A regular review of relevant news, cases and articles from **3-4 South Square Barristers**

3-4 DIGEST

February 2009

'When the tide goes out...'

Last year was quite a year. Following on from the start of the credit crunch in August 2007, 2008 saw some dramatic events the like of which most have not seen in their lifetime and which some say we are unlikely to see again for decades. The demise of Bear Sterns, the collapse of Lehman Brothers, financial problems for almost every major bank, the loss of all investment banks and a pummelling for stock markets around the globe. And all that is not to mention the problems with the Icelandic banks and the use of anti-terrorism legislation to deal with difficulties spawned by their downfall. Nor is it to mention that the wider economy in the UK began to take hits towards the end of the year. For larger retail casualties started to come in November - even before the normally profitable Christmas period and the January sales - and by the end of December included Woolworths, MFI (for the second time in 2008), The Pier, Whittard of Chelsea, The Officers' Club, Zavvi, Adams, USC and Morgan.

December also saw the beginning of what are likely to be a number of frauds to be exposed even if the first one, Bernard Madoff's $50 billion "Ponzi" scheme, was in the US. For as Warren Buffett famously said "when the tide goes out, you see who's not wearing bathing trunks".

So what for 2009? Of course, none of us has a crystal ball. But the opening weeks of the year have not been good with a further bank bail out and more high profile collapses including Waterford Wedgwood, Viyella and Land of Leather. What's more everyone seems to be predicting that things are going to get a lot worse before they get any better and that the recession is going to be deep and painful.

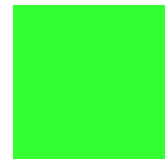
To go with these increasingly tough times, 3-4 South Square gives you the second edition of the new format Digest. This time we have articles by Lloyd Tamlyn on the new Banking Bill, Gabriel Moss QC on Landlords, CVA Surrenders and the Release of Guarantors and Blair Leahy on Applications under paragraph 43 of Schedule B1 of the Insolvency Act 1986.

The Case Digests appear between pages 5 and 15 and News in Brief is on pages 25 and 26. We have also added a new feature - an article by a member of Chambers on external but related activities. We start this with David Marks on the Information Tribunal where he sits as a judge.

Finally we have a rather different insolvency challenge which will not only test your memory of recent events but also gives you a chance to show how much you know of the recessions in the 1970s, 80s and 90s: see page 27.

We hope you enjoy the second of the New Digests. If you wish to be added to the circulation list (or if your contact details change) please send an email to kirstendent@southsquare.com and we will endeavour to ensure that you receive the next edition as soon as it is published.

David Alexander QC



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Failing banks: the new procedures

The insolvency procedures that apply to UK banks are the same as apply to any other UK company. This is about to change says **Lloyd Tamlyn.**

The Banking Bill, introduced to the House of Commons on 7 October 2008, will create two new procedures, called bank insolvency and bank administration. The Bill is intended to receive Royal Assent in February 2009.

Most UK banking casualties of the present crisis (Northern Rock, Bradford & Bingley, Kaupthing Singer & Friedlander Limited, Heritable Bank Plc) have thus far been dealt with through secondary legislation enacted under the Banking (Special Provisions) Act 2008 (the 2008 Act), a stop-gap measure empowering the Treasury to deal with failed banks on an ad hoc basis.

Those powers should cease as from 20 February 2009 under the 2008 Act's sunset provisions, if not already terminated by the Banking Bill receiving Royal Assent. The 2008 Act established, expressly at least, no new insolvency procedures for banks.

In 1997, the Government proposed a tripartite structure for overseeing the UK financial system, with roles for the Treasury, the Bank of England (BoE) and the Financial Services Authority (FSA). In 1998, the banking supervision function previously undertaken by the BoE was transferred to the FSA. The Financial Services and Markets Act 2000 (FSMA 2000) set out the framework within which the FSA operates as single regulator of the financial services industry, and also the framework for the Financial Services Compensation Scheme (FSCS) to provide compensation to, inter alia, bank depositors in the event that a bank is unable to meet its obligations to them.

This framework applied when, in August and September 2007, the tightening of credit markets resulted in the crisis at Northern Rock, and the "banana-republic-style bank run" (as one of the experts giving evidence to the Treasury Select Committee described it) between 14th and 17th September. Northern Rock was a balance sheet solvent bank, albeit suffering an extreme liquidity problem. Those who queued to withdraw their deposits were nonetheless, according to Mervyn King, acting logically. FSCS compensation for depositors was then limited to only the first £2,000 in full, and 90% of the remainder between £2,000 and £35,000. Moreover, previous bank and other insolvencies had shown that depositors could wait months or years for repayment. Hence the logic of those who queued.

The tripartite authorities soon concluded that the legal framework within which they were operating was deficient. In particular, the powers of the tripartite to act pre-emptively were too limited. As King commented shortly after the run, "...in some countries there is a system in which it's possible to intervene pre-emptively and take the retail depositors out of the bank and transfer their accounts to another bank...We don't have that power in Britain. We need it."

A discussion paper issued by the tripartite authorities in October 2007 noted that, whereas there were special administration regimes in place for the water, railway and energy infrastructure companies, there was no special insolvency regime for banks. The paper looked abroad, particularly to North America, where bridge banks and special resolution regimes existed for failing banks. There was, the paper suggested, a need for legislation to ensure that critical banking functions (eg access by depositors to their money) were preserved in the event of insolvency, and to facilitate a speedy and efficient resolution of bank insolvency for the depositors. The two new bank insolvency procedures, as part of a broader regime, seek to satisfy this need.

Part 1 of the Bill creates a special resolution regime for banks, applicable where all or part of the business of a bank has encountered, or is likely to encounter, financial difficulties. This consists of three stabilisation options, as well as the new bank insolvency and bank administration procedures. The three stabilisation options are (i) the transfer (either of shares in the failing bank, or all or part of of its property) to a private sector purchaser; (ii) the transfer of all or part of a failing bank's property to a bridge bank (ie a special purpose company wholly owned by the BoE); and (iii) the transfer of the failing bank's shares into temporary public ownership (ie nationalisation). The options are achieved through the exercise of one or more stabilisation powers (ie share or property transfer powers). The tripartite regulatory structure has been retained, so that each of the BoE, the Treasury and the FSA has a role in the operation of the special resolution regime. The Bill sets out 5 special resolution objectives to which each of the authorities is to have regard in using or considering the use of the stabilisation powers, the bank insolvency procedure or the bank administration procedure. These objectives are to

protect and enhance the stability of the financial systems of the UK and public confidence in the stability of its banking systems, to protect depositors and public funds, and to avoid interfering with property rights in contravention of the European Convention.

Despite criticisms of the tripartite regulatory structure in the report of the Treasury Select Committee on Northern Rock, the tripartite split underlies the regime. Before any of the stabilisation powers can be exercised certain general conditions must be satisfied. The FSA must be satisfied both that the bank is failing, or likely to fail, to satisfy the threshold conditions within the meaning of section 41(1) of FSMA, and also that it is not reasonably likely that action will be taken which will enable the bank to satisfy those threshold conditions. This is a low and somewhat vague hurdle for the exercise of such powers. It may be that the conditions are tightened before the Bill becomes law. If the general conditions are satisfied, the BoE may, subject to certain specific conditions, exercise the first two stabilisation powers, and thus transfer the shares in or property of a failing bank to a private sector purchaser, or the property alone to a bridge bank.

The specific conditions are that the exercise of such powers is necessary, having regard to the public interest in the stability of financial systems in the UK, the maintenance of public confidence in those systems, or the protection of depositors. Where, however, the Treasury has provided financial assistance to the failing bank, the BoE can exercise these two stabilisation powers only if the Treasury has recommended that the BoE exercise the power on the grounds that it is necessary to protect the public interest, and in the BoE's opinion, exercise of the power is an appropriate way to provide that protection. The third of the stabilisation powers, transfer of the failing bank into temporary public ownership, is exercised by the Treasury, and may only be exercised if necessary to resolve or reduce a serious threat to the stability of the financial systems of the UK, or to protect the

A discussion paper issued by the tripartite authorities in October 2007 noted that there was no special insolvency regime for banks.

public interest where the Treasury has previously provided financial assistance to the failing bank.

The broad effect of these aspects of the regime is as follows. The third power, transfer into temporary public ownership, speaks for itself. Northern Rock and Bradford & Bingley have, of course, already been nationalised under the 2008 Act. Whether "temporary" has meaning, or is merely an aspiration, is unclear. The first two powers enable the forced transfer of shares in or property of the failing bank either to a private sector purchaser, or to a bridge bank. The bridge bank, a company wholly-owned by the BoE, is intended (as its name suggests) to be a short-term operation, only existing until an appropriate private sector purchaser or similar solution can be found. If this does not happen, the bridge bank will either be wound up or nationalised.

A crucial aspect of the Bill is that it allows for the partial transfer of assets and liabilities to a private sector purchaser or bridge bank, as did the 2008 Act, so the business of the failing bank is split. The Treasury envisages that partial transfers will take place in three main circumstances. First, a transfer of the deposit book only, to ensure protection and continuity of service for

Lloyd Tamlyn

A crucial aspect of the Bill is that it allows for the partial transfer of assets and liabilities to a private sector purchaser or bridge bank

depositors; secondly, to facilitate a pre-agreed resolution with a private sector purchaser; and thirdly to "sanitise" the balance sheet of a failing bank by separating good and bad assets. Partial transfers may create specific difficulties. Secondary legislation is proposed to protect set-off and netting, structured finance and security arrangements: particular concerns to the banking industry which fears that, unless these matters are properly dealt with, the Bill might significantly increase regulatory capital and undermine competitiveness. Draft secondary legislation seeks also to ensure that those creditors who are left behind in the "rump" bank are no worse off than they would have been had the entire business been wound up.

How do the two new insolvency regimes fit within this structure? The bank administration procedure, Part 3 of the Bill, is an adaptation of the existing company administration regime, to be used where part of the business has been or is to be transferred to a private purchaser, or a bridge bank. The residual bank is very likely to be insolvent, but may retain property, information and rights essential to the successful continuing operation of the business transferred. The procedure seeks to ensure that the residual bank supports the new bank, providing such services and facilities as may be necessary to ensure the new bank's effective operation. The BoE (alone) may thus apply to the Court for a bank administration order in respect of the residual bank where a partial transfer has occurred or is intended, and where the residual bank is insolvent or likely to become insolvent. The Court may then appoint a licensed insolvency practitioner as bank administrator.

The bank administrator has, however, two objectives: a first objective of support for the commercial purchaser or bridge bank, and a second objective of a "normal" administration (rescue as a going concern, or achieving a better result than winding-up). Although the bank administrator is obliged to begin working towards both objectives immediately upon appointment, the support objective takes priority over the normal administration objective. The support objective remains until the BoE issues an achievement notice, signifying that the support of the residual bank is no longer required. Until an achievement notice is issued, the creditors take a back seat: no meeting of creditors is called, and no creditors' committee constituted. A statement of proposals is issued in the normal way, but the BoE must normally have given its prior consent to them. After the achievement notice is issued, the administration continues in much the same manner as any normal administration.

Whilst the procedure is new, the Treasury has used its powers under the 2008 Act to similar effect in at least a couple of cases. Kaupthing Singer & Friedlander Limited was placed into "normal" administration by Court Order on 8 October 2008, but an overriding objective of ensuring support for a transferee of deposits was imposed by statutory instrument. Similarly for the Scottish incorporated Heritable Bank Plc (where a "bridge bank" wholly owned by the Treasury was used to effect a transfer).

The second new procedure is bank insolvency in Part 2 of the Bill. This procedure is based on the existing compulsory winding-up process, with variations designed to promote (without actually preferring) the interests of depositors eligible for compensation from the FSCS. Both the BoE and the FSA are entitled to apply for an order if (a) the general conditions preliminary to the exercise of any of the stabilisation powers are satisfied; (b) the bank has eligible depositors; and (c) either the bank is insolvent, or the winding-up of the bank would be "fair" (ie "just and equitable"). The Court may make a bank insolvency order if satisfied of (a) and (c). An insolvency practitioner is appointed as bank liquidator. The DTI may also apply on the public interest ground.

Broadly speaking, the normal compulsory liquidation legislation applies thereafter, with variations. In particular, a bank liquidator has two objectives. In addition to the normal objective of winding up the affairs of the bank so as to achieve the best result for the bank's creditors as a whole (Objective 2), the liquidator must work with the FSCS so as to ensure that as soon as reasonably practicable each eligible depositor has his account transferred to another institution, or receives payment from the FSCS (Objective 1). Whilst the bank liquidator is obliged to begin working towards both objectives immediately upon appointment, Objective 1 takes precedence. Until Objective 1 is achieved, the role of ordinary creditors in the process is very limited. A liquidation committee, consisting solely of nominees of the BoE, the FSA and the FSCS is formed, to which the bank liquidator must report. The committee must recommend to the liquidator the manner in which he should pursue Objective 1. Normally, only when Objective 1 is achieved will a meeting of creditors be called, and only then will creditors replace the nominees of the BoE, FSA and FSCS on the liquidation committee.

The Bill will apply only to institutions incorporated in or formed under the laws of the UK authorised to accept deposits under Part 4 of FSMA 2000. It will not apply to UK branches of foreign banks (so would not have applied to Icesave). Amendments are proposed to bring bank holding companies within its operation. Consideration is being given to extending the new insolvency procedures, or some variant, to investment firms which hold client money. Part 1 of the Bill applies, with modifications, to Building Societies. Secondary legislation may provide for the modified application to them of the new insolvency procedures.

case digests

Welcome to the second edition of the summary of cases in the "new look" 3-4 South Square Digest. The seriousness of the problems faced by the financial institutions has fed through surprisingly quickly to other economic activities.

The Court has already made decisions in relation to some insolvent financial institutions, two of which are summarised below: the decision in the administration of Lehman Brothers and in the case of Sigma (one of the largest, if not the largest, structured investment vehicle).

Members of chambers have been involved in the insolvencies of a number of other financial institutions that have been widely reported in the media, including Icesave, Landesbanki and Kaupthing Singer & Friedlander and also in the insolvencies of well-known names in the troubled retail sector, in particular, Woolworths, MFI, Zavvi (which was put into administration on Christmas Eve) and Waterford Wedgwood, which described itself in happier days as "the world's leading luxury lifestyle group".

Beyond these two sectors, members of chambers have been involved in the Nortel and Alitalia cases and in some of the fallout from Mr. Madoff's activities.

The digest is not, even in the present climate, concerned only with corporate insolvencies. It includes important cases in banking and financial services and other decisions of the Commercial Court, company law, civil procedure, insurance, personal insolvency and professional negligence.

If you would like the digest to cover any other areas of the law we would welcome your suggestions.

Hilary Stonefrost

BANKING AND FINANCIAL SERVICES

Digested by Jeremy Goldring and Adam Al-Attar

Barclays Bank plc v Kufner [2008] EWHC 2319 (Comm) (Field J), 10 October 2008

Barclays applied for summary judgment against Mr Kufner ('Kufner'), who had guaranteed repayment of a loan to Kel Maritime Limited ('Kel'), an Isle of Man company beneficially owned by him.

Kel had entered into a facility loan agreement to finance the acquisition of a motor yacht ('Lifestyle') on which repayment of the facility was secured (the 'Kel facility'). Paelten Consultores e Servicos Lda ('Paelten'), a Madeira company, was to acquire Lifestyle with the use of a further secured facility agreed with Barclays (the 'Paelten facility').

The Kel facility was to be deemed repaid upon due execution of the Paelten facility and grant of security. Lifestyle was transferred to Paelten and removed from the Isle of Man register, but Lifestyle was not registered in Madeira and no new mortgage was granted to Barclays.

Kufner argued Barclays was not entitled to summary judgment because (i) Barclays had an equitable duty as a secured creditor of the principal debtor, Kel, to procure grant of equivalent security and had failed to do so, and because (ii) Barclays was liable for certain negligent misstatements made to Kel on which he was entitled to rely as surety.

Clause 5.3(f) of the guarantee entitled Barclays to "release, enforce or not enforce our rights under any such security, guarantee or commitment", and, similarly, clause 19.1(a) of the Kel facility provided that all amounts due under that agreement (or any related security agreement) shall be paid "without any form of set-off, cross-claim or condition".

The Court held that: (i) Barclays had no duty to take reasonable care to procure an effective substitute security as it had liberty to release its security and, moreover, clause 5.3(f) was effective because for a guarantee to fall within the Unfair Term in Consumer Contracts Regulations 1999, both the guarantee and the principal contract to which it is ancillary must be executed by a "consumer"; and, (ii) that clause 19.1(a) was not unreasonable within the meaning of section 13 of the Unfair Contract Terms Act 1977 because Barclays had a legitimate commercial interest in receiving payment under the Kel facility without being kept out of its money whilst a cross-claim was litigated.

Jeremy Goldring

Adam Al-Attar

Middle Eastern Oil LLC v National Bank of Abu Dhabi [2008] EWHC 2895 (Comm) (Teare J), 27 November 2008

Middle Eastern Oil ('MEO') issued proceedings against its bank, the National Bank of Abu Dhabi ('NBA'), in England on the basis that NBA had failed to transfer funds to an English company in which MEO had invested with the consequence that that company's share price was reduced. The issue was whether MEO was entitled to sue in England for breach of the banking mandate, or in tort for breach of a non-contractual duty of care or a foreign statutory duty. The proper law of the banking contract was the law of the United Arab Emirates ('UAE'), and the banking contract contained the following jurisdiction clause: "The Bank and the Customer submit to the jurisdiction of the Civil Courts of the United Arab Emirates but without prejudice to the Bank's general right to take proceedings, where necessary, in any court wheresoever."

The Court held that the jurisdiction clause required MEO to commence proceedings in the courts of the UAE, and that the proper law of the tort was the law of the UAE and, as such, there was no compelling reason not to stay the proceedings in England.

The case is of general significance because it confirms the effectiveness of one-sided jurisdiction clauses in banking contracts, and because it indicates that, in applying the Private Law (Miscellaneous Provisions) Act 1995, the Court is likely to consider tortious claims connected with a banking contract to be governed by the same law as that contract.

CIVIL PROCEDURE

Digested by Tom Smith

Tom Smith

Sheffield United Football Club Limited v West Ham United Football Club plc [2008] EWHC 2855 (Comm) Queen's Bench Division, Commercial Court (Teare J), 3 December 2008

During the 2006/2007 football season W engaged an Argentinian football player which engagement S considered was in breach of the rules of the Premier League and a cause of S's relegation. S commenced arbitration in respect of its claim pursuant to an arbitration agreement contained in the FA rules and obtained an interim award from the arbitral tribunal. W sought to appeal the award to the Court of Arbitration for Sport. S sought an injunction to restrain such appeal as being in breach of the arbitration agreement. The Court held that S had a very strong case that W's appeal to CAS was in breach of the arbitration agreement, that damages would not be an adequate remedy and that the balance of convenience favoured granting an injunction. Although the application for an injunction was brought under both section 37 Supreme Court Act 1981 and section 44 Arbitration Act 1996, where the injunction sought under section 37 is in support of arbitration the Court ought, when considering whether it is just and convenient to grant an injunction, to have regard to the requirements of section 44. In the present case those requirements (of urgency and that the arbitral tribunal was unable to act effectively) were satisfied.

Sprecher Grier Halberstam LLP v Walsh [2008] EWCA Civ 1324 Court of Appeal (Ward, Moore-Bick, Rimer LJJ), 3 December 2008

In the course of litigation, a claimant had applied for and obtained a freezing order against the defendant. The defendant considered that the order had been obtained on the basis of false and misleading statements made by the claimant. The proceedings were subsequently discontinued by the claimant. The defendant then commenced proceedings against the claimant and his solicitors alleging fraudulent deceit and conspiracy in relation to the statements made in support of the application for the freezing order. It was contended that the claim was barred by public policy and the immunity attaching to statements of witnesses in legal proceedings. The Court of Appeal held that this immunity extended to affidavit evidence sworn in support of an application for a freezing order and correspondence between solicitors based on their instructions. If and to the extent that solicitors were complicit in any wrongdoing the appropriate remedy was a wasted costs order and there was no need to restrict application of the rule.

Korea National Insurance Corporation v Allianz Global Corporate & Speciality AG Court of Appeal [2008] EWCA Civ 1355 (Waller, Rix, Thomas LJJ), 22 December 2008

The Claimant, an insurance company owned by the State of North Korea, sought to enforce a judgment against the Defendant reinsurers given by the North Korean courts. The Defendant sought to resist enforcement on grounds that the judgment had been fraudulently procured by the North Korean State. The Claimant in turn alleged that these allegations were non-justiciable by the English court as involving alleged criminality of a foreign state. The Judge ruled that the allegations were non-justiciable as likely to embarrass diplomatic relations between the United Kingdom and North Korea and struck them out. The Court of Appeal over-

turned the Judge's decision. It held that there is no support for the view that, where in a commercial context allegations are made against the state, not in relation to some commercial act carried out in its own jurisdiction but in relation to acts which affect the rights of a party under a commercial contract, the court should exercise restraint to the extent of not being prepared to decide the issues.

COMMERCIAL COURT DECISIONS

Digested by Ben Valentin

Ben Valentin

Elektrim SA v Vivendi Holdings 1 Corporation [2008] EWCA Civ 1178 (May P, Hallett and Lawrence Collins LJJ), 24 October 2008

Parties with substantial telecommunications interests were engaged in long-running proceedings concerning certain bonds issued by a special purpose vehicle, which were guaranteed by the Claimant.

In 2007, the Defendant, a Delaware corporation with its principal place of business in New York and a subsidiary of one of the parties to the bond litigation, acquired a substantial holding in the bonds, for the purpose of pursuing the battle with Elektrim in relation to the bonds by indirect means. The Defendant commenced proceedings in Florida against Elektrim alleging fraud. The main claim against Elektrim was that it had secretly agreed to transfer certain shares for a fraction of their true value, and that it had ignored orders made by arbitrators in London.

Elektrim sought final anti-suit injunctions, arguing that the Florida proceedings were in breach of a "no action" clause. Lewison J granted injunctions. As regards the claim against Elektrim, Lewison J held that the causal link between the alleged fraud and the claimed loss was fanciful, and the claim as framed against Elektrim was bound to fail. Nor was there any juridical advantage in suing Elektrim in Florida of which VH1 would be unjustly deprived.

The Defendant appealed against the injunction granted in favour of Elektrim on a number of grounds, including lack of jurisdiction to award an anti-suit injunction. The Court of Appeal held (dismissing the appeal) that the court had had jurisdiction to grant an anti-suit injunction. In so holding, the Court also held that the inherent weakness of a claim, taken together with other matters, could be an important factor in the consideration of whether foreign proceedings were vexatious or oppressive. The English court was entitled to take a view in the round, and it was entitled to be sceptical about attempts to cure by potential amendment claims which on their face were hopeless. The judge was fully entitled to take into account the weakness, and inherent implausibility, of the claim in the exercise of the discretion. Consequently, an injunction would have been appropriate on this ground even if the "no action" clause had not applied.

Michael Wilson & Partners Ltd v Emmott [2008] EWHC 2684 (Comm) (Teare J), 6 November 2008

The claimant provided legal services in Kazakhstan. It was agreed that the defendant would join the claimant as a director and shareholder in creating the leading independent legal and business consultancy in Kazakhstan. The agreement contained an arbitration clause for disputes to be resolved in London before a tribunal of three arbitrators.

The agreement came to a premature end and the claimant commenced arbitration. The tribunal issued a procedural order granting permission to amend and specific disclosure.

Following service of the application notice for an order from the court pursuant to section 67 of the Arbitration Act 1996 the defendant applied for an order from the tribunal pursuant to section 67(2), which empowers arbitrators to continue the proceedings and make a further award while a jurisdictional challenge is pending. The arbitrators made a continuation order on 12 September 2008.

In dismissing an appeal under section 67, it was held that the procedural order issued by the tribunal was not an award and the court had no jurisdiction to hear an appeal under section 67. Whether or not a decision was an award was a question of substance and not of form. The test to be applied was how the reasonable recipient of the tribunal's decision would have viewed it. The reasonable recipient of the decision would have concluded that it consisted of an answer to two procedural questions. He would not have regarded the decision, or any part of it, as an award as to jurisdiction. It was not appropriate for the court to decide whether the arbitrators had substantive jurisdiction to make their award. The jurisdiction issue, at least initially, was a matter for the tribunal.

COMPANY LAW

Digested by Daniel Bayfield

Daniel Bayfield

Re McCarthy Surfacing Ltd [2008] EWHC 2279 (Ch) (Michael Furness QC), 3 October 2008

The Court upheld, in part, allegations of unfair prejudice made on a section 459 (Companies Act 1985) petition and, having regard to the extent of the prejudice that the petitioners suffered and would continue to suffer, ordered the respondents to buy out the petitioners' minority shareholding in the company. The unfair prejudice allegations which were upheld related to: (i) the board of directors having repeatedly entered into contracts on behalf of the company with members of the board, without negotiation or investigation into the prices being charged; and (ii) the board's decision effectively to exclude shareholders from a share of the company's profits by failing to consider whether to declare dividends.

Re Southern Counties Fresh Food Ltd [2008] EWHC 2810 (Ch) (Warren J), 20 November 2008

The Court upheld, in part, allegations of unfair prejudice made on a section 994 (Companies Act 2006) petition including: (i) the late payment under the memorandum of understanding which constituted unfairly prejudicial conduct; (ii) the respondent directors acting in breach of their duties and the shareholders' agreement by not offering the company the opportunity of developing a trade in cows which another company managed by them developed; (iii) a breach of the self-dealing and no dealing rules. In reaching these conclusions the court held that a nominee director owed the same duties to the company as any other director. The Court decided that the parties should be given an opportunity to address the form of relief, however, it was accepted that a working relationship was no longer possible and that there should be a share sale and purchase order in one direction or the other.

AMG Global Nominees (Private) Ltd v Africa Resources Ltd [2008] EWCA Civ 1262 (Sir Andrew Morritt C, Hooper and Wilson LJJ), 20 November 2008

The Court held that, (i) although section 152(1)(a) of the Companies Act 1985 purports to define "financial assistance", it does not do so because in the purported definitions it repeats the word "financial"; and, (ii) the fact that a parent company might, by the exercise of its control over its subsidiary, acquire for itself the asset of the subsidiary used in the provision of financial assistance but instead of doing so authorises its subsidiary to provide the financial assistance is not the sort of hive-down Millett J evidently had in mind in Arab Bank plc v Mercantile Holdings Ltd [1994] Ch 71. It does not involve either an asset leaving the parent or an assumption of liability by the parent.

Mactra Properties Ltd v Morshead Mansions Ltd & ors [2008] EWHC 2843 (Ch) (Timothy Brennan QC), 6 November 2008

On the basis that the defendant company had a policy of not registering share transfers where, as in this case, there were outstanding debts due from the transferor, it had not acted in bad faith in refusing to register the transfer of its shares from the claimant company to third parties.

CORPORATE INSOLVENCY

Digested by Blair Leahy and William Wilson

William Willson

Re Courts PLC (in liquidation) [2008] EWHC 2339 (Ch) (Blackburne J), 9 October 2008

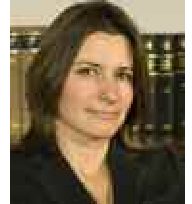
The joint liquidators of Courts plc applied for (i) an order pursuant to section 176A(5) of IA 1986 that section 176A(2) should not apply so as to require a distribution of the prescribed part to unsecured creditors whose claims are £28,000 or less on the basis that the cost of making a distribution to such creditors would be disproportionate to the benefits; and (ii) consequential directions in relation to the costs incurred in dealing with the prescribed part pursuant to rule 12.2 (2) of IR 1986. Blackburne J held that the Court had no jurisdiction to order a partial disapplication of section 176A(2) of the Act. The Judge based this conclusion on: (i) the words of the Act; (ii) the principle of pari passu distribution which underlies the treatment of unsecured creditors in an insolvent liquidation; and (iii) the fact that when determining whether a distribution of the prescribed part would be disproportionate to the benefits, the Court must consider the question by reference to the interests of the creditors as a whole as opposed to a particular sub-class of creditors. Blackburne J also held that the Court had jurisdiction to fix the costs of dealing with the prescribed part without first requiring the convening of a meeting of creditors of the company to consider such costs.
[David Allison]

In the matter of Federal-Mogul Aftermarket UK Ltd [2008] EWHC1009 (Ch) (David Richards J), 21 May 2008

The Applicant Supervisors of a company voluntary arrangement applied for directions in relation to a deficit in a pension fund.

The issue for determination was how claims under the Pensions Act 1995 section 75 were to be quantified. The Court held that (i) the claims in the CVA were to be estimated as in a liquidation; (ii) in valuing contingent claims account is taken of those subsequent events which can bring greater certainty to the process of estimation; (iii) the actuaries' certification of the liability under section 75 is necessarily a subsequent event of which account should be taken; and, (iv) the amount of the liability was therefore the sum quantified in the actuaries' certificate.

[Lucy Frazer]


Lucy Frazer

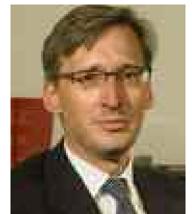
(1) Millhouse Capital UL Ltd (2) Roman Abramovich v Sibir Energy plc & Ors [2008] EWHC 2614 (Ch) (Christopher Clarke J), 29th October 2008

Y, a Russian company, was being wound up in Russia. Y wished to commence proceedings in the Commercial Court against R, a Russian citizen, and M, an English registered company. Accordingly, a creditor and contributory of Y petitioned for the winding up of Y and the appointment of a provisional liquidator in England in order that an English provisional liquidator, and, in due course, liquidator might pursue the Commercial Court action.

Following the appointment of the provisional liquidator, Y commenced the Commercial Court proceedings against M and R. M and R, however, applied to have the Commercial Court proceedings dismissed and for an order setting aside the appointment of the provisional liquidator, a declaration that the Court decline to exercise its insolvency jurisdiction over Y and an order that the petition to wind up Y be dismissed.

Although the Court dismissed the Commercial Court action it held that had the result been otherwise, it would not have declined to exercise its winding up jurisdiction and would not have set aside the appointment of the provisional liquidator but for the fact that there had been material non-disclosure on the application for the appointment of the provisional liquidator. First, Y's claim for US$2 billion against M and R, who, on the hypothesis that the Commercial Court proceedings were to go ahead, would either be resident in England or a necessary or proper party to the claim against M, and, in either event, subject to the jurisdiction of the English Court, was an asset which constituted a sufficient link with England. Second, there was a real possibly of benefit to the petitioners from an appointment of the provisional liquidator and his appointment, in all probability, as liquidator following a winding up, because the Commercial Court proceedings would be overseen by a licenced insolvency practitioner well versed in the intricacies of English litigation of this size and complexity, who was an officer of, and accountable to, and subject to the direction of the English Court.

[Robin Dicker QC, Mark Arnold]

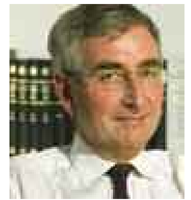

Robin Dicker QC

Mark Arnold

Re Sigma Finance Corporation (in administrative receivership) [2008] EWHC 2997 (Ch) (Sales J), 7 November 2008 and the Court of Appeal decision in Re Sigma Finance Corporation (in administrative receivership) [2008] EWCA Civ 1303 (Lord Neuberger, Lloyd LJ, Rimer LJ), 25 November 2008

The receivers ("R") of a structured investment vehicle (Sigma) applied for directions in relation to the construction of a security trust deed. Sigma was massively insolvent and an enforcement event had occurred. The occurrence of an enforcement event had the effect of starting a 60 day realisation period during which the trustee was to use reasonable endeavours to establish pools of assets matching Sigma's liabilities. Once the pools had been established provision was made for distributions on a pari passu basis. Clause 7.6 of the deed provided that during the realisation period the security trustee "shall so far as possible discharge on the due dates therefore any short term liabilities falling due for payment during such period, using cash or other realisable or maturing assets of the issuer". A creditor ("S") which held notes which matured during the realisation period submitted that the meaning of the provision was that its debt should be paid in full or to the greatest extent possible, even if that meant that other creditors whose debts matured after its debt received little or nothing. The judge held that the natural and ordinary meaning of the deed was that for which S contended. The deed fell to be interpreted according to ordinary principles and on that basis its provisions supported the "pay as you go" construction. It could be said that this construction was adventitious, depending on the maturity dates of particular instruments, and unfair on creditors whose debts matured after those of S, but neither of those features flouted business common sense. It would be wrong to adopt a strained construction of clause 7.6 to remedy unfairness where the risk had been deliberately undertaken in a detailed regime designed to replace the statutory insolvency regime. The words "so far as possible" related to the possibility of being able to pay the short term liabilities referred to

on their due dates having regard to the extent of the assets which were in practical terms available to the trustee. It was not viable to spell out of those words an intention or requirement for pari passu distribution.
On appeal from the decision of Sales J, the Court of Appeal dismissed the appeal (Lord Neuberger dissenting). The wording of clause 7.6 of the deed was clear in imposing an obligation on the trustee to pay on the due dates the short-term liabilities falling due during the realisation period, out of the available assets, so far as possible. The obligation was qualified by the words "so far as possible" which could refer to payment on the due date, so as to protect the trustee if payment was possible but not until a day or more later. The wording was unlike most other provisions of the deed in imposing a specific obligation to pay as and when liabilities fell due and was not subject to any clear indication that the obligation was conditional on the trustee being of the view that the available assets were sufficient to discharge the corresponding liabilities. If that had been intended a suitable provision could and would have been included, as it had been elsewhere in the deed. The argument for pari passu distribution placed on the words "so far as possible" a weight and significance they could not bear. **[Gabriel Moss QC, Simon Mortimore QC, Richard Sheldon QC, Barry Isaacs, Felicity Toube, Daniel Bayfield]**


Richard Sheldon QC

Felicity Toube

NYK Bulkship (Atlantic) NV v Britannia Bulk plc (in Administration) Commercial Court (Teare J) (unreported), 14 November 2008

NYK was the owner of a vessel which had been chartered to BB on the terms of the NYPE form ("the Head Charter"). Clause 18 of the Head Charter gave NYK a lien on sub-freights. BB had sub-chartered the vessel to a third party ("the Sub-Charterer").

The Sub-Charterer was due to pay sub-time charter hire to BB. BB went into administration. NYK obtained an ex parte injunction to restrain BB and the administrators from demanding or accepting payment from the Sub-Charterer, on the basis that such payment would destroy NYK's lien under clause 18. On the return date, the administrators contended that there was no genuine triable issue, because: (1) the lien was void as an unregistered charge; alternatively (2) the lien was merely a contractual right in personam which would not survive the commencement of administration, because NYK could not contract out of Rule 2.69 of the Insolvency Rules 1986. NYK argued: (1) that there was a genuine triable issue, because it was arguable that the lien under clause 18 of the Head Charter was analogous to the right of stoppage in transit which would survive the commencement of insolvency proceedings; and (2) that the Court should grant permission under paragraph 43 of Schedule B1 for the issue to be determined by way of arbitration, pursuant to an arbitration clause in the Head Charter.

The Judge held that there was a real triable issue and that the injunction should be continued. Although the Privy Council had held in Agnew v Commissioner of Inland Revenue [2001] 2 AC 710 that the lien was purely contractual and did not confer any equitable proprietary interest in sub-freights, Gross J had suggested in Samsun Logix Corporation v Oceantrade Corporation [2008] 1 Lloyd's Rep 450 that the lien would nevertheless survive the commencement of insolvency proceedings. The decision of the House of Lords in British Eagle International v Air France [1975] 2 All ER 390 appeared to provide a serious response to NYK's contentions, but there was a genuine triable issue which the Court could not resolve on the return date.

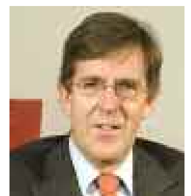
However, the Judge was not persuaded that it was appropriate for NYK to have permission under paragraph 43 of Schedule B1 to commence arbitration proceedings, because an issue as to the proper treatment of an asset in the estate of an insolvent company should ordinarily be a matter for the Companies Court on an application by the administrators for directions.
[Stephen Robins]

Stephen Robins

Innovate Logisitcs Ltd (In Administration) v Sunberry Properties Limited [2008] EWCA Civ 1261 (Mummery, Wall and Stanley Burnton LJJ), 18 November 2008

The Appellant company ("C") had substantial book debts. C's administrators ("A") sought to maximise recovery of these book debts by affecting a sale on a pre-packaged going concern basis to ensure continuity of service and therefore a reduction in cross claims. Continuity of service could only be achieved if the purchaser ("P") distributed the £20 million of frozen foods stored at C's leased premises. C therefore granted P a temporary licence to occupy the leased premises and P undertook to perform the customer contracts.

The granting of the licence was in clear breach of the covenant against alienation contained in the lease. C's landlord ("L") sought permission under paragraph 43(6) of Schedule B1 to the Insolvency Act 1986 to commence proceedings for a mandatory injunction to terminate the licence and thus put right C's breach of covenant. HHJ Simon Brown QC granted permission under paragraph 43(6) holding that the purpose of the administration would not be impeded by the commencement of proceedings because the purpose of the administration had already


Simon Mortimore QC

been achieved by selling the business of C on a pre-packaged going concern basis. Accordingly, there was no need to carry out the exercise of balancing the interests of L against the interests of C's creditors in accordance with the guidance of the Court of Appeal in Re Atlantic Computer Systems Plc [1992] Ch 505.

Allowing A's appeal, the Court of Appeal held as follows. One of the main purposes of the administration was a continuation of the collection of C's book debts which could only be achieved if P continued to occupy the leased premises. The purpose of the administration would be impeded by the granting of permission because the mandatory injunction would, if granted, terminate the ability of P to carry out the contracts and to assist in getting in the book debts owed by customers. Accordingly the learned Judge ought to have carried out the balancing exercise in accordance with the guidance in Atlantic Computers. Once that exercise was carried out, the balance lay clearly in favour of C's creditors.

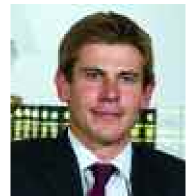
[Gabriel Moss QC, Simon Mortimore QC, Blair Leahy]

Gabriel Moss QC

SV Special Situations Fund Ltd v Headstart Class F Holdings Ltd British Virgin Islands (Olivetti J), 21 November 2008

SV applied to the Court to set aside a statutory demand served on it by Headstart in respect of unsatisfied redemption requests. The judge refused to set the statutory demand aside, finding as follows: (i) Headstart was a "creditor" within the meaning of section 9 of the BVI Insolvency Act 2003 ("the Act") since (a) the prohibition under section 197 of the Act on past members claiming in the liquidation of a company becomes relevant only following an order for the winding-up of a company, and (b) in any event, the claim of Headstart, albeit deriving from unpaid redemption requests, could not now be characterised as the claim of a former member following the agreement reached between the parties in relation to the timing of the redemption payments; (ii) the evidence revealed that the directors of SV had exercised their discretion to meet SV's redemption obligation in cash. The directors were, therefore, no longer entitled to exercise their discretion under the articles to redeem in specie by the provision of securities to Headstart. Alternatively, SV was now estopped from contending that it had a right to meet its obligations to Headstart by the provision of securities; (iii) once a creditor had established an undisputed debt in excess of the prescribed minimum of US$2,000 it was entitled to serve a statutory demand. The small size of the debt relative to the total assets of SV did not, without more, amount to proof of substantial injustice.

[David Allison]



David Allison

Re Lehman Brothers International (Europe) (in administration) [2008] EWHC 2869 (Ch) (Blackburne J), 24 November 2008

Four private investment funds applied to the Court for an order requiring the Joint Administrators of Lehman Brothers International (Europe) ("LBIE") to provide them with information in writing in relation to certain securities which were, or had been, held by LBIE pursuant to prime brokerage and margin lending agreements.

The applicants relied upon three jurisdictional bases, namely, (i) paragraph 68(2) of Schedule B1 to the Insolvency Act 1986 ("Schedule B1"), (ii) paragraph 74 of Schedule B1; and (iii) the court's jurisdiction with respect to trusts.

The Judge rejected the application, concluding that: (i) where, as in this case, there is no suggestion that the administrator is acting improperly, it would run "contrary to the nature and purpose of an administration if the court were to interfere in the detailed day to day management of the administration in the way that this application seeks"; (ii) he felt "unable" to conclude that any case of unfair harm had been established; and (iii) "If the court is not willing to exercise its power under paragraph 68(2) by giving directions which require the administrators to respond to the applicants' wish for further information, recourse to some wider jurisdiction in order to secure the same objective will not put the applicants in a better position".

The Judge also commented that: "… the administrator must be accorded a wide measure of latitude in the way he goes about the exercise of his powers so as to achieve the statutory purpose.

His task would become quite unmanageable, particularly in an administration as immense and complex as LBIE's, if he is to be at the beck and call of each and every creditor or each and every asset claimant wishing to be informed about his claim or asset and who expects the administrator to turn aside from the general conduct of the administration and devote time and resources to responding to his enquiries."

[William Trower QC, Daniel Bayfield]

William Trower QC

Re the Parkside Group of companies, Leeds District Registry (Anthony Elleray QC), 25 November 2008

The administrators of three Parkside companies sought directions from the Court as to whether an assignment to Parkside International Limited ("International") of a debt of £3 million owed by Parkside Perfomance Films ("Films") to Parkside Flexibles Limited ("Flexibles") was valid and/or could be set aside as a preference under section 239 of IA 1986 and/or could otherwise be challenged in circumstances where the assignment was effected on 19 November 2004 and Films was placed into administration on 22 November 2004. Given the administrators' conflict as administrators of all three companies, the interests of the creditors of Films and Flexibles were represented by creditors of those companies at the expense of their respective administrations. The judge held that the mere fact that Flexibles had a right of set-off under rule 2.85 of IR 1986 did not prevent the assignment giving rise to that set-off from being attacked as a preference. However the judge held that the assignment was valid, that Films did not do anything or suffer anything to be done in relation to the assignment (whether by way of deliberately delaying the administration of Films for long enough to allow the assignment to proceed as alleged or otherwise) and that the assignment could not therefore be set aside as a preference. In that context the judge indicated that for a person to suffer anything to be done, the action had to be something which that person could control. Finally, the judge held that the assignment could not be set aside on account of any alleged breach of duty on the part of the directors of Films.
[David Alexander QC]

David Alexander QC

INSURANCE

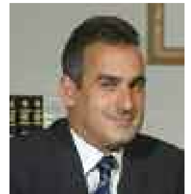
Digested by Barry Isaacs and Stephen Robins

Re Names at Lloyd's for the 1992 and prior years of account, represented by Equitas Limited [2008] EWHC 2960 (Ch) (Floyd J), 3 December 2008

Section 109(1) of the Financial Services and Markets Act 2000 requires an application for an insurance business transfer scheme under section 107 to be "accompanied by" a report on the terms of the scheme. That did not mean that at the moment at which it is issued the originating process must be accompanied by a scheme report.

The Court considered an application for an order, pursuant to Regulation 4(2) of the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, waiving the requirement to send a notice, stating that an application for an order sanctioning a business transfer scheme has been made, to every policyholder of the parties. The Court held that it had jurisdiction to grant the waiver before the scheme report had been produced.

The Court granted the waiver because strict compliance was impossible; because the purpose of the notice could in large part be achieved by steps which Equitas proposed to take; and because notification beyond that proposed would be disproportionate in time and cost.
[Barry Isaacs]



Barry Isaacs

Durham v BAI (Run Off) Ltd; Fleming & Eddleston v Independent Insurance Co Ltd; Thomas Bates & Son Ltd v BAI (Run Off) Ltd [2008] EWHC 2692 (QB) (Burton J), 21 November 2008

Two insolvent insurance companies, BAI (Run Off) Limited ("BAI") and Independent Insurance Company Limited ("Independent"), were Defendants in three of the six test cases tried in June and July 2008 under Practice Direction: Employers' Liability Policy Trigger Issues [2007] All ER (D) 453 (Jul). The central issue was whether employers' liability policies which provided an indemnity to employers in respect of employees' claims for "injury sustained" or "disease contracted" during the period of insurance responded where employees had been exposed to asbestos during the period of insurance but had not developed mesothelioma until after the expiry of the policies. BAI and Independent contended, relying on the wording of the policies and the decision of the Court of Appeal in Bolton MBC v Municipal Mutual Insurance Ltd [2006] 1 WLR 1492, that the injury/disease came into existence many years after the expiry of the policies, when the mesothelial tumour started to grow in an uncontrolled fashion following the necessary genetic alterations and 'angiogenesis' (the moment when a small cluster of cancer cells develops its own blood supply, thereby enabling the incipient mesothelioma to become independent and grow exponentially within the body). Burton J held that: (1) injury/disease does not occur upon exposure to asbestos or during the subsequent period of microscopic irritation, genetic changes and the operation of the body's defence mechanisms; (2) injury/disease occurs on angiogenesis, which may be taken to be 5 years prior to the 'diagnosability' of the mesothelioma; (3) the concept

of injury/disease in the policies is actionable injury/disease; (4) as a matter of ordinary language, the event which the policies require to happen during the period of insurance in order for the policies to respond is the moment when the injury/disease finally comes into existence, i.e the moment when it occurs; and (5) there was no universal usage of the insurance industry which could have any bearing on the meaning of the policies provided by BAI or Independent.

However, notwithstanding these findings, the Judge held that the policies should be read as if the words "sustained" and "contracted" were deleted and replaced with the word "caused". In coming to this conclusion, the Judge relied primarily on the fact that the policies referred to injury/disease being sustained/contracted by "employees".

In reliance on this and other similar terms, the Judge held that the policy trigger was therefore an event which had to be capable of happening to each victim of mesothelioma whilst he or she was still an employee of the tortfeasor, and could not be an event which happened after retirement. Bolton MBC v Municipal Mutual Insurance Ltd [2006] 1 WLR 1492 distinguished.

PERSONAL INSOLVENCY

Digested by Marcus Haywood

Marcus Hayood

Barrett v Barrett [2008] BPIR 817 Chancery Division (David Richards J), 19 May 2008

The Court upheld the decision of HHJ Levy QC stricking out a claim by T against his brother, J on the grounds that it disclosed no reasonable cause of action.

That claim had asserted that the proceeds of sale of a property which T had originally owned, but which had been sold by T's trustee in bankruptcy to J, were in fact held on trust by J for T. The existence of any such trust was denied by J, who also argued that the transaction in question had been designed to defeat the interest of the trustee in bankruptcy in the entire estate of T. The Court held that the transaction in question, having been entered into for an illegal purpose (i.e. to defeat the claim of the trustee in bankruptcy by enabling T to escape his obligation of disclosure of assets under s 333(2) of the Insolvency Act 1986), could not be used to assert a proprietary claim.

Pickthall v Hill Dickinson LLP (Unreported, 13 October 2008) Chancery Division (HHJ Waksman QC), 13 October 2008

The bankrupt issued negligence proceedings in his own name against his former solicitors on the eve of the expiry of the limitation period. After expiry, he obtained an assignment of the claim from the Official Receiver. The Court found that it was necessary for the claim form to be amended to plead the assignment but granted permission under CPR r.17.4(2) to amend. In particular the Court was motivated to exercise its discretion under CPR r.17.4(2) because there was no prejudice to the defendant by allowing the amendment other than the fact that it would be deprived of a limitation defence. In the absence of any abuse of process on the part of the claimant, and despite the fact that he had known that he required an assignment when he issued the claim, the Court found that he and the Official Receiver: "can properly be described as two sides of the same coin for present purposes" and accordingly allowed the amendment.

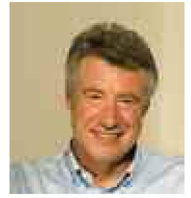
Raymond Saul & Co., (A Firm) v Holden [2008] EWHC 2731 (Ch) (Richard Snowden QC), 12 November 2008

The Court considered whether a sole residuary legatee under a will who becomes bankrupt (but is discharged from bankruptcy before the administration of the testator's estate is completed), is entitled to the legacy forming the residual estate, or whether the legacy is payable to his trustee in bankruptcy. The Court held that the right of the residuary legatee was a composite right to have the estate properly administered and to have the residue (if any) paid to him as and when the administration was complete. That composite right was a chose in action, which was transmissible, and accordingly fell within the first limb of the definition of 'property' in s 436 of the Insolvency Act 1986.

On that basis, it followed that a bankrupt residuary legatee's composite right, including the right to have the assets in the residuary estate paid over to him following the administration of the estate, vested in his trustee in bankruptcy. Once vested in the trustee, the right will not revest in the bankrupt unless and until his bankruptcy debts and costs have been paid. The right will be capable of being asserted by the trustee in bankruptcy against the executors.

Lewis v Metropolitan Property Realizations Limited [2008] EWHC 2760 (Ch) (Proudman J), 21 November 2008

A trustee in bankruptcy had "realised the interest" of a bankrupt in his family home within the meaning of section 283(A)(3)(a) of the Insolvency Act 1986 by transferring it to a creditor for £1 plus deferred consideration (payable out of any subsequent sale on by the creditor), with the effect that the interest did not revest in the bankrupt on the third anniversary of the bankruptcy.
Section 283A(3)(a) required only the estate's interest in the property to be realised, not (where there were co-owners) the underlying property itself. Accordingly, a trustee who sold the estate's interest for deferred contingent consideration 'realises' the interest within the meaning of s 283A(3) of the 1986 Act. A sale for a deferred consideration would, however, only amount to a 'realisation' if the trustee had assigned the estate's interest absolutely.
[John Briggs]


John Briggs

Power v Brown [2009] EWHC 9 (Ch), (Gabriel Moss QC), 15 January 2009

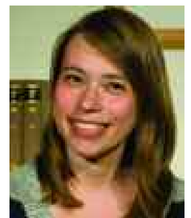
A bankrupt had no standing to pursue any appeal which related to the assets in his estate which had passed to his trustee in bankruptcy: Heath v Tang [1993] 1 WLR 1421 applied.
Furthermore, section 284 of the Insolvency Act 1986 (which renders void any disposition of property made by the bankrupt in the period beginning with the day of the presentation of the petition for the bankruptcy order and ending with the vesting of the bankrupt's estate in a trustee, except to the extent that it is or was made with the consent of the court, or is or was subsequently ratified by the court) could be relied upon by persons other than the trustee in bankruptcy.
There was no reason in this regard why the position in relation to bankruptcy should not be the same as the parallel avoidance provisions in relation to companies: see section 127 of the Insolvency Act 1986 and Mond v Hammond Suddards [1996] 2 BCLC 470.
The Court's ability to validate dispositions under either section 127 or 284 of the Insolvency Act 1986 will check any attempted excessive or unjust use of the provisions.
In the circumstances, the right of appeal advanced by the appellant was vested in the appellant's trustee in bankruptcy who had not pursued it. The appellant had no standing to pursue the appeal which was dismissed accordingly.
[Gabriel Moss QC]

PROFESSIONAL NEGLIGENCE

Digested by Georgina Peters

(1) Major Dhillon (2) Bachmann Trust Co Ltd v Javed Siddiqui & 6 Ors [2008] EWHC 2020 (Ch) (Bernard Livesey QC), 13 August 2008

The claimant (C) sought damages against his accountants (D) for negligence in their provision of tax advice. D had recommended the purchase of offshore investments and creation of offshore companies to hold those investments and C's shares in E, a company owned by C.
Creation of the companies generated substantial expense. The issues were whether: (i) it was appropriate to create structures which imposed those additional expenses and D had properly explained the full nature of the ongoing expenses and impact on E's taxation regime; (ii) D was negligent in advising C in relation to the declaration by E of a dividend payable to an offshore holding company ("the Dividend") with adverse tax consequences for E; and (iii) D should have advised C not to pay himself bonuses given his stated intention to sell E.
Bernard Livesey QC, sitting as a deputy judge of the High Court, allowed C's claim to succeed only to the extent that D was negligent in advising C about the Dividend. On the particular facts, the learned judge rejected the remaining allegations.
The case calls for comment in relation to his rejection of D's reliance on the reflective loss principle: D contended that loss from use of associated companies had been sustained by E, and C's loss could only be loss reflected in a diminution in value of his shareholding in E.
That principle applied only where a duty was owed to the company as well as the shareholder, for breach of which the company could bring an action for damages in its own right. Here, however, it was alleged that D owed a duty to C personally.
The scope of that duty was to provide to C appropriate advice to secure, by the ordering of either his personal finances or those of E, the best overall financial return that might reasonably be achieved from both taken together. That was outside the reflective loss principle.
Were it to be otherwise, it would deny a client, who sought tax advice to secure the best outcome from the ordering of his personal and his company's affairs, an important remedy for breach of duty, wherever his loss was sustained not to personal finances but through the medium of his company, whose assets it was the accountant's duty to order for the benefit of his client.


Georgina Peters

Sara Dayman (as Trustee of the Estate of Sandra Estelle Fielding, a former bankrupt) v Lawrence Graham (A Firm) [2008] EWHC 2036 (Ch) (Judge Hodge QC), 28 August 2008

The claimant trustee in bankruptcy (C) claimed damages against a firm of solicitors (D) for breach of contract and professional negligence. The claim arose out of D's conduct of the sale and purchase of property for the bankrupt (F). The principal issue was whether, as a result of D's alleged acts and omissions, F lost the chance of avoiding liability for the balance of a debt incurred by her husband (H), without her knowledge, on an account in their joint names with the Royal Bank of Scotland (RBS). H at the relevant time was a partner in D. D was retained to perform conveyancing work associated with the sale of F and H's home and purchase of a new property in F's name. Bridging finance was obtained to purchase and renovate that property, secured by an undertaking from D to repay the finance from sale proceeds of the first property. F believed the proceeds had been sufficient to repay the mortgage bank (RBS), to repay the bridging finance to a second bank and to leave her with a balance held by D on client account. In fact, there remained substantial outstanding indebtedness to RBS, which obtained judgment against F. The shortfall on the bridging loan had been financed by H by an alternative source of funding.

Judge Hodge QC held the relevant breaches of duty to fall within the performance of D's retainer in relation to sale of the first property. H acted in the dual capacity of performing certain tasks ordinarily undertaken by a conveyancing solicitor, and others in his capacity as F's husband. However, once H had found alternative funding to repay the bridging finance, D's retainer properly extended to provision of appropriate legal (as distinct from commercial) explanation and advice to F as to the terms of, and security for, such funding. Such advice was not given, as D proceeded on the assumption that it would have come from H. To the extent that D looked to H to discharge their duty, that must have been in his capacity as solicitor and partner. D was thus vicariously liable for his omission to do so. The case is authority for the proposition that a firm of solicitors who, when acting for the spouse (or other relative) of a partner, looks to that partner to discharge a legal duty falling within the scope of that firm's retainer, is liable for any failure in that regard. D could have discharged that duty by providing such advice by way of letter to F. Applying Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602, C had to demonstrate on the balance of probabilities that had D so advised F, she would have disputed her liability to RBS, and F would have accepted any deal that there was a real or substantial chance that RBS would have proposed. On an analysis of the facts, it was held that D's limited breach of duty was not causative of loss and the claim failed.

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(1) Pegasus Management Holdings SCA (2) Ivan Harold Bradbury v (1) Ernst & Young (A Firm) (2) Ernst & Young LLP [2008] EWHC 2720 (Ch) (Lewison J), 11 November 2008

The claimants (C) claimed damages against the defendant accountants (D) for negligence in failing to advise the second claimant individual (B) to incorporate a company with subsidiaries rather than a stand-alone company as part of a tax avoidance scheme. The issues were whether: (i) the claim in tort was statute-barred; and (ii) D owed a duty of care to the first claimant company (P). B had sold his business in return for loan notes. He sought to defer liability for capital gains tax by reinvesting the proceeds of the loan notes, in a way that satisfied the Taxation of Chargeable Gains Act 1992 s. 164A-164N. On D's advice, B incorporated P and disposed of certain loan notes to subscribe for its shares. That transaction was completed in April 1998. P purchased the shares of various companies carrying on a qualifying trade, the assets and trading activities of which were hived up to P. In 2002 B discovered that this would in fact affect his capital gains position adversely when P came to sell the businesses. C claimed such a consequence could have been avoided had D timeously advised that P should incorporate and fund subsidiaries to acquire the businesses and to hive the businesses up to themselves.

Mr. Justice Lewison held, as to the first issue, that the claim in tort against D was statute-barred. The relevant question was to determine when C suffered actual damage. After a thorough review of the authorities, Lewison J concluded that it has been consistently held by the Court of Appeal that, in a professional negligence case, the client suffers damage if he does not get what he ought to have got. Where he has engaged professionals in connection with a transaction to secure for him some property or rights, and because of their negligence acquires less valuable property or rights than he would have done had he been given correct advice, he sustains damage at the time of the transaction, even if the property or rights are worth no less than he paid for them. Further, that the relevant Court of Appeal cases were not disapproved by the House of Lords in Nykredit Plc v Edward Erdman [1997] 1 WLR 1627 or Law Society v Sephton & Co [2006] 2 AC 543. The relevant transaction here was bilateral: purchase of shares. For B to have taken advantage of reinvestment relief, the subsidiaries had to have been incorporated, or an intention to incorporate them had to have been formed, before P's share issue. Accordingly, D's advice had to have

been given before completion of the share issue in April 1998. Further, had the correct advice been given B would have bought shares in a parent company. Instead he bought shares in a stand-alone company. As such, what he acquired was less advantageous to him than what he ought to have acquired. It followed that he had sustained loss at the date of the share issue. It was further held, on the facts, that D did not owe a duty of care to P either by way of an implied contractual term or in tort. D was consequently entitled to summary judgment against P on the second issue.

OTHER CASES

The Financial Services Authority and Information Commissioner (Appeal No's EA/2007/0093 and 0100: Preliminary Issue)

Section 44(1)(a) of the Freedom of Information Act 2000 provides that information is "exempt information" if its disclosure (otherwise than under the Act itself) by the public authority holding it is prohibited by or under any enactment. Section 348 of the Financial Services and Markets Act 2000 provides that "confidential information" (as defined in section 348(2)) must not be disclosed by the FSA without the consent of the person who provided the information or, if different, the person to whom that information relates. This case involved information received by the FSA which was analysed and assessed by the FSA, together with outside advisers, so as to ascertain whether or not the information was capable of amounting to a breach of warranty and/or material misrepresentation by companies which provided endowment mortgages and equity release products to the public and which, in turn, provided a justification for compensation being payable to the public. It was held that the information was not covered by the terms and prohibition in the FSA and nor could such disclosure under the Freedom of Information Act be said to be an indirect way of penalising mortgage companies, depriving them of the benefit of the disciplinary process provided by the Financial Services legislation. Disclosure under the Freedom of Information provisions could not be said to constitute a sufficient default which would normally trigger the appeal process under the Financial Services legislation. The decision is currently under appeal.
[David Marks]

David Marks

Freeman v Ansbacher Trustees (Jersey) Limited, Royal Court of Jersey (Birt, Deputy Bailiff), 9 January 2009

The defendant trustee applied to strike out an action brought by the beneficiary of a discretionary trust for breach of trust. The defendant trustee argued, inter alia, that as the object of a power the beneficiary lacked standing to bring the action, that liability was excluded by an exculpation provision in the trust deed which excluded liability for gross negligence and that an amendment to allege gross negligence should not be permitted and, since the relevant trust property was held by a nominee company, the loss claimed by the beneficiary was merely reflective of the loss suffered by the company and therefore not recoverable.

The court held that on true construction of the trust deed the beneficiary was both an object of a mere power of appointment and a contingent beneficiary of the ultimate default trust. In either capacity, the beneficiary had standing to sue for breach of trust. Further, the amendment to plead gross negligence would be permitted even though the limitation period had expired since it did not involve the pleading of a new cause of action and in any event arose of same facts as already pleaded.

Finally, it was strongly arguable that the principle against recovery of reflective loss had no application in the context of an action brought by a beneficiary for breach of trust where the trust assets were held by a nominee company.
[Tom Smith]

Bride and prejudice

Landlords CVA Surrenders, Release of guarantors

By **Gabriel Moss QC**

Landlords, especially of retail chains, are dusting down their guarantees from parent companies and others. These guarantees are meant to be personal "security" (as opposed to "security" in the strict sense of a mortgage charge or lien etc) for payment of rent and performance of other covenants. Landlords are however asking the same question that Lawrence Olivier was asking Dustin Hoffmann in the film *Marathon Man* as he was drilling into his gums: "Is it safe?", in other words, "Can the guarantees be relied upon?".

The general rule, absent any contrary agreement, is that any variation of the principal obligation that cannot without enquiry be seen to be insubstantial releases a surety, even if upon enquiry it can be shown that the variation was beneficial to the surety: Rowlatt on Principal and Surety (5th ed., 1999) p.80.

When a tenant becomes insolvent and cannot pay the rent and dilapidations, it may be sensible in his own interests, and those of his surety, to surrender the lease.

The Troubles of Mr. Bennett

In *Lord Harberton v Bennett* (1829) Beatt. 386, the noble lord had on 30th September 1808 granted Mr. Benett the lease of a mansion and lands in Newbury at an annual rent of £786 and 14 shillings, a very substantial amount at the time. Curiously, this Mr. Benett appears to have been a contemporary of the better known Mr. Bennet of *Pride and Prejudice* published in 1813 by Jane Austen. It will be recalled that Jane Austen's Mr. Bennet was a gentleman who had five daughters to marry off (Jane, Elizabeth, Lydia, Kitty and Mary). He was also not a tenant but a landowner, albeit subject to a rather un-PC mechanism called an "entail" which prevented his daughters from inheriting his property, which would on his death descend to his nearest male heir, the appalling Mr. Collins.

In *Lord Harberton v Benett*, a Mr. Wildridge rather unwisely mortgaged his property as surety for the liabilities of the Mr. Benett for rent and dilapidations etc. Mr. Benett failed to keep up the rent and allowed the property to deteriorate. If this Mr. Benett was anything like Jane Austen's Mr. Bennet, this may have been due to the expenses associated with having to marry off daughters.

Eventually, Mr. Benett of the law report surrendered the lease, leaving arrears of rent and dilapidations. Lord Harberton as the landlord then looked to the guarantee by way of mortgage given by Wildridge, who had since died, and sued the estate as a secured creditor for the balance of rent and dilapidations. However, the estate claimed by way of defence that the noble Lord's acceptance of the surrender of the lease had also released the secured suretyship of Wildridge. This defence succeeded.

If this is still a relevant authority, landlords face a clear and present danger in accepting surrenders without the consent of the surety, unless their forms of guarantee have covered this point. It is surprising how many landlords' guarantees fail to cover this and other potential defences.

How can the decision in *Lord Harberton v Benett* be justified? The reasoning was that Wildridge had had a right to pay off Mr. Bennett's debts in respect of the lease to Lord Harberton and upon such payment to be subrogated, subject to the landlord's paramount rights to rent etc, to Lord Harberton's rights against Mr. Bennett to recover an indemnity for the payment. At the time, this right to subrogation was only in equity but it now also has statutory form in s.5 of the Mercantile Law Amendment Act 1856 (set out at the back of Rowlatt in Appendix 2). By accepting a surrender of the lease, Lord Harberton prevented Wildridge, upon payment, being subrogated to Lord Harberton's proprietary rights as landlord to recover the indemnity.

It is not easy to see how this type of subrogation is meant to work in the real world, but suppose for example that Mr. Bennett had a bad year followed by a good year in relation to two of his (hypothetical) unmarried daughters, whom we could call "Jane" and "Elizabeth". Supposing in the bad year he could not pay £100 of the rent (e.g. because Jane had to go to London and try to attract the attentions of a Mr. Bingley), and suppose that therefore the £100 was paid by Wildridge as guarantor. Suppose then in the good year Mr. Benett had enough to pay the whole rent and in addition had £100, which could either be used to pay Mr. Wildridge by way of indemnity for the previous year's bail-out or to spend on a ball designed to impress a Mr. Darcy, who appeared to fancy Elizabeth. Wildridge, having paid £100 as guarantor, could in principle be subrogated in equity to Lord Harberton's remedies, such as distress, to recover his indemnity, in order to ensure the money was spent on him and not on the ball. However, it could be argued that the exercise of any such remedy could imperil the noble Lord's ability to recover future rent and therefore interfere with his paramount rights as landlord. On the

Landlords face a clear and present danger in accepting surrenders without the consent of the surety

other hand again, it may be the court would assume that if Mr. Bennett did not use a surplus one year to reimburse Wildridge, he would only spend the money, for example on the ball, and not keep it in the bank as a reserve to pay the rent the following year. Or, if he kept it in a bank, he might deposit it with Overend & Gurney (founded 1800), which might have failed earlier, say in the 1825 financial crisis when it bailed out other banks, than it did in 1866 (the last run on an English bank prior to Northern Rock).

The example of subrogation above, though possible, was in reality as fictitious as *Pride and Prejudice*. Subrogated remedies against a non-paying tenant were and are in fact likely to be worthless in the real world. In *Lord Harberton v Bennett* the noble lord argued that the estate was not worth the rent and that therefore the surety had not been prejudiced by the surrender. The court's answer was that the creditor had no right to make that judgment for the surety. In other words, if a landlord wanted to be able to accept a surrender, he needed to have the surety's consent, either beforehand in the guarantee document or specifically at the time of surrender.

Releases by Variation Generally

As mentioned in *Lord Harberton v Bennett*, any variation of the principal obligation, such as those of a tenant under a lease, can release a surety.

The detailed principles in case law are set out in some detail in Chapter 8 of the 5th ed. of Rowlatt on Principal and Surety (1999). Even a binding agreement to give time to pay could have the effect of releasing the entire suretyship liability. Needless to say any well drafted guarantee would exclude the possibility of release by this method. It is still surprising how many guarantees fail to take this obvious precaution.

CVA's

One particular form of variation of the principal liability would occur where a debtor entered into a binding composition with his creditors: see Rowlatt, especially at paragraphs 8-25 and 8-27.

However, a release by entering into a composition arises because agreeing to the composition is a *voluntary act of the creditor* to vary the principal, underlying obligation. Therefore, as a matter of principle, no such release will result from a statutory composition, where release results not from any voluntary act of the creditor but from the operation of the statute, at least if the creditor has not voted in favour. The point is concisely and clearly set out in Rowlatt at paragraph 8-22 (and see also paragraph 8-23).

Since CVA's (and the equivalent for individuals, IVA's) are simply updated and simplified versions of previous statutory compositions, such as section 425 of the Companies Act 1985, they ought not to have any different effect. Mr Justice Jacob so held in *RA Securities Limited v Mercantile Credit Co Limited* [1994] BCC 598. He then unsurprisingly followed that decision himself at first instance in Johnson v Davies [1997] 1 WLR 1511. That general approach was endorsed by Lightman J in *March Estates Plc v Gunmark Limited* [1996] 2 EGLR 38.

Unfortunately, this long-established and sensible approach was purportedly overturned by a dictum of the Court of Appeal in *Johnson v Davies* [1999] BCC 275. In that case, three co-sureties claimed to be released from liability by the terms of an IVA in respect of the fourth co-surety. The Court of Appeal took the view that the terms of the IVA were inconsistent with any immediate or absolute release of the co-sureties per Chadwick L.J. at 281E - 282D. Nevertheless, Chadwick LJ went on to consider the question of whether or not a statutory composition such as an IVA effected a release.

Chadwick LJ set out step-by-step the long and well-established line of cases which stated that a statutory composition did not release a guarantor because the effect was created by the statute and not the will of the creditor. He described the arguments based on these cases as "powerful" (289D) but then distinguished the cases on the rather flimsy basis that the draftsman of the Insolvency Act 1986 had introduced wording which was phrased in the form of a deemed consent by each creditor to the statutory compromise(289G-H). The wording in the case of a CVA in the coda to section 5(2)(b) of the Insolvency Act 1986 states that a creditor is bound into the CVA "as if he were a party" to the CVA. Chadwick LJ reasoned as follows:

"*Unlike the earlier legislation, s. 260(2) of the 1986 Act does not, in terms, impose the arrangement on a dissenting creditor whether or not he has agreed to its terms; rather, he is bound by the arrangement as the result of a statutory hypothesis. The statutory hypothesis requires him to be treated as if he had consented to the arrangement. The consequence, as it seems to me, is that the legislature must be taken to have intended that both the question whether the debtor is discharged by the arrangement and the question whether co-debtors and sureties are discharged by the arrangement were to be answered by treating the arrangement as consensual; that is to say, by construing its terms as if they were the terms of a consensual agreement between the debtor and all those creditors who, under the statutory hypothesis, must be treated as being consenting parties.*"

The statutory hypothesis of consent is convenient to explain the binding effect of a statutory composition on dissenting creditors and is also useful in pointing to the correct method of interpreting IVA's and CVA's, i.e. as statutory contracts (*Sea Voyager Maritime Inc & Ors v Bielecki* [1999] BCC 924; *Horrocks & Anor v Broome* [2000] BCC 257). However, other than the form of wording, none of this is new. It is still the statute which makes the compromise binding and there is no voluntary act by the creditor which might release a surety. To treat the statutory hypothesis as if it were a real voluntary act makes no sense, with the greatest of respect.

In *Commissioners of Inland Revenue v Adam & Partners Ltd* [2000] BCC 513 the dictum was described in a first instance dictum as applying to CVA's:

"*18. Section 260(2) of the Insolvency Act 1986 contains a statutory deeming provision in the case of personal insolvency corresponding precisely with that of s. 5(2). The effect of s. 260(2) has been considered by the Court of Appeal in Johnson v Davies[1999] BCC 275; [1999] Ch 117. It does not purport to impose the arrangement directly on a dissenting creditor: instead, he is bound by the arrangement as the result of a statutory hypothesis that*

requires him to be treated as though he had consented to it (see [1999] BCC 275 at p. 284E-G; [1999] Ch 117 at pp. 131F-132A). The same consequences therefore follow as if he had actually done so (and so that the question as in Johnson v Davies whether the debtor and the co-debtor and sureties are discharged by the arrangement is to be answered by construing its terms as though they were terms of a consensual agreement between the debtor and all those creditors who must be treated as consenting parties). [page 519] Precisely the same result must, I think, follow in the case of a company voluntary arrangement under Pt. I."

It can only be hoped that an opportunity will arise for the House of Lords to correct this fundamental error. The Court of Appeal were given an opportunity not to follow the dictum in *Raja v Rubin & Anor* [1999] BCC 579 but chose to approve it in the context of the question of whether an IVA could subsequently be varied by consent. That is a very different question and is not really related to the question of whether a deemed consent should be treated as a voluntary act. The Court of Appeal in *Raja v Rubin & Anor* [1999] BCC 579 held that a subsequent variation would not have the statutory effect of an IVA but could take effect in contract between parties to the variation. That conclusion is not inconsistent with the point being advocated here. With all due respect to the comment by Judge Norris (as he then was) in *Re Britannia Heat Transfer Ltd (in admin.)* [2007] B.C.C. 470, his suggestion that approving the dictum of Chadwick LJ in *Johnson v Davies* was an essential part of the reasoning in *Raja v Rubin & Anor* is not correct. A statutory contract can be "varied" as between immediate contracting parties (i.e. the contracting parties can subsequently contract to have different rights *inter se*) regardless of whether the statutory contract was imposed on dissenters by statute directly or via a deemed consent.

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The landlord can of course exclude the result suggested by the dictum in *Johnson v Davies*, as was the effect of the terms of the guarantees in *Prudential Assurance Co Limited v PRG Powerhouse Limited* [2007] BCC 500 (para 41, citing *Lombard Natwest Factors Ltd v Koutrouzas* [2003] BPIR 444).

Landlords v administrators

Landlords v Administrators: applications under paragraph 43 of Schedule B1 to the Insolvency Act 1986. By **Blair Leahy**

Administrators often grant temporary occupational licences of leasehold property when making a going concern sale of an insolvent company's business. Sometimes the grant of the licence is for a short period of a few months to enable an orderly transfer of the business of the company in administration to other trading premises owned or leased by the purchaser and with the intention of surrendering the lease at the end of the license period. On other occasions, the occupational licence is granted pending an application to the landlord for consent to assign the licence to the licensee.

Frequently, if not invariably, the going concern sales are made on an urgent basis because of lack of funding to support continued trading and because delay leads to loss of confidence amongst suppliers, customers and staff, and consequent damage to the company's business. As a result the temporary licences are usually

granted without the consent of the landlord and accordingly in breach of the covenant against alienation contained in the standard commercial lease.

Where the licensee is of dubious covenant strength and/or the property is under-rented, landlords may wish to exercise their right of forfeiture during the currency of the administration. More unusually, and perhaps only where the property in question is over-rented, landlords may wish to obtain a mandatory injunction terminating the unlawful licence so as to encourage an agreement under which the unlawful occupant takes an assignment or a new lease of the property on terms that are more beneficial to the landlord than can be obtained on the open market.

However, and by reason of the statutory moratorium that takes effect upon a company's administration, landlords are unable to take steps to enforce their substantive rights during the currency of the administration without the consent of the administrator or the permission of the Court under paragraph 43 of Schedule B1 to the Insolvency Act 1986 ("Schedule B1" and "the Act").

Paragraph 43 of Schedule B1 derives from the former section 11 of the Act. In *Re Atlantic Computer Systems* Plc [1992] Ch 505 (*"Atlantic Computers"*) at pp 542C-544C the Court of Appeal gave guidance on the application of s.11 of the Act which is equally applicable to paragraph 43 of Schedule B1. In summary:

(1) The burden of proof is on the lessor seeking permission to enforce his rights to satisfy the Court that it is inequitable for him to be prevented from doing so;

(2) Where the grant of permission is unlikely to impede the achievement of the purpose of the administration, permission should normally be given;

(3) If the granting of permission is likely to impede the purpose of the administration, the Court must compare the loss which would be caused to the lessor if permission is refused against the loss which would be caused to the general body of creditors if permission is granted.

In Metro Nominees (Wandsworth) (No 1) v Rayment [2008] BCC 40 ("Metro Nominees") HHJ Norris QC

Where the licensee is of dubious covenant strength landlords may wish to exercise their right of forfeiture during the currency of the administration.

(as he then was) granted the landlords permission to commence proceedings for forfeiture. The decision was widely publicised and may well have had the effect of encouraging landlords to think that the courts would generally support them in contests against administrators who had instigated a breach of the covenant against alienation. Metro Nominees properly understood, however, is a case involving special facts. The company's administrators had sold the business of the company carried on at the leasehold premises with an agreement to assign the residue of the term of the lease of those premises but without any provision for compensation in the event that the company's landlords refused permission to assign. It follows that the grant of permission would not have impeded the purpose of the administration as the retention of the lease would not have resulted in any continuing benefit to the company in administration. Accordingly, Metro Nominees cannot be read as embodying any general principle that landlords will be able to enforce their proprietary rights against a company in administration where the company has ceased to trade and the business operated from the leasehold premises has been sold.

Metro Nominees, however, did not need to decide the more difficult question of how, where (a) there has been a wilful and deliberate breach of the covenant against alienation and (b) the purpose of the administration is likely to be impeded by the grant of permission, the interests of the landlord and the unsecured creditors are to be balanced. It was this question that the Court of Appeal had to consider in Innovate Logistics Ltd v Sunberry Properties Ltd [2008] EWCA Civ 1261 ("Innovate").

Innovate Logistics Limited ("the Company") was placed into administration on 30 June 2008. On the same day, the business and assets of the Company (but not the Company's substantial book debts) were sold to Yearsley Holmewood Limited ("YHL") on a pre-packaged basis. The Company's administrators were concerned that if the £20m of frozen goods stored at the Company's

The current recession is likely to lead to more disputes between landlords and administrators. How will courts apply the balancing exercise?

leased premises ("the Property") were not delivered in accordance with customer contracts this would impede the administrators' ability to collect (through the agency of YHL) the Company's substantial book debts. Accordingly, the sale to YHL was on terms that YHL undertook the Company's obligations under the outstanding customer contracts. For that purpose, YHL was granted an occupational licence of the Property for 6 months.

The landlord of the Property ("Sunberry") was keen for YHL to take an assignment of the lease of the Property from the Company. When YHL refused to take an assignment, Sunberry sought permission under paragraph 43(6) to commence proceedings for a mandatory injunction to terminate the licence and thus put right the Company's breach of the covenant against alienation.

Whether permission under paragraph 43 should be given was of considerable commercial significance to the creditors of the Company, since termination of the licence would put in jeopardy the ability of the administrators to collect book debts worth some £8.9 million through the agency of YHL in performing and/or taking over the Company's contracts and assisting in the collection of book debts.

The issue was also of broader significance. As a matter of commercial necessity, administrators often have no choice but to grant temporary occupational licences of leasehold property when making a going concern sale of an insolvent company's business. If the practice of granting such temporary licences was likely to expose companies and purchasers to proceedings for mandatory injunctions to terminate the licences or forfeiture, the ability of administrators to rescue failing businesses and maximise book debt recoveries would be severely restricted.

At first instance HHJ Simon Brown QC granted permission, holding that the purpose of the administration had been achieved on the first day of the administration by reason of the pre-pack going concern sale to YHL. As the granting of permission would not impede the achievement of the purpose of the administration it was unnecessary to carry out the exercise of balancing the interests of Sunberry against the interests of the Company's creditors in accordance with the Atlantic Computers guidance. The judge also accepted Sunberry's submission that the fact that there was a clear breach of the covenant against alienation took its application under paragraph 43 of Schedule B1 out of the familiar pattern of balancing the legitimate interests of the applicant against the legitimate interests of the other creditors of the Company in accordance with the guidance of the Court of Appeal in Atlantic Computers.

The Court of Appeal unanimously allowed the appeal, holding that the learned Judge had been wrong to conclude that the purpose of the administration would not be impeded by the granting of permission, because the mandatory injunction would, if granted, terminate the ability of YHL to carry out the contracts and to assist in getting in the book debts owed by customers. The learned Judge ought, therefore, to have carried out the balancing exercise in accordance with the Atlantic Computers guidance. Instead "he relied on a range of inadequate reasons for not carrying out the balancing exercise" including the breach of the covenant against alienation.

The primary loss identified by Sunberry if it were refused permission was the loss of its so-called "bargaining position". The bargaining position consisted of the threat of the mandatory injunction requiring the Company to terminate YHL's licence with the object of obtaining an agreement under which YHL would take an assignment or a new lease of the Property on terms that would be more beneficial to Sunberry than could be obtained on the open market. The clear inference was therefore that the passing rent was greater than the market rent. When the balancing exercise was carried out, i.e. when the loss relied upon by Sunberry was weighed against the potential loss to the creditors of the Company, the Court held that the result was "obviously" in favour of refusing permission.

Stanley Burnton LJ further doubted whether the loss of the alleged bargaining position was in fact a relevant consideration for the Court to

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take into account on an application under paragraph 43 of Schedule B1 and concluded (at [68]) that:

"I certainly do not think that the court should view an application by a lessor in such circumstances sympathetically. In a case such as this, where Sunberry contends that it is indisputably entitled to an injunction if it is permitted to bring proceedings, the court's principal, if not only, focus must be on the consequences of the grant of that injunction rather than on what Sunberry might obtain by the threat of those proceedings."

The current recession is likely to lead to more disputes between landlords and administrators.

It remains to be seen how the courts will apply the balancing exercise in different situations, for example, where there is a serious issue about covenant strength of a proposed assignee. In such a situation, the landlord may have a significant case that the value of his reversion is being damaged by reason of the unlawful occupation which the courts will have to balance against the interests of the company's creditors in allowing the unlawful occupation to continue pending assignment or surrender.

[*Blair Leahy acted for the landlords in Metro Nominees and the administrators in Innovate.*]

Insolvency and Freedom of information: strange bedfellows

By David Marks

As is the case with several other members of chambers, I sit in a part-time judicial capacity. In my case, it is in the Information Tribunal which deals with issues arising under the Freedom of Information Act 2000 as well as under the Data Protection Act 1998.

Once upon a time, about 10 years ago, I was rung up out of the blue by a very pleasant lady called Mary in the Lord Chancellor's Department as to whether I would like to accept the post of the one and only Deputy Chairman of the now obsolete Data Protection Tribunal. I said yes as every insolvency lawyer should do. I then proceeded to spend the next few years sitting in on the then Chairman's cases, which were very few and far between and which were usually held in some army barracks in SW3 where access was almost impossible, and then sitting on my own in a number of invariably aborted hearings.

Most of the cases involved electricity and gas boards using or perhaps misusing personal data given in connection with their utility bills for the purposes of selling holidays and vehicle finance arrangements as well as advertising companies pestering people with their wares by using individual and allegedly unauthorised fax numbers.

In all these cases the basic problem involved misuse of personal data contrary to the basic principles of data protection law now embodied in section 4 and schedule 1 of the 1998 Act. Personal data had, and still has to be, processed "fairly and lawfully".

I was then urged by a retired Lord Justice of Appeal who presided over the National Security Appeals Panel (which in a way sits on top of the former Data Protection tribunal and now the Information Tribunal) to reapply for a post as a part-time Deputy Chairman when the 2000 Act came into force. There was an interview held in the shadow of the Houses of Parliament. The feedback noted that I had not exactly exuded massive enthusiasm for the job but despite that I was reappointed. There are now over 10 part-time Deputy Chairmen, mostly from the Bar but with several solicitors all drawn from a variety of practising backgrounds. The Chairman is a former partner at Clifford Chance and now a Professor in Information Law at Queen Mary College in London. He has my unbounded admiration for the skill and patience he displays in occupying the role and in arranging for the Information Tribunal to be slotted into the new tribunals' system which is now coming into force involving so called Upper and First Tier tribunals, depending on the degree of importance attached to the work involved. The Information Tribunal is something of a hybrid and will for important cases sit in the Upper Tribunal from which an appeal can be made to the Court of Appeal and where unlike the present Information Tribunal, the Tribunal will act as a court of record. This fact alone shows the importance of the increasing number of cases which the present Information Tribunal has decided and which will no doubt be referred to in future cases much as the case law prior to the Insolvency Act has been cited in post Insolvency Act decisions.

Reverting to the present Information Tribunal which was created alongside the implementation of the Freedom of Information Act, the real importance of the constitution of the Tribunal lies in its lay membership. Lay members are drawn from all walks of life as might be expected. They come from inside and outside central or local government, the social services, industry and charitable work. That is but to name a few of the backgrounds of the very impressive body of people who have been appointed. Not surprisingly the legally qualified Chairman writes the draft Judgment following upon a hearing but the lay members are at liberty to and indeed always do contribute a great deal to the ultimate decision.

The first case I presided over following my reappointment was an extremely lengthy matter which lasted nearly two weeks and involved three Chief Police Constables seeking a ruling that criminal data be retained on the Police National Computer for 100 years or death, whichever came sooner, in respect of serious offences such as assaults and above. The appeal came in the wake of the Soham Inquiry and the Bichard Report which followed the Soham murders. The Tribunal ruled that such data should be retained but for Police eyes only and not for the benefit of the many hundreds of other agencies and bodies which had access to the Police National Computer and the criminal records system and which in the case of an offence perhaps committed many years previously and on a one off basis might well prejudice the data subject's ability to seek re-employment outside perhaps the care of children and vulnerable adults. The case made the first page of The Times in 2005 on a Saturday morning. The judgment ran for over 100 pages.

Since then I have presided over 30 Appeals, many of them involving major Government Departments such as the Treasury, the Foreign and Commonwealth Office, the Ministry of Defence and the former

Department of Trade and Industry. In many of these cases extremely eminent Counsel often appear and the hearing in effect assumes the trappings of High Court litigation with perhaps some of the finer points of evidential law and practice missing. This is not to say that the evidence is not extensive. The documents can sometimes be voluminous as indeed can the skeleton arguments.

There are not always transcripts of these hearings but cases involving major public authorities usually do mean that they are provided. As most High Court Judges would no doubt agree, skeletons are valuable but not at the cost of failing to revisit the oral arguments which are likely to address the real issues as distinct from those set out in the skeletons.

The Tribunal's remit is to review Decision Notices issued by the Information Commissioner. A Decision Notice is issued whenever a request is made for disclosure of information from a public authority. It follows from the public authority refusing to make disclosure or making a disclosure with some reservations against the wishes of the person making the request. The Commissioner then determines whether the public authority was right to act in the way it did. If he overrides the public authority in whole or in part and either party appeals, Section 58 of the 2000 Act enables the Tribunal to consider whether the Decision Notice against which the appeal is brought was "not in accordance with the law" or "to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently". If either criteria or both criteria is or are satisfied the Tribunal "shall allow the appeal" or substitute such other notice as could have been served by the Commissioner. In any other case, the Tribunal must dismiss the appeal. On any appeal the Tribunal may review findings of fact on which the Notice was based. Hence the volume of evidence which often emerges during the course and prior to an appeal.

The Freedom of Information principles have now been considered by the High Court on an increasing number of occasions.

As all readers of this piece will know, the Tribunal has often made the news, eg in the case of MPs' expenses.

More importantly, the Freedom of Information principles have now been considered by the High Court on an increasing number of occasions. A Mr Sugar in particular is attempting to take his appeal to the House of Lords in his quest to determine whether the business of journalism is susceptible to a Freedom of Information request since, according to the 2000 Act, the BBC is immune from the regime of the Act when it comes to the disclosure of information held "for the purposes … of journalism, art or literature". See generally BBC v Sugar [2008] 1 WLR 2289. In this case and indeed in nearly all cases the usual problem facing the Commissioner and the Tribunal is to see whether first of all an exemption to disclosure applies, eg national security or legal professional privilege or confidential information etc and then to conduct an exercise which balances the respective public interests involved in either maintaining the exemption

David Marks

which has been engaged or in justifying disclosure.

The author is presently charged with the first remitted hearing to the Tribunal after a High Court decision in which the High Court dealt with a request made of the Office of Government Commerce for disclosure of its reports made to Government Departments in respect of major projects and programmes in which those departments are involved. These are so called Gateway Reviews, in use for example extensively with such projects as the forthcoming London Olympics. See generally Office of Government Commerce v Information Commissioner and HM Attorney-General [2008] EWHC 774(Admin).

There are frequently issues of confidentiality similar to those which might apply in a national security setting. In such cases the Tribunal will sit in closed session and issue a closed judgment if necessary. The Tribunal's website which is now well oiled shows over 250 Decisions. This author has been appealed once and thankfully upheld. See ECGD v Friends of the Earth [2008] Env LR 40 where it was held that the Tribunal had not erred in deciding that correspondence between the ECGD and a number of other Government Departments relating to a proposed scheme to develop offshore oil and gas fields in the feeding grounds of endangered white whales should be disclosed under the environmental equivalent of the Freedom of Information principles, namely the Environmental Information Regulations 2004. A long way from insolvency it might be thought.

Like the whales, no doubt, work in the Tribunal has its soft underbelly. Litigants in person can be, and usually are, particularly vociferous and very difficult. The same might be said of the bankruptcy court where Dickens would no doubt find the same old characters and faces reappearing today as appeared in his day.

The author once made the mistake in the Tribunal of thinking that he was only gently reminding one such character to read the documents on which a public authority was posing questions to its witness only to have the said character explode into a tirade of ire, scorn and abuse, initially vocally and then in documentary form, as the person in question took his complaint first to the Chairman and then to the judicial complaints authorities only again thankfully to see his complaints dismissed. It took longer to make notes with regard to my report on the conduct of the appeal and the complainant's extensive submissions as to my alleged impartiality and intolerance, than it did to write the Judgment. It is in this way that the annals of such a Tribunal as the Information Tribunal are compiled and some would say consigned to history.

To end, it can be seen that there is not, on the surface at least, a great deal in common between insolvency work and the work of the Tribunal. However, there was one happy marriage between the two subjects in the form of a decision called Department of Trade and Industry v Information Commissioners[2006] UK IT EA/2006/007. Here the Tribunal on the facts before it held that the DTI's Company Investigations Branch's right not to disclose information regarding the reason why a person or party was being investigated should be upheld on the balance of the respective public interests involved.

It could be said that this decision did no favour to insolvency lawyers since advice is often sought on this very subject by companies and other parties in distress before they end up on the short end of the petition to wind up on public interest grounds in the Chancery Division. A refreshing reminder that the view from the bench is quite different to that from the shop-floor.

The view from the bench is quite different to that from the shop-floor.

diary dates

18-21st February 2009
R3 19th Annual Conference
Geneva, Switzerland.

26-28th February 2009
Legal Week Trusts and Estate Litigation Forum.
Provence, France. With David Alexander QC, 3-4 South Square

27th March 2009
ILA Annual Conference.
Cardiff, Wales.

2nd April 2009
Insol International One Day Seminar.
Rio de Janeiro, Brazil.

13-14th May 2009
R3 Lite Conference.
Chester, England.

19th May 2009 (evening)
Bankruptcy, Restructuring and Insolvency Law Conference. 3-4 South Square & UCL Institute.
London.

29th May 2009
COMBAR's North American Meeting.

5th June 2009
Easter European Countries Conference.
INSOL Europe.
Croatia.

18th June 2009
III 9th Annual Conference.
New York.

21st-24th June 2009
Insol 2009 Eighth Quadrennial Congress.
Vancouver, Canada.

1st-4th October 2009
Insol Europe Annual Congress.
Stockholm, Sweden.

5th November 2009
Cayman Islands.
Insol International Cayman Islands One Day Seminar.

18th November 2009
Auckland, New Zealand.
Insol Auckland One Day Seminar.

2010

13th-17th October 2010
Insol Europe Annual Congress.
Vienna, Austria.

UNIDROIT General Assembly Approves Model Law on Leasing

At a meeting held in Rome, Italy on November 13, 2008, the 61 member governments of the International Institute for the Unification of Private Law (UNIDROIT) General Assembly gave their unanimous final approval to the UNIDROIT Model Law on Leasing. The General Assembly passed a resolution at the meeting thanking Ronald DeKoven for acting as the Reporter. Ron - an associate member of 3-4 South Square - worked with UNIDROIT for more than three years to create the Model Law on Leasing, which was designed to help countries with emerging and transitioning economies attract the leasing investment necessary for small and medium-sized enterprises. Ron, a longstanding correspondent of UNIDROIT, served as Reporter for the Model Law charged with drafting the Model Law. The Model Law is intended to serve as a best practice reference to assist developing countries and countries in transition to a market economy develop modern leasing laws in order to develop their economic infrastructure. Representatives of the International Finance Corporation (IFC), the private-sector arm of the World Bank, announced at the meeting that parts of the draft law had already been used as the basis for national legislation in Tanzania, Yemen, and Jordan, and the full law is before governments for adoption in Afghanistan and the West Bank. The IFC also announced that it will incorporate all the key principles of the Model Law in its new edition of Leasing Guidelines. UNIDROIT is an independent intergovernmental organization that studies the needs and methods for modernizing, harmonising and coordinating private and, in particular, commercial law as between countries.

Ronald DeKoven

Pre-Packs: New Guidelines

On 1 January 2009 R3 published a new statement of insolvency practice (SIP) regarding pre-packaged sales in administration.

The SIP acknowledges that unsecured creditors in a pre-pack are not given the opportunity to consider the sale of the business/assets before its takes place, and recommends that certain information (e.g. marketing activities, valuations obtained) should be disclosed to creditors in all cases where there is a pre-packaged sale. The information should be provided in all cases unless there are exceptional circumstances, and if this is the case, the reason why it is not provided should be stated. Also, unless it is impracticable to do so, the information should be provided with first notification to creditors.

The SIP can be found on the R3 website (www.r3.org.uk).

Credit crunch bites as big names go

The number of well-known names collapsing into administration is growing rapidly.

Recent victims include:- Woolworths, Entertainment UK, Whittard of Chelsea, The Officers' Club, Adams, Olan Mills, USC, Zavvi, London Scottish Bank, Wagon Automotive, MFI, Britannia Bulk, Folio Hotels, The Pier, Pinnacle, Klick Photopoint, Nice Car Company, Morgan, Bowie Castlebank, Fitzgerald Lighting, Unoco Group, Passion for Perfume, Waterford Wedgwood, Viyella, Land of Leather and Empire Direct.

news in brief

Double trouble in Italy

An unusual and recent case in Italy rested on an allegation of double trouble: identical twin sisters were prosecuted for a long-running scam in which one allegedly filled in for the other at work.

Gabriela Odisio, a lawyer and part-time judge from Magenta, allegedly used her sister Patrizia to impersonate her when she was double-booked, allowing her to draw fees for being in two places at once.

The sisters managed to fool everyone for three years, prosecutors said.

FSB 'closures'

A survey by the Federation of Small Businesses (FSB) in early December 2008 claimed that 40 per cent of small businesses in England were thinking about closing down.

The survey also showed that 36 per cent planned to cut their employees' hours and 35 per cent were considering redundancies. There are approximately 4.7 million small and medium-sized businesses employing around 13.5 million, which is nearly 60 per cent of the private sector workforce.

The FSB's survey confirmed an increasingly bleak picture. Tenon Recovery recently warned recently that an "insolvency epidemic" is likely in 2009.

Asset sale site launched

With an epidemic of business failures predicted for 2009, a new website has been launched to help insolvency practitioners looking to sell distressed assets.

IP-Bid.com lets insolvency practitioners post online details of the businesses/assets they are selling, whilst interested parties with cash to invest can register the types of thing they are looking for.

The buyers receive email alerts when assets matching their criteria come onto the market, and the website acts as a quasi clearing house. There are now over 1,000 registered buyers.

Tough economy leaves Americans acting as their own lawyers

Due to the financial meltdown felt by millions of Americans in the United States, the number of people acting as their own lawyers is on the rise. In the past, less complicated cases such as uncontested divorces or small claims were often filed by parties serving as their own attorney.

But in this tough economy, even those tied up in child custody cases, complex lawsuits and complicated bankruptcies are representing themselves as well. "It's not just that poor people can't afford lawyers. This is really a middle-class phenomenon," said Sue Talia, a Judge from Danville, California.

The result of this legal trend is causing court systems to clog with filings from people unfamiliar with the legal process.

Sadly, some of these pro se litigants, as they are being called, are making mistakes with expensive and permanent consequences. "Courts are absolutely inundated with people who do not understand the procedures," said Talia.

"It is a disaster for high-volume courts, because an inordinate amount of their clerks' time is spent trying to make sure that the procedures are correctly followed".

The American Bar Association is encouraging all states to set up self-help desks at courts and to adopt standardised forms to help cut legal costs. Volunteer lawyers are available in some states to give legal advice to those who cannot afford legal counsel.

Furthermore, a majority of states are promoting a growing legal trend known as "unbundling," in which an attorney handles just part of a lawsuit or other litigation for a small fee, rather than taking on an entire case.

3-4 South Square members in ICR special edition

The journal International Corporate Rescue has produced a special edition containing articles published in it by members of 3-4 South Square in 2008.

The special edition - containing articles by Robin Dicker QC and Stephen Robins, David Marks, Richard Fisher (below), Georgina Peters, Ron DeKoven and Adam Al-Attar - is available on the 3-4 South Square website.

William Trower QC and Adam Goodison (above) presented the Insolvency Law Workshop to the Chancery Bar at the Chancery Bar Conference on 16 / 17 January 2009 at the Royal College of Physicians, London. The topics included: assets available for distribution, trusts and insolvency, clawback actions and set off.

Fake brief is jailed for two years

A failed law student who bought a wig and gown on eBay and pretended to be a barrister has been jailed for two years at Durham Crown Court.

The court heard that Ian Clegg, 32, had defended two people accused of motoring offences, and had conducted several debt enforcement cases in the local county court on a 'no win, no fee' basis.

Jailing him, the Judge, Judge Faulks, said: "I am satisfied that you are a compulsive liar and that you wanted to appear more important than you really are".

Along with his prison sentence, Clegg was given an ASBO banning him from claiming he was legally qualified.

Insolvency Challenge

Welcome to the first of 2009's Insolvency Challenges. Given the current state of the economy here is a challenge to test your memory of what has happened recently as well as your knowledge of more distant recessions, namely those in the 1970s, 1980s and 1990s.

Please send your entries by email to kirstendent@southsquare.com or by post by Friday 6th March to the address on the back page. As before the winner - drawn from the wig tin if necessary - will receive a magnum of champagne.

2007/2008

Since the start of the credit crunch, some high profile entities, both in the United Kingdom and the United States, have really felt it. Name the following credit crunch victims.

(1) _ _ G ____________________

(2) _ _ n n _ _ / _ a _ ____________________

(3) _ _ h _ _ _ /_ _ _ _ h _ _ _ ____________________

(4) _ _ O _ ____________________

(5) _ _ _ t_ _ _ n / _ _ _ k ____________________

(6) B _ _ _ / _ t _ _ _ s ____________________

(7) W _ _ _ w _ _ _ _ _ ____________________

(8) _ F _ ____________________

(9) Z _ _ _ _ ____________________

(10) _ _ _ t t _ _ _ / _ _ / C _ _ _ _ _ a ____________________

1990s

The early 1990s also claimed many organisations. Name the following entities affected.

(11) _ _ _ l ____________________

(12) _ _ _ _ y / _ _ _ k ____________________

(13) _ _ x w _ _ _ ____________________

(14) _ _ _ _ _ _ _ & _ _ _ _ _ _ _ _ _ _ _ _ ____________________

(15) _ _ _ _ n _ _ c / _ _ _ p _ _ _ _ _ ____________________

(16) _ _ _ _ _ n _ t _ _ _ _ l / _ _ is_ _ _ / G _ _ _ p ____________________

(17) B _ _ _ _ _ /C_ _ w _ _ ____________________

(18) _ _ _ _ _ _ _ _ / D _ _ ____________________

(19) _ _ y _ _ _ a & _ _ _ k ____________________

(20) R _ _ _ & _ _ _ _ _ _ _ _ s ____________________

1970s/1980s

The 1970s and early 1980s saw some well known names - corporate and individual - face financial difficulties. Name the following entities/individuals affected.

(21) W _ _ _ _ _ _/ _ t _ _ n (property) ____________________

(22) J _ _ _ / _ _ u _ _ _ _ (Yorkshire architect) ____________________

(23) G _ _ _ d _ _ _/ P _ _ _ e _ _ _ _ s (property) ____________________

(24) S _ _ _ _ _/ _ _ _ k _ _ (banking) ____________________

(25) _ _ _ _ _ x (model maker) ____________________

(26) K _ _ s _ _ / _ _ _ m _ n _ (banking) ____________________

(27) _ _ _ _ _ _ _ h/E _ _ _ _ (airline) ____________________

(28) _ _ r t _ _ _ _/ D _ _ _ _ o _ m _ _ _ s (property) ____________________

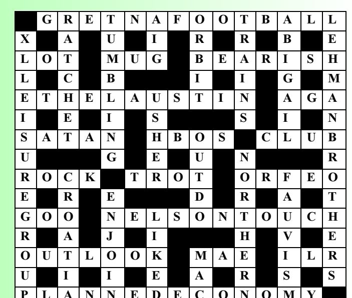
(29) B _ r _ _ _ _/ F _ n _ _ _ _ (banking) ____________________

(30) _ _ _ _ _ h/O _ _ (energy) ____________________

Solutions to Insolvency Challenges from the November 2008 Digest

Herewith the solution to the crossword set by Christopher Brougham QC in the last Digest. Congratulations to the winner, **Neil Dooley of Lovells** who receives a magnum of Champagne for his efforts.

Congratulations also to **Chris Chapman of John Salmond Chambers, Wellington, New Zealand** who is the winner of the Wordplay set by Richard Sheldon QC and who also receives a magnum of Champagne for coming up with the most words from the octagon.



3-4 South Square

Barristers

"Long-time leader of the pack", 3-4 South Square remains the chief set for insolvency and corporate recovery work. Noted for its high concentration of "brilliant" lawyers at both silk and junior level, this group "impresses across the board".
Chambers 2008

Michael Crystal QC
Christopher Brougham QC
Gabriel Moss QC
Simon Mortimore QC
Stuart Isaacs QC
Richard Adkins QC
Richard Sheldon QC
Richard Hacker QC
Robin 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
John Briggs
David Marks
Mark Arnold
Lexa Hilliard
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Glen Davis
Andreas Gledhill
Barry Isaacs
Ben Valentin
Felicity Toube
Jeremy Goldring
Lucy Frazer
David Allison
Daniel Bayfield
Tom Smith
Richard Fisher
Blair Leahy
Stephen Robins
Marcus Haywood
Hannah Thornley
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