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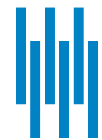

a monthly review of relevant news, cases and articles Vol 13 No 9 February 2008

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Simon Mortimore QC
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Marion Simmons QC
Richard Adkins QC
Richard Sheldon QC
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Mark Phillips QC
Robin Dicker QC
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Richard Fisher
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Simon Fuller
William Willson
Georgina Peters

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

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In the latest step in the Metronet litigation, on 23 November 2007, Mr Justice Patten has addressed the meaning of the term “other appointee”. The following members of chambers appeared at the hearing: Gabriel Moss QC, Simon Mortimore QC, Richard Adkins QC, Richard Sheldon QC, Mark Phillips QC, William Trower QC, Antony Zacaroli QC, David Allison and Tom Smith.

Meanwhile, Mr Justice Briggs’ judgment in Re Cheyne Finance PLC (in Receivership) [2007] EWHC 2402 has now become public and is summarised below. The judgment contains interesting observations on the meaning of the wording "unable to pay debts as they fall due" in s123(1)(e) of the Insolvency Act 1986 and the extent to which future debts may be taken into account under that subsection. 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 all appeared at the hearing of the application.

The Dubai International Financial Centre Courts have delivered judgment in the first trial to come before the Courts. David Allison appeared on behalf of the Defendants. A summary of the judgment is set out below.

Chambers is delighted to announce that Georgina Peters has become our newest junior tenant.

This edition of the Digest was compiled by William Willson.

**Marcus Haywood**

## GENERAL NEWS

According to new figures from the Insolvency Service, there were 3,135 liquidations in England and Wales in the fourth quarter of 2007. This was an increase of 0.3% on the previous quarter and a decrease of 2.1% on the same period a year ago. At 12,426, total liquidations in 2007 showed a 5.4% decrease on 2006 (13,137).

There were 24,846 individual insolvencies in England and Wales in the fourth quarter of 2007. This was a decrease of 3.9% on the previous quarter and a decrease of 16.4% on the same period a year ago. This was made up of 15,659 bankruptcies and 9,188 Individual Voluntary Arrangements. Annually, total individual insolvencies in 2007 (at 106,645) were 0.6% less than in 2006 (107,288). Bankruptcy orders (at 64,480) were 2.4% higher than in 2006 (62,956), while IVAs (at 42,165) were 4.9% lower than in 2006 (44,332).

## CIVIL PROCEDURE

**Tamares (Vincent Square) Ltd v Fairpoint (Vincent Square) Ltd**
**[2007] EWCA Civ 1309**
**CA (Civ Div) (Sir Andrew Morritt, Rix LJ, Lloyd LJ), 15 November 2007**

The appellant company ("F") appealed against a decision of Gabriel Moss QC (sitting as a Deputy High Court Judge) ([2007] EWHC 828 (Ch)) that it pay the respondent company ("T") 75 per cent of their costs. T's application for an injunction to prevent interference with right to light by F had been refused, although damages in lieu of an injunction were awarded. At the costs hearing the Judge held that T was entitled to 75 per cent of its costs as, whilst it had failed to obtain an injunction, it had been awarded damages and because F had failed to accept a Part 36 offer. F contended that the Judge had erred in his assessment of costs as he had treated the case as one of commercial litigation despite the fact that it was an application for an injunction. F contended that in light of its partial success there should have been no order for costs or an order that it pay no more than 25 per cent of T's costs. Held, the Judge had not misdirected himself in applying the principles of commercial litigation. Looking at the case as a whole the Judge could have made a wide range of orders and whilst the situation might be different in other cases involving an injunction the Judge had not misdirected himself in the instant case, AL Barnes Ltd v Time Talk (UK) Ltd [2003] EWCA Civ 402 considered. The Judge had had proper regard to all the relevant matters, had correctly balanced those matters and had reached the correct decision in the exercise of his discretion.

## COMPANY

**Dutch Equity Partners Ltd v Daman Real Estate Capital Partners Ltd**
**Dubai International Financial Centre Courts, Deputy Chief Justice Hwang (reported at http://www.difccourts.ae/judgements_and_orders/judgements/files/CFI1%2020 06%20Judgment.pdf)**

The Defendant was a company registered in the DIFC which was developing a building within the DIFC. The Claimant was a 5% shareholder in the Defendant. The Claimant commenced proceedings seeking (i) a declaration that the articles of association of the Defendant remained the incorporation articles and not those which had placed before the general meeting of the Defendant in April 2005 ("Claim 1"); and (ii) a declaration that the management agreement ("the Management Agreement"), pursuant to which the Defendant company had engaged an associate company ("DAM") to manage the building project, was invalid ("Claim 2").

The Claimant relied on inter alia the following matters in support of Claim 1: (i) the meeting was called on fewer than 21 days' notice as required by Article 58(1) of the 2004 Companies Law; (ii) the notice of the meeting could not be understood without reference to the Management Agreement which was not enclosed with the notice of the meeting; (iii) the notice of the meeting referred to "ratification" of the articles as opposed to "adoption" of a new set of articles; (iv) the notice did not contain a fair, candid and reasonable explanation of the business to the voted upon at the meeting; (v) the new articles were not distributed before the meeting; and (vi) there was no proper show of hands taken at the meeting. The Defendant acknowledged that there had been certain procedural irregularities in relation to the general meeting, but contended that the Court should grant a declaration pursuant to Article 157 of the 2006 Companies Law that the

procedural irregularities did not invalidate the approval of the new articles.

The Judge found as follows (i) Article 157 extended to a company's internal administrative procedures and was not, as contended by the Claimant, restricted to dealings between a company and the Registrar of Companies; (ii) a defect of notice would not normally invalidate a company meeting unless a substantial injustice had been caused by the defect; (iii) no substantial injustice had been caused on the facts of the case. Accordingly, the Court granted the application pursuant to Article 157 and found that the incorporation articles of the Defendant were replaced with those which had been placed before the general meeting in April 2005.

The Judge dismissed Claim 2, accepting the Defendant's submission that the Claimant had no locus standi to pursue the claim for inter alia the following reasons: (i) the Defendant was the proper claimant to bring an action to seek a declaration that the Management Agreement was invalid; (ii) the Claimant was a minority shareholder and the rule in Foss v Harbottle precluded the Claimant seeking a declaration in relation to the validity of the Management Agreement as it did not fall within any of the exceptions to this rule; (iii) Article 24 of the 2006 Companies Law meant that there was no room for the operation of the doctrine of ultra vires in relation to the entry into the Management Agreement; (iv) the Claimant's allegation that the Management Agreement was illegal as it circumvented the requirement under DIFC law that a company must be managed by not less than two directors was rejected. The learned Judge found that any breach of the Companies Law would not render the Management Agreement invalid as there was an insufficient nexus between a statutory provision which requires a company to be managed by two or more directors and the entry into a Management Agreement which delegates most of the directors' powers; (v) the Court rejected the Claimant's allegation that the failure of DAM to register in the DIFC invalidated the Management Agreement on grounds of illegality. The learned Judge held, on the assumed fact that DAM should have registered in the DIFC, that there was an insufficient nexus between the failure to register and the entry into the Management Agreement so as to render the agreement invalid.

**[David Allison]**

**CORPORATE INSOLVENCY**

**Re Metronet Rail BCV (in PPP administration) [2007] EWHC 2697 (Ch) Ch D (Patten J), 23 November 2007**

On 18 July 2007, Mr Justice Lightman made PPP administration orders in respect of Metronet Rail BCV Ltd (which is responsible for the Bakerloo, Central, Victoria and Waterloo and City lines) and Metronet Rail SSL Ltd (which is responsible for the District, Circle, Metropolitan, Hammersmith and City and East London lines). The purpose of the PPP administrations is the transfer to another company or companies of so much of the undertakings of the PPP companies as it is necessary to transfer in order to ensure that the relevant activities may be properly carried on (s220(2)(a) of the Greater London Authority Act 1999 ("the GLA Act")). The PPP Administrators intend to achieve the statutory purpose by making a transfer scheme under the powers contained in Schedule 15 of the GLA Act. The power to make such a scheme is conditional on the consent of "any other appointees" (as defined in para 1(2) of Schedule 15 of the GLA Act) in relation to the matters affecting them. The PPP Administrators applied to the Court for directions as to the meaning of the words

"other appointee". The PPP Administrators contended that the words should be construed as including only companies which either are or will as a result of the transfer scheme become a party to a PPP agreement (i.e. a PPP company within the meaning of s210(5) of the GLA Act). This construction was supported by Transport for London. A number of creditors of the PPP companies appeared before the Court and contended that the words "other appointee" should not be limited to PPP companies, but should be construed as including any company if and so far as it turns out that it is affected by the transfer scheme. Furthermore, certain of the creditors contended that it would be wrong in principle for the Court to decide the point of statutory construction until the terms of the transfer scheme were known. Mr Justice Patten refused to dismiss the application as premature. It was common ground that the transfer scheme is likely to involve the transfer of the PPP contracts held by the PPP companies to a new PPP company. In such circumstances, the Judge held that Court had all the necessary material in order to decide the question and that the PPP Administrators were not asking the Court to construe the words "other appointee" in a vacuum or without any factual context. The Judge held that the only companies which can fall within the term "other appointee" are PPP companies in whose favour there is under the transfer scheme a transfer of property, rights and liabilities from the PPP companies in administration. Accordingly, the creditors will not have a right of veto in respect of any transfer scheme proposed by the PPP Administrators pursuant to Schedule 15 of the GLA Act.

**[Gabriel Moss QC, Simon Mortimore QC, Richard Adkins QC, Richard Sheldon QC, Mark Phillips QC, William Trower QC, Antony Zacaroli QC, David Allison, Tom Smith]**

## Re Cheyne Finance PLC (in Receivership)
## [2007] EWHC 2402 (Ch)
## Ch D (Companies Court) (Briggs J), 17 October 2007

The applicant receivers (R) of a company (C) asked the Court to determine, on assumed facts, issues of construction of the definition of "Insolvency Event". Under the Common Terms Agreement, "Insolvency Event" was defined as: "a determination by the Manager or any Receiver that the Issuer [the company] is, or is about to become, unable to pay its debts as they fall due to Senior Creditors and any other persons whose claims against the Issuer are required to be paid in priority thereto, as contemplated by s 123(1) of the United Kingdom Insolvency Act 1986 (such subsection being applied for this purpose only as if the Issuer's only liabilities were those to Senior Creditors and any other persons and any other persons whose claims against the Issuer are required under the Security Trust Deed to be paid in priority thereto)." On the assumed facts, C could not pay its senior debts in full as they fell due merely by letting its investments run to maturity. Senior creditors with short maturity dates submitted that on the question of whether C was unable to pay its debts as they fell due only those senior debts which were presently due were to be considered, and on the question whether C was about to become unable to pay its debt, those senior debts which were about to become due were to be considered but all senior debts with medium or longer term maturities were excluded. Other senior and subordinated creditors submitted that, both in principle and because all C's senior debts had fixed maturity dates and amounts and because C was in run-off rather than a going concern,

all senior debts had to be considered whenever falling due. The Judge held that the alterations to the insolvency test, first made in the Insolvency Act 1985 and subsequently in s 123 of the Insolvency Act 1986, replaced in the commercial insolvency test found in s 123(1)(e), one futurity requirement, namely the inclusion of contingent and prospective liabilities, with another more flexible and fact sensitive requirement encapsulated in the new phrase 'as they fall due'. The words 'fall due' were synonymous with 'become due'. When separating out balance sheet insolvency from commercial insolvency in 1985 the legislature had not merely removed the requirement to include contingent and prospective liabilities in framing s 123(1)(e) out of its predecessor, but added what, in Australia, had always been regarded as the key words of futurity. Accordingly, the receivers were not precluded from having regard to future debts in determining whether an Insolvency Event had occurred by virtue of the fact that the balance sheet insolvency test under s 123 (2) of the 1986 Act had been precluded from the "Insolvency Event" definition. Section 123(1)(e) of the 1986 Act permitted the consideration of future debts in determining the question of insolvency.

**[Simon Mortimore QC; Stuart Isaacs QC; Richard Sheldon QC; William Trower QC; Martin Pascoe QC; Hilary Stonefrost; Barry Isaacs; David Allison; Daniel Bayfield, Richard Fisher]**

**Re Minrealm Ltd [2007] EWHC 3078 (Ch) Ch D (Morgan J), 20 December 2007**

The applicants ("S") applied to wind up a company ("M"), of which they were the majority directors. S and the minority directors ("B") owned M's share capital equally. S and B had been unable to agree on various company matters and their relationship broke down. B issued a petition pursuant to the s 459 of CA 1985, alleging that S had stripped M of its assets and diverted its business to themselves. An order was sought for the Court to regulate the conduct of M's affairs, and authorising M to institute proceedings against S to recover its assets. The petition had not yet been disposed of and in the course of litigation relating to it, and on B's application, S were ordered to make an interim payment into M's bank account. S subsequently informed B that because of M's debts and sums allegedly due to it, M ought to be put into liquidation. S, despite B's opposition, voted in favour of that proposal, and a petition under s 124 of IA 1986 ("the Act") was presented. Held, M's liabilities exceeded its liquid assets. However M's claim under the s 459 petition against S for moneys diverted from it, and a possible claim against B for money lent by M, which B admitted was due, remained outstanding. B had been asked on more than one occasion to pay the admitted sum due and had not done so. Whilst B withheld that sum from M, it was unable to pay its debts as they fell due. S had, therefore, established, pursuant to s 123 of the Act that M was deemed unable to pay its debts and the Court had jurisdiction to wind up M. The Court had an unfettered discretion as to whether to wind up a company or adjourn or dismiss the petition. In light of the s 459 proceedings, it ought not to be long before the Court was able to determine the amount of moneys which S ought to pay into M's bank account. That would solve M's cash flow insolvency and in those circumstances it would not be appropriate to wind up M. Those considerations pointed strongly towards the desirability of ordering an adjournment of the winding up petition to await the

outcome in relation to the quantification and payments of interim sums due from S. Accordingly, the winding up petition was adjourned pending the determination of the interim payment application in the s 459 proceedings.

**Peter Alan Langard v Patricia Sheldon-Lochore**
**Ch D (Paul Girolami QC, sitting as a Deputy High Court Judge), Unreported**

A company ("C") was put into administration on 14 October 2003. Prior to the winding up of C, the sole director and shareholder of C ("D") drew a cheque on the Company's bank account in favour of D's former wife ("W"). The liquidator ("L") brought an action against W pursuant to s 238, alternatively s 423 of the Insolvency Act 1986 ("the Act"). W argued that (a) the payment should be regarded as a drawing of D or remuneration and therefore there could not be a transaction at undervalue; (b) the grant of relief was precluded by s 238(5) on the grounds that the transaction was entered into in good faith and for the benefit of C; and (c) the company was not insolvent. Held, dismissing the application that although there was a relevant transaction and the company was insolvent, there was no actionable transaction at an undervalue because (i) W was not a party to the transaction because there were no "dealings" between her and the Company, merely the transmission to her of a company cheque (Taylor Sinclair (Capital) Ltd [2001] 2 BCLC 176 followed); and (ii) W was a sub-transferee who had acted in good faith.

**[Felicity Toube, Hannah Thornley]**

**Re Permacell Finance Ltd (in liquidation)**
**Ch D (Birmingham District Registry) (HHJ Purle QC), unreported, 30 November 2007**

The liquidators of Permacell Finance Ltd ("the Company") sought directions as to whether Synseal Holdings Ltd ("the secured creditor") should be permitted to participate in the Prescribed Part (as defined by section 176A of the Insolvency Act 1986), in respect of the shortfall under its floating charge. Subsection (2) of section 176A provided that a liquidator, administrator or receiver (a) shall make a prescribed part of the company's net property available for the satisfaction of unsecured debts, and (b) shall not distribute that part to the proprietor of a floating charge except in so far as it exceeds the amount required for the satisfaction of unsecured debts. Though the Judge acknowledged that the principle of pari passu is recognised by authority at the highest level, he held that its source was statutory, and that it did not operate as a free-standing principle against which specific statutory provisions could be construed. In this case, the provisions of s 176A operated as a departure from the general rule that secured creditors rank ahead of unsecured creditors. Further, the evident policy of the legislature had been to create a fund out of the floating charge holder's security to which unsecured creditors alone could have recourse, in return for the advantage afforded to floating charge holders by the abolition of the Crown's preferential status under the Enterprise Act 2002. In the Judge's view, s 176A recognised a distinction between "unsecured debts" and debts due to "the proprietor of a floating charge holder". The prohibition on distributing the prescribed part to a floating charge holder was absolute.

## PERSONAL INSOLVENCY

**Law Society & Ors v Dixit Shah & Ors**
**[2007] EWHC 2841 (Civ)**
**Ch D (Floyd J), 30 November 2007**

Applications were made to determine the rights of

injured third parties to claim on the insurance of a discharged bankrupt under the Third Parties (Rights Against Insurers) Act 1930. The defendant in the first action ("S") had acquired a number of firms of solicitors. The claimant Law Society ("C") had intervened, alleging a large sum misappropriated from their client accounts by S. C compensated the victims from a specially maintained fund. By s 36 of the Solicitors Act 1974, C was subrogated to the rights and remedies of the victims in relation to the acts or defaults in respect of which payments had been made. C issued proceedings against S and other defendants who had been partners in those firms, including three ("B") who were discharged bankrupts. C issued originating applications in B's bankruptcies designed to enable, through the proof of debt procedure in bankruptcy, a determination of its claim. B applied to strike out C's claim. It conceded that the effect of B's discharge from bankruptcy was that it could not succeed in its subrogated claim, but sought to take advantage of the 1930 Act. Although solicitors were required by law to take out and maintain professional indemnity insurance, B had not done so. Cover was provided by C's "Assigned Risks Pool", and the second respondent insurers had subscribed to that pool in the relevant year. It was to be decided whether C could claim payment from the insurers under the 1930 Act in respect of its claims against B after they had been discharged from bankruptcy. Held, in a contract of insurance that indemnified the insured against loss through a claim, the indemnifiable loss would be limited to where a claim had been elevated from a mere disputable claim to one that had been accepted by agreement or adjudicated upon in favour of the third party. The admission of a claim in bankruptcy was adequate establishment of a claim against an insured to enable the Court to say that the insured had suffered indemnifiable loss under the policy of insurance. In the instant case, that had clearly been the position prior to B's discharge. That was also the position after discharge provided that B were liable to C up to the date of their discharge. Once it was accepted, as in the instant case, that admission of the debt in bankruptcy was adequate establishment of the C's claim to give rise to indemnifiable loss and a claim under the policy, the release of the bankrupt from the obligation to pay, or more accurately the remedy of payment, was irrelevant. The matter of C obtaining proof of the debt in bankruptcy was to be determined at the same time as C's actions against the remaining defendants. Accordingly, C's application in the bankruptcy would succeed to the extent that it sought determinations of the question whether the C's proofs should be admitted in the bankruptcy.

**[Richard Sheldon QC; Lloyd Tamlyn; Stephen Robins]**

### (1) Richard Hill (2) John Bangham v Wendy Haines [2007] EWHC Civ 1284 CA (Civ Div) (Sir Andrew Morritt, Thorpe LJ, Rix LJ), 5 December 2007

The appellant ("W") appealed against a decision to grant a declaration in favour of the respondent trustees in bankruptcy ("T") that a transfer of property pursuant to an order in matrimonial proceedings had been a transaction at an undervalue. W and her former husband ("H") had jointly owned a property that in ancillary relief proceedings had been ordered to be transferred to W. Shortly afterwards H had become bankrupt and T as his trustees had unsuccessfully sought to set aside the transfer as a transaction at an undervalue pursuant to s 339 of IA 1986 ("the Act"). On appeal the Judge had found

that an applicant for ancillary relief could not give consideration by purporting to compromise claims for such relief by entering into a settlement agreement, and therefore an applicant who succeeded in obtaining a property adjustment order after a contested hearing, which depended on the same exercise of discretion as the Court approving a compromise agreement, could be in no better position. W argued that the Judge had been wrong to hold that only the release of a pre-existing right or cause of action was capable of constituting consideration for the purposes of s 339 of the Act, wrong to focus his attention on a compromise agreement rather than the relevant transaction, and wrong to hold that consideration was not given by a party to an agreement compromising ancillary relief claims. Held, the Judge had been wrong to conclude that parties to an order for ancillary relief did not give consideration for the purposes of s 339 of the Act. The ability of one spouse to apply to the Court for an order under s 23 to 24D of the Matrimonial Causes Act 1973 was a right conferred by law. It had value in that it might lead to Court orders entitling one spouse to property or money, and the value of that right was the value of the money or property. There was no reason why some dealing with a pre-existing statutory right could not constitute consideration. An ancillary relief order might be susceptible to relief under s 339 of the Act despite the existence of a court order if there had been collusion between the parties to prejudice the bankrupt's creditors, or some other vitiating factor such as fraud, mistake or misrepresentation, but it would be contrary to Parliament's intention and the objectives of the 1973 Act if every ancillary relief order was automatically subject to nullification at the suit of the trustee in bankruptcy of a party who had become bankrupt after the order had been made.

**APPOINTMENTS**

Christopher Brougham QC was elected a Bencher of Inner Temple in November 2007

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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