly, in satisfaction of or provision for all Senior Obligations as and when the same become payable and, if more than one such Senior Obligation is payable at the relevant time, *pari passu* and in proportion to the amounts payable in respect thereof.” Creditor A submitted that the Receivers were obliged to use available moneys in paying in full Senior Obligations by then due and payable; and then in using any surplus as a cash provision for Senior Obligations not yet due and payable and only if a full cash provision left a surplus moving down to subsequent priorities. Creditor B submitted that the Receivers were obliged to apply moneys first, in making provision for payment of all Senior Obligations whether or not immediately due and payable; and making full payment in satisfaction of presently payable obligations only if the available moneys are sufficient to do so after making full provision and, if not sufficient, paying a reduced sum *pari passu* to all Senior Creditors. The Judge concluded that the clause was to be construed in accordance with the *pay-as-you-go* construction advanced by Creditor A.

[Simon Mortimore QC;
Richard Sheldon QC;
William Trower QC; Hilary Stonefrost; Barry Isaacs;
Jeremy Goldring]

**St Tropez Villas v Lyons
Ch D (Briggs J), 5 October
2007 (unreported)**

The applicant company applied for an injunction to restrain presentation of a winding up petition against it based on a debt arising from a contract for the rental of a holiday villa. The applicant's defence was based on a term of the contract which the respondent submitted was, inter alia, an unenforceable penalty, unreasonable within the meaning of the Unfair Contract Terms Act 1977, and unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999. The Judge held that these submissions raised issues of fact not suitable for resolution on an application for an injunction. He also held that there was no arguable defence to the respondent's submission that the applicant was estopped from relying on the term. He therefore declined to grant an injunction.

[Barry Isaacs]

**Re ULVA Ltd (In
Administration); DRC
Distribution v Foster and
others
Ch D (His Honour Judge
Purle QC sitting as a
Deputy Judge of the
Chancery Division in the
Birmingham Civil Justice
Centre), 25 September
2007 (unreported)**

The sole director of ULVA Limited ("ULVA") appointed

administrators on 14 August 2007. Prior to doing so he had set up ULVA International Limited ("UIL") and transferred various of the assets of ULVA to UIL and himself by what he alleged were arm's length transactions for full value. DRC Distribution Limited ("DRC") applied to the Court to terminate the administration under paragraph 81 of Schedule B1 to the Insolvency Act 1986 ("Schedule B1") on the basis that the administrators had been appointed by the director for an improper motive. In the alternative, DRC sought the removal of the administrators under paragraph 88 of Schedule B1 on the basis that they had been in office for a month and had taken no proper steps to recover the assets of ULVA and/or relief under paragraph 74 of Schedule B1 and/or directions. Prior to the hearing of the application, the administrators themselves issued an application to terminate the administration.

The Judge terminated the administration on the application of the administrators and made a winding up order in respect of ULVA on a winding up petition presented by the administrators. He ordered that ULVA's director and the administrators pay DRC's costs on a joint and several basis holding that: (1) For the purpose of establishing the jurisdiction of the Court to

terminate an administration under paragraph 81 of Schedule B1 the Applicant did not have to prove the alleged improper motive. It was sufficient to show that there was a good arguable case that the appointment had been made for an improper motive; (2) The Court was satisfied that there was a strong prima facie case of improper motive on the part of ULVA's director, namely to better his own position at the expense of the creditors of ULVA by seeking to preserve the business of ULVA for himself through a phoenix company; (3) The Court would, therefore, have terminated the administration under paragraph 81 of Schedule B1 on the application of DRC; and (4) If necessary, the Court would also have removed the administrators under paragraph 88 of Schedule B1 because they had not acted expeditiously or with the robustness of purpose expected of them.

[David Alexander QC]

COSTS

**Chantrey Vellacott v The
Convergence Group
[2007] EWHC 1774 (Ch)
Ch D (Rimer J), 31 July 2007**

Where companies had pursued a hopeless counterclaim on the instructions and for the benefit of their controlling director, the director was made personally liable, jointly

and severally with the companies, to pay the costs of the proceedings on an indemnity basis. On an application under the s 51 of the Supreme Court Act 1981, the relevant test is whether in all the circumstances it is just to exercise the jurisdiction to order costs against a third-party. The exercise of the jurisdiction is a particularly fact-sensitive one. The discretion will not usually be exercised against “pure funders”, being those who have no personal interest in litigation, who will not benefit from it and do not seek to control its course. But the position will or may be different in cases in which the non-party not merely funds the proceedings, but also controls or is to benefit from them, and in such cases it may be appropriate to make an order against such a person. In such cases that person is or may be regarded in this context as “the real party”, although that does not mean that he would himself have been the proper party to the proceedings. It simply reflects the court’s endeavours to identify the substance of what underlies the litigation from the perspective of the non-party against whom the order is sought; it is not directed at identifying the person in whom the cause of action was vested. A further consideration relevant to whether an order may be made against a non-party is

whether he was promoting the claim or its defence in some improper way, or was advancing a speculative claim. If a speculative case is pursued, or a claim or defence is pursued with impropriety, that too will or may by itself be a ground for a costs order, regardless of questions of whether its promoter was benefiting from or funding the litigation; and the pursuit of speculative litigation is itself regarded as a category of impropriety. In addition, however, it is also necessary to show that the incurring of the relevant costs was caused by the conduct complained of.

[Stephen Atherton QC]

Chantrey Vellacott v The Convergence Group [2007] EWHC 1774 (Ch) Ch D (Rimer J), 31 July 2007

On consideration of the question of costs in relation to the judgment summarised above the Court held that: (1) On a proper construction of CPR r 36.14 when (in the exercise of the Court’s discretion) applying interest to an award of costs the interest is to be applied to the costs of the proceedings in respect of which the application under s 51 of the Supreme Court Act 1981 is made and ought not to be applied to the costs of the s 51 proceedings themselves. (2) The ability to award interest on damages to alleviate against the “general impact

of proceedings” (see Lord Woolf in *Petrgrade Inc v. Texaco Ltd*, Court of Appeal transcript, 23 May 2000) was a concept which may also have an application in appropriate cases when the Court is exercising its discretion to award interest on costs under CPR r 36.14.

[Stephen Atherton QC]

FREEDOM OF INFORMATION

Ministry of Defence v Information Commissioner and Rob Evans EA/2006/27

Sections 24 and 36 of the Freedom of Information Act 2000 dealing with national security and prejudice to the effective conduct of public affairs were engaged in the case of disclosing the list of employees at the Defence Export Services Organisation, a branch of the Ministry of Defence, but not to the extent that all names in the list of such personnel (save for the most senior directors) be redacted. It was not demonstrated that sufficient prejudice existed to prevent disclosure of all names down to a moderately middle-ranking position.

[David Marks]

LIMITATION**Swartzschild v Harrods Ltd QBD (Master Yoxall), 9 October 2007 (unreported)**

The claimant was an elderly German woman from a metal trading and jewellery family whose mother deposited the family jewellery with the Harrods safe depository in the 1950s. By reason of inheritance, the jewellery came to be owned by the claimant. Harrods admitted that the jewellery had been deposited with them and admitted also that the items had been removed from the safe deposit box in or around 1994 and could no longer be found. The claimant commenced proceedings against Harrods for damages in conversion, and Harrods applied to strike out the claim on limitation grounds. The Master held: (1) an allegation that Mr and Mrs Al Fayed appropriated the jewellery in 1994 or 1995 (which was made by the claimant, and on which Harrods relied for limitation purposes) amounted to a prior conversion, meaning that the limitation period began running in 1994 or 1995; (2) alternatively, a letter from a private detective retained by the claimant in 1997 amounted to a valid demand for delivery up, which was not complied with by Harrods, meaning that the limitation period commenced running in 1997; (3) alternatively, the jewellery was lost prior to 1998, when

the claimant visited Harrods and the jewellery and could not be found, meaning that the limitation period had begun to run by 1998 at the latest. On any view, the claim was statute barred.

Accordingly, the claim was disposed of summarily under Part 24 of the CPR.

[Stuart Isaacs QC; Stephen Robins]

PERSONAL INSOLVENCY**Ashworth v Newnote Ltd [2007] EWCA Civ 793 CA (Civ Div) (Buxton LJ, Lawrence Collins LJ), 27 July 2007**

The appellant ("A") appealed against a decision upholding a statutory demand by the respondent former employer ("R"). R had served a statutory demand on A that included overpayment by R of £10,000 in respect of a loan, which A did not dispute, and £2,000 that A had allegedly taken from R. A cross claimed for various expenses, which included a claim for salary in lieu of notice. The district judge held that A had raised a genuine triable issue, and set aside the cross claims on the basis that the cross claims exceeded the amount of the demand. On appeal, a circuit judge held there were no genuinely triable cross claims. On appeal to the Court of Appeal, it was held that there was no practical difference between a "genuine triable issue" and

"real prospect of success", and that the statutory demand should be set aside.

SPORTS LAW**Scuderia Toro Rosso (Fuji Grand Prix, Japan) Court of Appeal, FIA**

Scuderia Toro Rosso appealed to the International Court of Appeal of the FIA against the stewards' decision imposing a 25 second penalty on Vitantonio Liuzzi for overtaking Adrian Sutil's Spyker under waved yellow flags. The grounds of the appeal were that the marshalls at Fuji had erroneously failed to show a waved green flag after the incident to indicate that the track was clear and that Liuzzi was entitled to rely upon his in-car GPS marshall light system. Having heard evidence from both drivers and argument on the construction of the Formula 1 Sporting and Technical Regulations from Scuderia Toro Rosso and Spyker, the International Court of Appeal rejected the appeal and the stewards' decision was upheld.

[Mark Phillips QC]

Benjani v Jouannaueu QBD Commercial Court (Tomlinson J), 11 October 2007

J, the former agent of a professional football player, B, who now played for Portsmouth, had obtained an

arbitration award from the Court for Arbitration in Sport against B for damages for breach of his management contract. J applied to the High Court for permission to enforce the award as a judgment in England, which relief was granted. B applied to set aside the order claiming that he had not had proper notice of the arbitration since the proceedings had not been notified to him at the address specified in the contract and notice of the proceedings had not in fact come to his attention. Held, that the test under Section 103 (2)(c) of the Arbitration Act 1996 was simply whether the relevant person had in fact received notice of the arbitration and accordingly the fact that notice of the proceedings may not have been sent to the address specified in the agreement for service was not material. As to the question of fact, the evidence before the court led to the irresistible conclusion that B had in fact had notice of the proceedings.

[Tom Smith]

Lewis Hamilton World Motorsport Council, Paris

On 13 September, Mark Phillips QC represented Lewis Hamilton before the World Motorsport Council in Paris at the hearing resulting from the McLaren/Ferrari spying controversy. The Council was persuaded not to exclude the

McLaren team from the championship or to deduct any points from Lewis Hamilton or Fernando Alonso.

[Mark Phillips QC]

PUBLICATIONS

We are happy to announce the publication of Lightman & Moss, *The Law of Administrators and Receivers of Companies* (4th edition, 2007, Sweet & Maxwell). The book is edited by Gabriel Moss QC and Professor Ian Fletcher (who have also written chapters). There are further contributions from the following members of Chambers: Anthony Zacaroli QC, David Marks, Adam Goodison, Hilary Stonefrost, Lloyd Tamlyn, Jeremy Goldring, Felicity Toubé, Daniel Bayfield, Simon Fuller and Dr Riz Mokal.

David Marks has co-authored a chapter on English restructuring rules and techniques in the present publication of Wolters Kluwer, entitled "Expedited Debt Restructuring: An International Comparative Analysis" (edited by Olivares-Caminal). The work has detailed chapters on re-organisation rules and principles in about 15 leading world jurisdictions.

[David Marks]

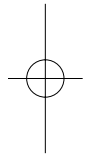
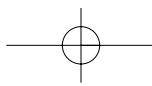
TALKS

The Insolvency Europe Annual Congress took place in Monte

Carlo from 11 – 14 October 2007. Gabriel Moss QC and Lloyd Tamlyn were both speakers. Michael Crystal QC, David Marks, Paul Cooklin and Michael Killick also attended.

On 25 September 2007 David Marks gave a talk in French on aspects of English administrations to a group of French judges, accountants and government officials convened in Paris at the Paris Chamber of Commerce.

[David Marks]



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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