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

3-4 DIGEST

May 2010

Changing times

Welcome to the May 2010 edition of the Digest. It comes at an important time for UK plc with the election over and with there being an urgent need to deal with the country's deficit and its debt. However as events in Greece have demonstrated austerity measures are never popular and I am sure that they will not be here. Whether that leads to the same sort of thing as happened in Greece remains to be seen. But it must be likely that that there will be some expression of dissatisfaction from the areas affected.

So what has happened in the insolvency world during the last three months? It is tempting to say not much – for there has been a feeling that the recession (now technically over) has not really had the sort of effect that many expected.

Nevertheless, more well-known names have collapsed into administration: for example, the UK arm of Readers Digest, Jarvis (the engineering group) and Ethel Austin (although Readers Digest saw plenty of interest in its assets and was snapped up by a private equity tycoon). However, perhaps the most high profile collapses have been in relation to football clubs. Portsmouth and Crystal Palace (unfortunately the club I support!) both collapsed into administration since the February Digest. And Chester City was wound up.

On the personal insolvency side, in case you missed it, Grant Bovey, the husband of Anthea Turner, declared himself bankrupt in March and Simon Halabi, whose White Tower property empire collapsed last year, was declared bankrupt in relation to a £56.3 million loan from Kaupthing.

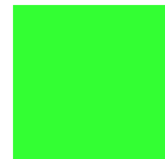
The last three months have also seen the pre-pack debate rumble on with the Labour government announcing a consultation to consider options such as strengthening laws surrounding the use of pre-packs and preventing an IP from advising on a pre-pack and going on to become the administrator.

On a Chambers note I am delighted to report that the last three month period also saw Sarah Worthington being made a Queen's Counsel Honoris Causa in the latest silk round. Many congratulations to Sarah on a thoroughly well deserved appointment.

So on to the contents of the present Digest. This time we have articles by Christopher Brougham QC on the "mismash and mismatch" created by Section 284 of the Insolvency Act 1986, John Briggs on Keeping the Fruits of Execution and Joanna Perkins, a new member of Chambers at 3-4 South Square, on Choice of Law and the Assignment of Debts. We also have a piece on Debbie Phillips and the single released by her daughter, Sarah, following Debbie's death which needless to say I would encourage all to read. The usual News-in-Brief and Diary Dates are towards the back. And finally we have a European Cross Border Insolvency Challenge for you.

We hope that you enjoy the May 2010 issue of the Digest. If you find yourself sitting somewhere reading someone else's copy and you are not on our list, please feel free to send an email to kirstendent@southsquare.com and we will have you added. Likewise if you have changed address do let us know so that you continue to receive your copy of the Digest without interruption!

David Alexander QC, Editor



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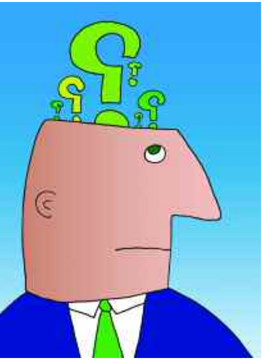
3-4 Digest is published by 3-4 South Square Barristers, Gray's Inn, London WC1R 5HP. 020 7696 9900.
Publication, print and production on behalf of 3-4 South Square Barristers by Wendover Publishing. 01428 658697.



Section 284: mishmash and mismatch?

Reflections on s. 284 of the IA1986 by **Christopher Brougham QC**

Part IX of the IA 1986, which (via the IA 1985) replaced the Bankruptcy Act 1914, constituted the first major reform of bankruptcy law in over a century. Among the major changes made was the abolition of "acts of bankruptcy" which, if any of them were committed by a debtor, gave grounds for the presentation of a bankruptcy petition against him. Under the Bankruptcy Acts, a bankruptcy was deemed to have relation back to, and to commence at, the time of the commission of the relevant act of bankruptcy. Other provisions of the Bankruptcy Acts mitigated the potentially harsh consequences of this retrospective commencement. Under the Bankruptcy Act 1914, s.45:

"Subject to the foregoing provisions of this Act … with respect to the avoidance of certain settlements … and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy—

(a) Any payment by the bankrupt to any of his creditors;

(b) [Irrelevant]

(c) Any conveyance or assignment by the bankrupt for valuable consideration;

(d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration;

Provided that both the following conditions are complied with, namely—

(i) that the payment, … conveyance, assignment, contract, dealing or transaction, as the case may be, takes place before the date of the receiving order; and

(ii) that the person … to … or with whom the payment, … con-

Parliament has endangered the coherence of the bankruptcy regime

veyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, … conveyance, assignment, contract, dealing, or transaction … notice of any available act of bankruptcy committed by the bankrupt before that time."

References in this section to provisions with respect to the avoidance of certain settlements and preferences were references to ss.42 (Avoidance of certain settlements) and 44 (Avoidance of preference in certain cases) of the 1914 Act, the predecessors of ss.339 (Transactions at an undervalue) and 340 (Preferences) of the IA 1986.

A bankruptcy under the 1986 Act commences with the day the bankruptcy order is made (IA 1986, s.278(a)). Unlike the Bankruptcy Acts, the 1986 Act contains no provision deeming the bankruptcy to have commenced at an earlier date. However, under s.284:

"(1) Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which this section applies is void 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.

(2) Subsection (1) applies to a payment (whether in cash or otherwise) as it applies to a disposition of property …

(3) This section applies to the period beginning with the day of presentation of the petition for the bankruptcy order and ending with the vesting … of the bankrupt's estate in a trustee.

(4) The preceding provisions of this section do not give a remedy against any person—

(a) in respect of any property or payment which he received before the commencement of the bankruptcy in good faith, for value and without notice that the petition had been presented …"

This section was derived partly from s.227 of the Companies Act 1948 (now IA 1986, s.127) and partly from s.45 of the 1914 Act. It appears to have been drafted without regard to the provisions and language of IA 1986, ss.339 and 340.

Section 284 was drafted without regard to the provisions and language of sections 339 and 340

Section 339 enables the court to set aside transactions at an undervalue entered into by an individual who is subsequently adjudged bankrupt. Subsection 339(3) defines a transaction at an undervalue, "for the purposes of this section", as either a gift or transaction providing for the prospective bankrupt to receive no consideration (s.339(3)(a)), or a transaction in consideration of marriage or the formation of a civil partnership (s.339(3)(b)), or a transaction for a consideration the value of which in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the prospective bankrupt (s.339(3)(c)). Section 340 enables the court to set aside payments to creditors made by an individual who is subsequently adjudged bankrupt. The court cannot make an order under s.340 unless the debtor was influenced in deciding to make the payment by a desire to put the creditor into a position which, in the event of the debtor's bankruptcy, would be better than the position he would be in if the payment were not made (ss.340(4), 340(3)(b)). A transaction can only fall within the ambit of s.339, or a payment within the ambit of s.340, if it was entered into, or made, within a stipulated period "ending with the day of the presentation of the bankruptcy petition" leading to the relevant bankruptcy order (ss.341(1)(a), 341(1)(b)).

So, what is the position where, after a petition has been presented against him and before the bankruptcy order has been made, the prospective bankrupt makes a disposition of his property at an undervalue as described in IA 1986, ss.339(3)(c), or pays one of his creditors, influenced (unknown to the creditor) by a desire such as is described in ss.340(4) and 340(3)(b), the disponee or creditor having no notice that the petition has been presented and being unaware of the prospective bankrupt's insolvency? There is as yet no reported case in which either of these questions has been addressed. Is the disposition "for value" within the meaning of s.284(4)(a), and is the state of mind of the prospective bankrupt at the time of the payment to his creditor irrelevant? For if so, it seems that both the disposition and the payment would be valid as against the prospective bankrupt's trustee, notwithstanding that had either been made immediately before the presentation of the petition, it would undoubtedly have been set aside under s.339 or 340. This would be a startling result and one that Parliament could not conceivably have intended. The trustee might seek an order under s.423 (Transactions defrauding creditors) setting aside the disposition or payment, but he would have to satisfy the court that the disposition or payment was made for one of the purposes set out in s.423(3), which would by no means always be the case, and could be particularly difficult to prove in the case of a payment by the prospective bankrupt to one of his creditors.

The 1986 Act contains no definition of "value", just as the 1914 Act contained no definition of "valuable consideration". Section 42 of the 1914 Act (the predecessor of IA 1986, s.339) excluded from its ambit any settlement made in favour of a purchaser in good faith and for valuable consideration. Under the general law a fraction of the market value of any property acquired, or even £1, could constitute "valuable consideration" for it, so in order to make s.42 effective against the mischief at which it was directed, these words in the section were given a purposive construction. "The consideration

could constitute "valuable consideration" for it, so in order to make s.42 effective against the mischief at which it was directed, these words in the section were given a purposive construction. "The consideration given … need not be equal in value to the consideration given by the debtor, though it must be valuable consideration in the commercial sense" (*Re Abbott (A Bankrupt*) [1983] Ch 45, DC, at 54G). This interpretation was not necessarily applied to the same words in s.45 (see *Re Keever (A Bankrupt*) [1967] Ch 182 at 191E-192D).

Parliament could easily have inserted words such as "(not being an undervalue within the meaning of subsection 339(3))" after the word "value" in s.45(4)(a) but did not do so. There can be no doubt that a court, in considering the meaning of "value", would strive to ensure the coherence of the bankruptcy regime. Whether the court would be prepared to go so far as to assume, within the subsection, an implied reference to s.339(3) remains to be seen. The alternative would be to give "value" the same interpretation as was given to "valuable consideration" in s.42 (but not in s.45) of the 1914 Act. Whether this would be a satisfactory solution depends upon whether a disposition of property for valuable consideration in the commercial sense is necessarily the same thing as a disposition of property for a consideration, the value of which is not significantly less than the value of the property.

An even more difficult problem for a court wishing to ensure the coherence of the bankruptcy regime is the problem of the post-petition payment to an innocent creditor by a debtor influenced by a desire such as is described in ss.340(4) and 340(3)(b). The discharge of the debt would be the "value" given for the payment and the creditor would have received the payment in good faith. As is the position under IA 1986, s.340, only pre-petition payments to creditors could fall within the ambit of the so-called "fraudulent preference" sections of the Bankruptcy Acts. In *Re Badham* (1893) 10 Mor 252, Vaughan Williams J solved the problem by holding that deliberate preferences were contrary to the policy of the bankruptcy laws and, in effect, a common law fraud to which the court was not bound to give the benefit of the protective provisions contained in s.49 of the BA 1883 (re-enacted as s.45 of the 1914 Act). However, the correctness of this decision was subsequently doubted by Bigham J in *Re Dunkley & Son* [1905] 2 KB 683, and in *Re Seymour* [1937] Ch 668 Clauson J declined to follow it: "the words of [s.45] are plain and unambiguous, and it is my duty to give them the meaning which they seem to me, on the face of them, to bear. Accordingly … the protective section covers the case" (ibid. at 674). It will be interesting to see which of these two approaches is taken by a court considering the problem under s.284.

In conclusion, it is surprising and unfortunate, particularly in the light of the decision in *Re Seymour* (above), that Parliament chose, in enacting s.284, simply to cobble together s.227 of the Companies Act 1948 and s.45 of the 1914 Act, instead of employing language that matched the language of IA 1986, ss.339 and 340. It has thereby created potentially large loopholes in the law and endangered the coherence of the bankruptcy regime, which only the ingenuity of the bankruptcy judges can now ensure.

Christopher Brougham QC

case digests

Edited by Hilary Stonefrost

The Insolvency (Amendment) Rules 2010 (see News in Brief) have introduced express provision for pre-appointment expenses to be recovered as an expense in the administration if and to the extent they are approved by creditors or the Court in accordance with rule 2.67A. The new rules define "pre-administration costs" as "(i) fees charged, and (ii) expenses incurred by the administrator, or another person qualified to act as an insolvency practitioner before the company entered into administration but with a view to its doing so"; rule 2.33(2A). The new rules do not, however, provide any guidance on the scope of the work the costs of which fall within "pre-administration costs". Included in the Corporate Insolvency section of the digest is Re Johnson Machine & Tool Co Ltd and Empire Surfacing Ltd, a recent decision which pre-dates these new rules. In that case, HHJ Purle QC declined, in the exercise of the discretionary power under para 13 of Schedule B1 of the Insolvency Act 1986, to order that the pre-appointment costs incurred in the "pre-pack administrations" of two companies be treated as administration expenses. The Judge decided that the costs order should not include (i) the costs of insolvency advice given before any decision to seek administration has been made if the costs of the advice would have been incurred in any event; or, (ii) the costs of considering and arranging the pre-pack because the balance of advantage, as between the creditors and the managers, appeared to lie with the managers who purchased the business. Whether the Court will follow HHJ Purle QC on these issues when asked to make an order under the new rules remains to be seen.

Hilary Stonefrost

BANKING AND FINANCIAL SERVICES

Digested by Jeremy Goldring & Stephen Robins

Jeremy Goldring

Stephen Robins

Western Union International Ltd v Reserve International Liquidity Fund Ltd, British Virgin Islands, Eastern Caribbean Supreme Court, Bannister J (26 January 2010)

The appointment of liquidators to a BVI fund turned in part on section 197 of the BVI Insolvency Act 2003 (akin to UK CA 2006 section 655), specifically on whether a member who had redeemed pre-liquidation was a creditor. It provides that: "A member, and a past member, of a company may not claim in the liquidation of the company for a sum due to him in his character as a member, whether by way of dividend, profits, redemption proceeds or otherwise, but such sum is to be taken into account for the purposes of the final adjustment of the rights of members and, if appropriate, past members between themselves". Bannister J held that redeemed members who had not received their redemption proceeds were creditors. The payment which became due on redemption was a payment made in consideration of a member surrendering his rights as a member. The so called statutory contract comprised by the articles of association and any applicable provisions of the relevant legislation was brought to an end. The decision has now been appealed to the BVI Court of Appeal. **[Richard Hacker QC]**

Shah v HSBC Private Bank (UK) Ltd [2010] EWCA Civ 31Court of Appeal (Ward LJ, Longmore LJ, Lloyd LJ) 4 February 2010

The customer ("S") of a bank ("H") instructed H to transfer a number of sums of money. H suspected that the money was criminal property and, pursuant to the Proceeds of Crime Act 2002, made a disclosure to the relevant authorities and sought permission to make the transactions. Permission was not granted immediately and there was a delay before H could carry out the transactions. S commenced proceedings against H and alleged that H had acted irrationally and/or negligently by harbouring a self-induced and mistaken suspicion. The Judge held that, in order to impugn H's decision to make an authorised disclosure, S had to challenge H's good faith and that, since S had not done that, there was no real prospect of him establishing any breach of duty on H's part. On this basis, the Judge struck

out S's claim under Part 24. S appealed and submitted that his claim was insufficiently straightforward to have been dismissed summarily. The Court of Appeal held that the Judge had been right to say that S's allegations of irrationality, mistake and negligently self-induced suspicion had no reasonable prospect of success (R v Da Silva (Hilda Gondwe) [2007] 1 WLR 303 and K Ltd v National Westminster Bank Plc [2007] Bus LR 26 followed). However, the Judge had been wrong to conclude that S was left to rely only on bad faith. There was no reason why he could not be permitted to put H to proof of its suspicion. It was for H to prove that it suspected S of money laundering and it would be unusual to grant summary judgment in favour of the party who bore the burden of proving a primary fact that was in issue. The only evidence adduced by H before the Judge had been a witness statement signed by H's solicitor. It would be wrong for a bank to be able to obtain reverse summary relief under Part 24 merely by authorising its solicitor to make a witness statement to the effect that that various unidentified people in the bank entertained a suspicion. The Judge was wrong to say that H would be bound to win at trial and S's claim should not have been struck out.

Titan Steel Wheels Ltd v Royal Bank of Scotland plc [2010] EWHC 211 (Comm) David Steel J (11 February 2010)

The claimant ("T") was a manufacturer of steel wheels for the "off-highway" vehicle industry. Its income was predominantly in Euros whereas much of its expenditure was in sterling and it had a need to sell Euros and purchase Sterling on a regular basis. In these circumstances, T purchased two currency derivative products from a bank ("R"). R's terms of business stated that it did not act as T's adviser or in a fiduciary capacity and that it provided an execution-only service with no advisory services. The transactions were followed by confirmations which stated that T had made its own independent decision to enter into the transaction and did not rely on R which was not acting as a fiduciary or adviser. T alleged that the derivative products were unsuitable for its needs and commenced proceedings against R to recover its losses. T's case was that the bank had advised it to buy the products and was liable in negligence and was in breach of duty under the relevant rules of the Financial Services Authority. R denied liability. Preliminary issues were directed as to whether: (1) T was a "private person" as defined by the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 ("the 2001 Regulations"); (2) R had acted as an advisor to T and owed a common law duty of care in respect of any advice given about the products; (3) the contractual terms on which R relied were subject to the Unfair Contract Terms Act 1977 ("the 1977 Act"). It was held that: (1) T's loss was suffered "in the course of carrying on business of any kind" and T was not a "private person"; (2) R's terms of business, which formed part of the contractual basis of the transactions at issue, consistently with the parties' previous course of dealing based on the same documentary structure, made clear that T and R were agreeing to conduct their dealings on the basis that R was not acting as an adviser and was not undertaking any duty of care regardless of what recommendations, suggestions or advice happened to be tendered (Valse Holdings SA v Merrill Lynch International Bank Ltd [2004] EWHC 2471 (Comm) considered) and R did not owe a common law duty of care in respect of advice in relation to the products in issue (Henderson v Merrett Syndicates Ltd (No1) [1995] 2 AC 145, Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd [2006] 2 Lloyd's Rep 511 and IFE Fund SA v Goldman Sachs International [2007] 2 Lloyd's Rep 449 considered); and (3) the exclusion clause in R's terms of business satisfied the test of reasonableness.

Re Kaupthing Singer & Friedlander Limited [2010] EWHC 216 (Ch) Blair J (19 February 2010)

A bank had issued £50,000,000 7.5% subordinated bonds due 2019 under the terms of a trust deed, but had subsequently gone into administration. The administrators had obtained permission to make a distribution to the unsecured creditors of the bank and had given a notice to that effect in accordance with the Insolvency Rules. The terms of the trust deed provided for the bonds to be subordinated "in the event of the winding up of the Issuer". The trustee had submitted a claim under the bonds in the administration and the question was whether the bonds were subordinated where a distribution was to be made while the bank was in administration. The Judge held that the description of the bonds as "subordinated" shows that it was intended that the bonds would be available to meet the claims of creditors in all circumstances where the bank was insolvent. Further, where an administrator makes distribution to creditors he is performing a function in substance equivalent to that of a liquidator. Accordingly, the terms of the deed were to be properly construed as providing for the subordination of the bonds where the bank had gone into administration and a notice of intention to distribute had been given.

[Tom Smith]

Tom Smith

CIVIL PROCEDURE

Digested by William Willson

William Willson

Ashcroft v Bradford & Bingley [2010] EWCA Civ 223 (Sedley LJ, Jacob LJ, Patten LJ) 10 March 2010

The appellant ("A") appealed a decision that the respondent ("R") was not statute-barred from suing him for recovery of a debt. A had borrowed money from R to purchase a house, but failed to repay the interest or capital. R sold the property subject to its security, set off the proceeds against the outstanding debt, and attempted to enforce the remainder. A complained that the property had been sold at an undervalue, but began to make minimal monthly repayments. R issued a claim outside the 12-year time limit to recover the debt. At first instance, the Court held that the claim was not statute-barred because R had started the minimal monthly repayments less than 12 years before the claim was issued. On R's appeal, the Court of Appeal rejected A's argument that part-payment did not constitute acknowledgment under the Limitation Act 1980 because, although part payment can be regarded as a sub-species of acknowledgment, it is treated separately from and given equal status with acknowledgment by s. 29(5) of the Limitation Act 1980; there was, therefore, no call to analyse part payment or to gloss it in terms of acknowledgment. Time began to run when A began to make the minimal monthly payments. The Court also held that, on the issue as to whether the payments were referable to the whole sum or only part thereof, the payments made could only have been referable to the whole debt.

Deutsche Bank AG v (1) Alexander Vik (2) Vik Millahue Agricola y Vinedos Ltd [2010] EWHC 551 (Comm) (Burton J), 19 March 2010

The non-UK resident applicants ("A" and "B"), were defendants to a claim brought against them by the respondent bank ("R"). They applied to set aside an order granting permission for service out of the jurisdiction. R was a German bank with an office in London. B was a company incorporated in Chile, which was controlled by A, a resident of Monaco. R's claim concerned a payment, which it had made to A and B at the request of another company with which it was involved in separate legal proceedings. It claimed that the money had been paid to A and B under a mistake of fact and/or in a manner which caused them to be constructive trustees, and that it was entitled to restitution. Since both A and B were out of the jurisdiction, permission to serve out of the jurisdiction had been necessary. The Judge found that D could establish a reasonable prospect of success (satisfying the test in Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438 applied), and granted permission for service out of the jurisdiction. A and B submitted that the factual circumstances in which the payment had been made meant that there was no case in law or in fact for the existence of an operative mistake in R's London accounts. Permission for service out of the jurisdiction should therefore not have been granted. On the facts and on the evidence pertaining to the mistake (which had been unexplained and unsupported), it was clear that there was no realistic prospect of success and no serious issue to be tried, neither on the basis of restitution by virtue of payment under a mistake of fact nor constructive trust based on knowing receipt or retention. The constructive trust case would depend not only on success of R's mistake case, but also on proof of V's knowledge of the mistake (and there was no evidence whatsoever of that). The order granting permission for service out of the jurisdiction would be discharged, and R's claim would be dismissed on jurisdictional grounds.

COMMERCIAL COURT

Digested by Ben Valentin and Joanna Perkins

Ben Valentin

Kolmar Group AG v Traxpo Enterprises PVT Ltd [2010] EWHC 113 (Comm), 1 February 2010

A dispute arose under an agreement for the supply of methanol on terms that it was to be delivered FOB to the claimant, who would nominate a vessel to receive it. The claimant sought to recover sums that the claimant had paid to meet the defendant's price increases, imposed after the vessel had been chartered by the claimant at some expense, on the grounds that they had been paid under economic duress. The claimant also sought damages for intimidation and compensation for consequential loss. Mr Justice Christopher Clark held: (1) economic pressure could amount to duress provided it could be characterised as illegitimate and has constituted a "but for" cause inducing the claimant to enter into the contract; (2) a threat to break a contract will generally be regarded as illegitimate, particularly where the defendant must know that it would be in breach of contract if the threat were implemented; (3) it is relevant to consider whether the claimant had a "real choice" or "realistic alternative". If there is no

reasonable alternative, this may be very strong evidence that the party being victimized was influenced by the threat; (4) the presence, or absence, of protest may be of some relevance but even the total absence of protest does not mean that the payment was voluntary. In this case, the pressure exerted on the claimant by the defendant left the claimant with no practical choice but to agree to pay an increased price for the methanol. The claimant was therefore entitled to restitution of the increased payment which it had been forced to pay under economic duress.

COMPANY LAW

Digested by Daniel Bayfield

Daniel Bayfield

Boughtwood v Oak Investment Partners XII, Limited Partnership, CA (Rix, Moses, Rimer LJJ), 28 January 2010

The Court of Appeal expressed surprise that the Judge, who dismissed an unfair prejudice cross-petition brought under Part 30 of the Companies Act 2006, had given the petitioner permission to appeal against his decision when "the case before him was essentially fact-based and, once the facts were found, required of him a discretionary balancing exercise". The Court also disagreed with the Judge's reasoning in giving permission on the basis that there was no clear authoritative guidance as to the obligations of parties in a quasi?partnership company of the type in question in the petitions and that it was arguable that a consideration of the principles by this court might require the assessment of the parties' mutual obligations to be viewed differently, so requiring a re?assessment of the judge's disposition of the petitions. The Court stated that:

"The 30 years of the jurisdiction created by section 994 and its statutory forebears has generated a considerable flow of jurisprudence on the disposal of 'unfair prejudice' petitions in the context of quasi-partnership companies, culminating in the decision of the House of Lords in O'Neill and Another v. Phillips and Others [1999] 1 WLR 1092, in which the leading speech was delivered by Lord Hoffmann, a master in this field as in so many others. His speech, in particular section 5, headed 'Unfairly prejudicial', provides the guidance that is required when approaching the assessment of allegations of unfairly prejudicial conduct in the affairs of a company, including one said to be of a quasi-partnership nature. There is, however, necessarily a limit to the general guidance that can be provided for the purposes of the resolution of any particular case. That is because such resolution must turn on the facts of the particular quasi-partnership relationship and the basis on which the company is established and agreed to be operated. Those facts and bases will vary from case to case.

Kiani v Cooper, Ch. Div., (Proudman J), 4 February 2010

A director and shareholder of a property development company applied under section 261 of the Companies Act 2006 to bring and continue a derivative action (as defined by section 260) on behalf of the company against a joint director and another company of which he was also a director. The Court identified that a prerequisite for a derivative claim is that the cause of action must arise from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director. The Court was satisfied that there was a strong case that the defendant director was in breach of his duties as a director in rendering invoices to the company in the name of the other company and in effect submitting to judgment without involving his fellow director in the process. Balancing all the relevant factors set out in section 263(3), the Judge decided that the application to continue the action in the name of the company ought to be granted, although the Court granted permission only down to disclosure in the action. The Court also made an order that the Claimant's costs should be borne by the company, although it refused to grant her an indemnity in respect of any adverse costs order.

Re Tulsesense Limited, Ch. Div., (Newey J), 15 February 2010

The issue raised was whether the first defendant's son, Wayne, ceased to be a director of the company on 18 December 2008. The claimants contended that Wayne's appointment as a director came to an end when an annual general meeting of the company was held on that date. They argued that Wayne was appointed as a director by the board, acting by its then sole member, in accordance with article 95 of the 1948 version of Table A. That article provides for a director so appointed to "hold office only until the next following annual general meeting" and then to be eligible for re-election. Since Wayne was not re-elected as a director at the annual general meeting of held on 18 December 2008, they contended that he was thereafter no longer a director of the company. The first defendant's case was that Wayne remains a director of the company. He argued that Wayne was or is to be treated as having been appointed as a director by the shareholders, acting informally, on a date between about 17 July and 24 August 2007 pursuant to article 94 of Table A. Since article 94 pro-

vides for no limit on the period for which a director holds office, it followed that Wayne was appointed indefinitely. The argument was based on the Duomatic principle. In the alternative, he argued that the shareholders were to be taken to have tacitly modified the company's articles so that the appointment of a director by the board was not to be merely "until the next following annual general meeting", as article 95 of Table A stipulates. The Judge held that, whether or not the assent of all the beneficial owners of a share will suffice, the assent of just one of a number of such owners normally will not. Further, if an individual who holds some shares for himself and other shares as a trustee or executor has expressed assent, he is not to be taken to have given that assent in respect of the shares held as a trustee or executor if he did not intend to or purport to make a decision in relation to those shares, at any rate if it would have been apparent to an observer that the assent was not intended to extend to the shares held as a trustee or executor.
Furthermore, there must be material from which an observer could discern or (as in the case of acquiescence) infer assent.
The first defendant's alternative case was also rejected. The evidence indicated that too little regard was paid to the terms of the articles, not that they were varied.
In Ho Tung v Man On Insurance Company Ltd [1902] AC 232, which was relied on by the first defendant, the parties assumed that the company's articles took a particular form; there was no evidence that anyone assumed Tulsesense's articles to be in terms different from their actual terms. There was, more specifically, no evidence that anyone intended to dispense with the provision in article 95 of Table A to the effect that an appointment under that article should continue, in the first instance, only until the next annual general meeting. In short, this was a case where the articles were not always followed, not one where they were modified or disapplied.

Re Hedgehog Golf Co Limited, Ch. Div., (Gabriel Moss QC), 12 March 2010

The petitioner sought a declaration under Part 30 of the Companies Act 2006 that the affairs of a company (that had been incorporated as a joint venture in order to market and sell a type of modified golf cart that was capable of being used on the fairway in wet weather) had been conducted in a manner that was unfairly prejudicial to his interests and sought an order that he be entitled to purchase the shareholding of his joint venture partner and joint director. It was the petitioner's case that his partner had, amongst other things: (i) illegitimately withdrawn a large sum of money from the company's bank account; (ii) run up unexplained debts on a company debit card; (iii) convinced the petitioner, through misrepresentations, to alter the company's share structure and give his partner greater voting power; (iv) purported to remove the petitioner as a director at a meeting that was inquorate and nevertheless informing Companies House of the removal; (v) and opened a new company bank account, wrongly directing company receipts into it.
There was a clash in the evidence as to whether or not these allegations were true and the determination of the factual disputes came down to an appraisal of the credibility of the evidence given by the two shareholder/directors.
The Court preferred the petitioner's evidence and the court was persuaded that the respondent shareholder/director had, in relation to the matters alleged, conducted the company's affairs in a manner that was unfairly prejudicial to the petitioner as a member. The Court ordered the rectification of the Register to restore the position in relation to the company's share capital and made an order entitling the petitioner to purchase the respondent's share, directing an enquiry as to is value, such value to be determined taking into account further orders made requiring the respondent to repay monies to the company.

CORPORATE INSOLVENCY

Digested by Blair Leahy and Adam Al-Attar

Re Borders Ltd (in administration), Re [2009] EWHC 3487 (Ch) (Sales J) 18 December 2009

Borders entered administration in circumstances in which books subject to retention of title clauses had been mixed together with books of the company. The Joint Administrators ("JAs") of Borders Ltd ("Borders") proposed to sell the mixed books. The vendors to the company applied for an injunction.

The JAs had no right to deal with third party property in the possession of the company without first obtaining an order under IA 1986 Sch B1 para 72.

If the JAs did deal with such property without the protection of an order under that provision, they would commit the tort of conversion.

Sales J held that because the JAs had proceeded knowing of the issue of the mixture and without offering the vendors the protection of an application under para 72 it was likely that they had committed the tort of conversion. An injunction was not issued only because the company was to cease to trade with a sufficient reservation to protect the rights of the vendors.

[Daniel Bayfield]

Blair Leahy

GBI Investments Ltd, Re [2010] EWHC 37 (Ch) (Warren J) 15 January 2010

The debtor company was incorporated to hold bearer shares in another company. The petitioning creditor was the assignee of the counterparty to an agreement with the debtor company pursuant to which the counterparty was entitled to satisfaction of the debt owed to it by transfer of the bearer shares upon request. The petitioning creditor had issued such a request but was refused, being met with a defence in terms of limitation and the allegation that the relevant loan agreement was a sham. The petitioning creditor claimed damages for non-performance. The Court applied Claybridge Shipping Co SA, Re [1997] 1 BCLC 572 and Alipour v Ary [1997] 1 WLR 534 to make a winding up order notwithstanding a bona fide and substantial dispute in relation to the petition debt. Warren J held that the right to receive the bearer shares arose only on request and therefore the damages claim was not time barred and that the relevant loan agreement was not a sham but that, even if he were wrong, a winding up order should be made notwithstanding the existence of a bona fide dispute as to the damages claim on substantial grounds because the petitioning creditor would otherwise be without an adequate remedy. Without a compulsory winding up order, the debtor company would be liquidated under the control of the current owners and its assets would be distributed prior to the petitioning creditor establishing the validity of the loan agreement in proceedings. No prejudice would be caused to the debtor company which was a company incorporated to hold shares which would otherwise be dormant and which was plainly insolvent.

[David Alexander QC, Lloyd Tamlyn, William Willson]

David Alexander QC

Lloyd Tamlyn

In the matter of E-Clear (UK) Plc (Floyd J and Voss J) 12 January 2010 and 19 January 2010

Following the highly publicised collapse of the Globespan airline shortly before Christmas 2009, it appeared that the reason for the collapse of Globespan was that some £35 million had been withheld by E-Clear (UK) Plc which provided services to clear payments by credit card made by Globespan's customers. The administrators of Globespan made an urgent application for an administration order to be made in respect of E-Clear (UK) Plc. Following an initial hearing before Mr. Justice Floyd on 12 January 2010, E-Clear (UK) Plc was ordered to file evidence of the money that it was holding in its account. At the adjourned return date of the administration application before Mr. Justice Voss on 19 January 2010, E-Clear (UK Plc dropped its opposition to the application for an administration order and administrators were appointed.

[Simon Mortimore QC, Glen Davis]

Simon Mortimore QC

Coomber v Bloom [2010] EWHC 121 (Ch) Lewison J, 26 January 2010

A bank had advanced monies under a loan agreement to a company for the development of two properties. Following the bank going into administration, the bank had demanded repayment of lending which was on demand and had appointed LPA receivers who had subsequently sold the properties to a third party. The directors of a company claimed against the Administrators of the bank, the bank and the LPA Receivers alleging (inter alia) conspiracy, unlawful interference with contract, and misrepresentation. The claims were to be struck out. The bank was entitled to demand repayment of the loan, and owed no duty to the mortgagor company in relation to the exercise of its power of appointment of receivers other than not to exercise its powers for improper purposes, which means where it is no part of the mortgagee's purpose to recover the debt secured by the mortgage. This was not the position in the present case. Further, applying the principles in Silven Properties v RBS [2004] 1 WLR 997, there had been no breach of duties by the Receivers in selling the properties. Having regard to the fact that the receiver's primary duty is to bring about a situation where the secured debt is repaid, as a matter of principle the receiver is entitled, like the mortgagee, to sell the property in the condition in which it is in the same way as the mortgagee can, and in particular, without awaiting or effecting any increase in value or improvement in the property. The other claims were also without foundation and would be dismissed.

[Tom Smith]

Byers v Yacht Bull Corporation [2010] EWHC 133 (Ch) (Morritt C) 1 February 2010

The Joint Liquidators (JLs) of Madoff Securities International Ltd (MSIL) applied for a declaration that a motor yacht, the Yacht Bull, registered in the name of Yacht Bull Corporation (YBC) and held ostensibly for Ruth Madoff was in fact an asset in the liquidation of MSIL, having been purchased with company monies and held by YBC for MSIL under a resulting trust (the JLs' Application).

Financiere Meerschaert SA (FM), a French investment house which had lost money through the fraud of Bernard Madoff and which had arrested the Yacht Bull in Antibes post-liquidation, immediately prior to the JLs' arrest of the same, opposed the JLs' Application on the ground that the Court had no

Felicity Toube

jurisdiction to determine it because – MSIL was an "investment undertaking" within the meaning of Council Regulation 1346/2000 on insolvency proceedings (the Insolvency Regulation) and therefore that regulation did not apply; alternatively, the JLs' Application was not directly connected with the main insolvency proceedings opened by the winding up order, being a proprietary claim independent of the insolvency. The Chancellor rejected the first submission and accepted the second. The JLs' Application could not be characterised as an application for a declaration as to whether the statutory stay under IA 1986 s 130(2) had been breached and to which determination of the proprietary claim was merely incidental. The proprietary claim was independent of the insolvency and the JLs were required to sue FM in France, being its domicile for the purpose of Council Regulation 44/2001 on the recognition and enforcement of judgments in civil and commercial matters (the Judgments Regulation). **[Gabriel Moss, Felicity Toube, Adam Al-Attar]**

Adam Al-Attar

Stanford International Bank, Re [2010] EWCA Civ 137 (Morritt C, Arden and Hughes LJJ) 25 February 2010

The Court of Appeal upheld Lewison J in recognising the Antiguan Liquidation of Stanford International Bank as the foreign main proceeding under the Cross-Border Insolvency Regulations 2006 (CBIR) and the Antiguan Liquidators as the foreign representatives. The Receiver appointed by the US Securities and Exchange Commission and the Liquidator appointed by the Antiguan Financial Services Regulatory Commission had each applied for recognition in the UK under the CBIR to gain control of bank accounts in London. Lewison J had held that a two stage approach was required for determining COMI. The Court must first identify a set of objective and ascertainable factors and then determine from that set of factors where a company's head office functions were carried out to confirm or to rebut the presumption that its COMI is at the place of its registered office. SIB had its registered office in Antigua. In the course of its business, it issued certificates of deposit to customers resident in countries other than Antigua and to customers in the United States through financial advisers in that country, being the country in which the majority of its assets were managed under contract. Lewison J had discarded factors that were not objective and ascertainable and only analysed those that were in terms of their relevance and as pointing to or away from Antigua. For example, the location of the directors (the principal movers of the fraud in relation to SIB) was irrelevant as it was not ascertainable by third parties. The Chancellor agreed with this analysis. COMI for the purpose of the CBIR had the same meaning as under Council Regulation 1346/2000 on insolvency proceedings (the Insolvency Regulation) notwithstanding that the former regime had a slightly broader meaning of insolvency proceedings and did not operate against a single market background of mutual trust and cooperation. To confirm or rebut the presumption that a company's COMI was at it registered office required objective and ascertainable factors and not factors which would be revealed on an investigation of the matter. Arden LJ concurred although she differed from Morritt C as to how the test was to be applied. Whereas Morritt C only required the judge to have applied the right test, the determination of fact being a matter for him, Arden LJ was careful to distinguish between a finding of primary fact which an appellate court should be slow to challenge and a finding as to COMI on the basis of such facts which an appellate court was in just as good a position to review as the trial judge on the facts found by him subject to such deference as was required in respect of a complex conclusion based on a multi-factorial assessment. The decision is also useful for its discussion of "pursuant to a law relating to insolvency", being determinative to whether a proceedings is a foreign proceeding for the purpose of the CBIR. Morritt C considered that such a law does not have to be statutory or relate exclusively to insolvency. The Court of Appeal also re-granted a restraint order in favour of the SFO, conferring administrative priority on it in respect of assets of the bank in the UK. **[William Trower QC, Stuart Isaacs QC, Jeremy Goldring, Daniel Bayfield]**

William Trower QC

Stuart Isaacs QC

Jeremy Goldring

William Hare Ltd v Shepherd Construction Ltd [2010] EWCA Civ 283 (Thomas LJ, Lloyd-Jones J) 18 March 2010

Section 113(1) of the Housing Grants (Construction and Regeneration) Act 1996 outlaws "pay when paid" clauses in building contracts except where it can be shown that the third-party employer is insolvent. In these cases, the contracts (which had been entered into after the Insolvency Act was amended by the Enterprise Act) defined insolvency of the employer, among other things, by reference to the making of an administration order against the employer under Part II of the Insolvency Act 1986, but not by reference to out-of-court appointments under Schedule B1 which had become possible as a result of the Enterprise Act changes. The employer had entered administration by out-of-court appointment. The Court of Appeal, dismissing the contractor's appeals, held that the clause as worded works and that it was for the contractor to get a clause of this nature right if they wished to rely on it. **[Glen Davis]**

Glen Davis

Re Johnson Machine & Tool Co Ltd [2010] EWHC 582 (Ch) (HH Judge Purle QC), 18 March 2010

The Court held that the administrators of two companies that were bought by existing directors and owners as part of pre-pack administrations were not entitled to have their pre-appointment costs treated as administration expenses. HH Judge Purle QC applied Kayley Vending Ltd, Re [2009] EWHC 904 (Ch), which held that pre-appointment administration expenses were within the discretion of the Court under IA 1986 Sch B1 para 13, and explained that there was a distinction between an administration that was plainly for the benefit of creditors and one where the balance of advantage appeared to lie heavily with the management. In the former but not the latter it would be appropriate to allow the pre-appointment costs. The pre-pack administrations were for the benefit of creditors in the sense that a better result would be achieved than an immediate winding up, but because the directors were the purchasers it was difficult to conclude that the balance of advantage was clearly in the creditors' favour. Pre-appointment costs did not reflect time spent on any matter arising in the administration, and it would be misconceived if payment of pre-appointment costs were approved as part of the administrator's proposals because proposals were "for achieving the purpose of the administration". Such costs could not be characterised as an expense of the administration which the creditors might approve.

Re Energy Holdings (No. 3) Limited (Sir John Lindsay), 19 March 2010

The Supervisors of a CVA in respect of a company in the TXU group applied to the Court for directions as to how they should deal with a claim submitted in the CVA claiming indemnification in respect of certain environmental liabilities in the Unites States in circumstances where those liabilities were the subject of contested ongoing proceedings in Delaware. Held that it would be inappropriate for the Supervisors to defer adjudication of the claim pending the determination of the Delaware proceedings since this would be inconsistent with the dispute resolution procedure contained in the CVA which allowed a creditor to elect, in the event of his claim being rejected, to pursue the claim further either to the English Court or to a Claims Tribunal. The burden on the office-holder in deciding to reject a claim (as opposed to admitting a claim) was a relatively low one and therefore the Supervisors could reject the claim if they considered it had not been made out. The appropriate course was for the Supervisors to decide within 21 days whether to admit or reject the claim. **[Tom Smith]**

Re Overnight Ltd (in liquidation) [2010] EWHC 613 (Ch) (Roth J) Roth J, 25 March 2010

The Court held that the approach for assessing the contributions due for fraudulent trading was the same as that for wrongful trading.
Roth J explained that the Court has a wide jurisdiction and might make each respondent jointly and severally liable to contribute in respect of the loss to creditors caused by fraudulent trading but that in circumstances in which participation of the respondents was unequal it may be appropriate to make a separate assessment of the contribution each respondent is liable to make.
On the facts, the insolvent company had perpetrated a missing trader VAT fraud. The company secretary had operated in his own name the bank account into which all monies were received by the company or paid out by it and he had made large drawings from that account. By contrast, the company director had acted as an informant for HMRC and had earned more modest sums.
Roth J held that the company secretary was severally liable to make a contribution equal to the full value of the loss caused to HMRC as a creditor but that the company director was only jointly and severally liable for 50 per cent of that loss.

Re Kaupthing Capital Partners II Master LP Inc (in administration), Pillar Securitisation S.a.r.land others v Spicer and Shinners (Proudman J) 31 March 2010

The appointment out of court of joint administrators over a limited partnership's affairs was held to be invalid because the Guernsey limited partnership, even though it had separate corporate personality, was not a "company" and the correct form for appointing the administrators that should have been used was the form for partnerships and not the form for companies. The appointment was void and the acts of the administrators over about 18 months could not be validated except by a possible retrospective order, which could only extend backwards for 364 days.
The decision is of wider interest because Proudman J rejected the submission that the appointment was invalid because the Court had no jurisdiction to open main insolvency proceedings within the meaning of Council Regulation 1346/2000 on insolvency proceedings (the Insolvency Regulation) on the grounds that COMI was not in the UK but in the place of the registered office, Guernsey.
Applying the principles recently set out by Lewison J in Stanford

International Bank, Re (affirmed in the Court of Appeal), Proudman J distinguished between what was ascertainable by investors in the fund who were alleged to have failed to pay their contributions in full and what was ascertainable by creditors in order to assess, by reference to objective and ascertainable factors, the place from which the limited partnership regularly administered its affairs (its head office functions). The perspective of investors in a position similar to the holders of partly paid shares was irrelevant for this purpose. It would have been apparent to creditors that the partnership's affairs were run from London under contract by other KSF entities. The presence in Guernsey was no more than a letter box presence. **[Gabriel Moss QC, Andreas Gledhill]**

Gabriel Moss QC

Re Nortel Networks UK Ltd [2010] EWHC 826 (Ch) (Norris J), 22 April 2010

Following the making of an administration order in relation to Nortel Networks UK Ltd, the Joint Administrators gave notice terminating the employment of a number of the employees of the company. Unite the Union and the employees ("the Applicants") applied to the Court pursuant to paragraph 43(6) of Schedule B1 to the Insolvency Act ("the Act") for permission to continue proceedings filed in the Employment Tribunal - including claims for protective awards, unfair dismissal, breach of contract, discrimination, and expenses. The Joint Administrators consented to the pursuit of the protective award claims on the basis that, if successful, the employees would be entitled to receive payment from the Government. The Joint Administrators opposed the grant of permission in respect of the remainder of the claims. Mr Justice Norris dismissed the application. The following findings should be noted: (1) The claims were monetary claims and permission should only be granted in the event that the claims were exceptional in some way; (2) The Applicants were wrong in their contention that the claims should be regarded as exceptional on the basis that they would not be provable in the administration or a subsequent liquidation without an award of the Employment Tribunal; (3) The decisions in Glenister v Rowe [2006] Ch 76, Steele v Birmingham City Council [2006] 1 WLR 2380, Day v Haine [2008] IRLR 642, and Casson v Law Society [2010] BPIR 49 establish only the proposition that where the imposition of the obligation under which the debtor is made liable depends upon the exercise of some prior discretion, which has not been exercised at the date of insolvency, then at the date of insolvency the debtor is not subject to any liability (future, contingent or otherwise); (4) The exercise of a discretion (including a judicial discretion) is entirely distinct from judicial adjudication. In the present case, if the elements of the claim were established, the employees would be entitled to compensation; (5) The employee claims represented contingent liabilities to which the company was subject when it entered into administration. The claims of the employees arose pursuant to the terms of the employment contract or pursuant to obligations imposed upon an employer by statute; (6) Accordingly, the claims of the employees would be provable debts. **[David Allison]**

David Allison

Vaidya v Wijayawardhana [2010] EWHC 716 (Ch) Ch D (Sarah Asplin QC sitting as a deputy judge of the High Court), 31 March 2010

W had sought an interim injunction both on his own behalf and as a representative of an NHS Trust ("the Trust") preventing V from contacting W directly or entering the Trust's premises. A costs order had been made against V. V did not pay. W served a statutory demand. V applied to set aside the demand, contending that he had a claim for future loss of earnings against W and the NHS trust which amounted to a counterclaim and was already the subject of proceedings. V's application was dismissed by a district judge without a hearing and without detailed reasons pursuant to the procedure set out in Insolvency Rules 1986 r.6.5(1). W served a bankruptcy petition upon V and a bankruptcy order was made. V applied to annul the bankruptcy order. At the hearing V again relied upon his alleged counterclaim. The district judge dismissed V's application concluding that the issue of the existence of a counterclaim had been dealt with at the paper hearing of V's application to set aside the statutory demand and could not be reconsidered on the hearing of the application to annul.

On appeal the Court held that: (1) It was an accepted statement of principle that on the hearing of a bankruptcy petition or an application to annul a bankruptcy order, although the court had unlimited jurisdiction, a debtor would not be permitted to re-argue the very grounds upon which he was unsuccessful when seeking to set aside a statutory demand; (2) In the instant case, however, the issue of V's counterclaim had not been "obviously" considered by the district judge at the hearing to set aside the statutory demand. In the absence of reasons for that decision, there was nothing on which the district judge at the annulment hearing could have based his assumption that the issues relating to the counterclaim had been dealt with on their merits; (3) Accordingly, the district judge had failed to take into account all relevant matters or had taken irrelevant matters into account such that the exercise of his discretion should be set aside and the case remitted for rehearing.

PERSONAL INSOLVENCY

Digested by Marcus Haywood

Marcus Haywood

Lonergan v Gelding Borough Council [2009] EWCA Civ 1569 Court of Appeal (Civ Div) (LLJ Arden, Pill and Smith), 9 December 2009

On an application for permission to appeal, one of the issues with which the Court was concerned was whether the local authority had the power under the Council Tax (Administration and Enforcement) Regulations 1992, regulation 49 to present a bankruptcy petition for unpaid council tax.

The Court of Appeal held, amongst other things that the Judge was correct to conclude that the local authority had the power to present a bankruptcy petition for unpaid council tax. There was no need for regulation 49 to make some more general provision that a liability to pay council tax gave rise to a debt for all the purposes of the Insolvency Act 1986.

Ross v Commissioners for HM Revenue and Customs [2010] EWHC 13 (Ch) Chancery Division (Henderson J), 12 January 2010

This case concerned the circumstances in which the court may dismiss a bankruptcy petition pursuant to section 271 of the Insolvency Act 1986 on the basis that it is satisfied that the debtor has made an offer to secure the debt in respect of which the petition is presented and that the offer has been unreasonably refused. A bankruptcy petition had been served on the debtors by Her Majesty's Revenue and Customs ("HMRC"). The debtors wrote to HMRC offering a number of legal charges over various properties as security for payment. HMRC rejected the offer giving several reasons. They stated, amongst other things, that they were not prepared to accept legal charges as there was no guarantee when payment would be forthcoming; accepting legal charges would not maintain the flow of funds to the exchequer; settlement of the debt was required in full; HMRC was not resourced to monitor and administer property sales to pay tax debts; the debtors had had a significant amount of time to raise finance on their properties and it would be unfair to other tax payers who had made provisions to pay their taxes on time if HMRC were to accept legal charges in the instant case. Upholding the decision of the Registrar making bankruptcy orders against the debtors, the Court held: (1) The relevant test to be applied in deciding whether a refusal was reasonable was whether a reasonable creditor, in the position of the petitioning creditor, and in the light of the actual history as disclosed to the Court would have accepted or refused the offer; and (2) In the instant case, the hypothetical creditor had to be regarded as a national revenue authority in the same position, and subject to the same constraints as HMRC. Out of all the justifications offered by HMRC for not accepting legal charges the fact that the HMRC did not have the resources to act as mortgagees and to administer the sales of mortgaged property was a highly material consideration. HMRC's primary function was to collect tax not to act as an institutional lender. In the circumstances, HMRC's refusal to accept the offer was well within the range of reasonable responses open to it.

Child Maintenance & Enforcement Commission v Beesley [2010] EWHC 485 (Ch) Manchester District Registry (Judge Pelling QC), 11 March 2010

The Court held that The Child Maintenance and Enforcement Commission ("the Commission") was a creditor for the purposes of an individual voluntary arrangement ("IVA") entered into by a non-resident parent in arrears with child maintenance payments. The Court also held that the Commission was unfairly prejudiced by the approval of the IVA. The debtor's arrears to the Commission would not be provable were the debtor to be made bankrupt and discharge from bankruptcy would not release the debtor from any debt arising under a maintenance calculation made by the Commission. By contrast, the IVA provided for part-payment of his debts in full and final settlement of his debts. The Court held that the Commission was unfairly prejudiced by a term that required the Commission to accept a dividend in full and final settlement of debts to the Commission. Under the terms of the IVA the Commission was required to give up its rights to collect the debts which would have survived bankruptcy. The unfair prejudice to the Commission was caused by the particular terms that provided for this treatment of the debt to the Commission and not by the general provisions governing IVAs.

Selby Hall v Jan Van Der [2010] EWHC 537 QBD (Technology and Construction Court) (Coulson J), 15 March 2010

The High Court had jurisdiction to consider an application for leave, under the Insolvency Act 1986 s.252, to continue proceedings for breach of contract against a defendant who had obtained an interim order under that section from a county court. The applicants applied for leave to continue to pursue their claim against the respondent at trial. The applicants had issued proceedings against the respondent for breach of contract and a trial date was fixed. Approximately five months later, on the morning of the last working day before trial, the respondent's new solicitors sent a fax to the applicants' solicitors stating that the respondent had applied for an interim order under the Insolvency Act 1986 s.252 ("the Act"). The respondent contended in correspondence that since the interim order had been granted in a county court if the applicants wished to continue with their claim against the respondent they had to apply to the same court. The Court held that: (1) There was nothing in the Act which indicated that, if an interim order was made by a county court, the High Court was excluded from exercising any jurisdiction under s.252 of the Act. (2) Even if that were wrong, pursuant to the Insolvency Rules 1986 r.7.11, that aspect of the bankruptcy proceedings which was related to the trial could and should be transferred from the county court to the High Court so that it could be dealt with on the day which had been fixed for the previous five months. Further, the trial could be separately transferred from the county court to the High Court as there was nothing in r.7.11 which said it could not and r.7.11(4) suggested that it could.

Shepherd v Official Receiver [2010] EWHC 681 (Ch) (Nicholas Strauss QC), 23 March 2010

The appellant ("A") appealed against the dismissal of his application for a declaration. A was a former solicitor who had been convicted in 1993 of fraud and forgery against the Legal Aid Board ("LAB") relating to the submission of "green forms". He went on to make five claims against the Legal Services Commission ("LSC") for payment of various green forms. Though his first claim was struck out, he continued making claims for thousands of green forms. The claims were all assessed at nil on the basis that the LAB was not satisfied that the work for which payment was claimed had actually been done. A was made bankrupt in 2002 on the petition of the LSC based on various unpaid costs orders relating to those proceedings. The Official Receiver ("OR") told A that it would not assign the cause of action against the LSC: it had no prospect of success and the receiver would be at risk of an adverse costs order. A sought a declaration that the OR must have made a statutory decision that certain LSC guidelines on the assessment of legal aid fees were ultra vires and, in consequence of such decision, A's bankrupt estate, vested in the OR , had an unanswerable claim in negligence against the LSC. The registrar dismissed A's application summarily. On appeal, held that A was asking the court to reconsider the issue as to the OR's decision not to pursue claims against the LSC. It was plain that A was seeking to re-litigate, yet again, the issue as to whether he had valid claims against the LSC. That issue had been repeatedly decided against him. The registrar had failed to include in his order a statement that the party affected could apply to have it set aside, varied or stayed as was required under r 3.3 (5) of the CPR. But A knew that information, and was not prejudiced by the irregularity. The court had seen all the material relied on by A (Collier v Williams [2006] EWCA Civ 20 applied). A should accept that further litigation would do no good.

In re Mercury Tax Group Limited (in administration) His Honour Judge Langan QC (sitting as Judge of the High Court) 9 April 2010

This was a dispute about HMRC's vote at a creditors' meeting. HMRC's claim was in part based on HMRC post-administration amendments to self-assessments which were already under appeal at the date of the meeting and as to the remainder based on amendments to self-assessments notified for the first time during the course of the meeting. For these reasons (and others) the chairman admitted HMRC to vote for £1.5m (out of a claim of c.£8.7m). HMRC appealed the decision contending that by reason of s 55 of the Taxes Management Act 1970 the chairman ought to have admitted the claim in full. Dismissing HMRC's appeal, the Court held that: (a) on the true construction of rules 2.38(4)&(5) of the Insolvency Rules 1986, votes must be calculated according to the amount of the creditor's claim as at the date the company entered administration and unliquidated or unascertained claims must be left out of account unless the chairman agrees to put upon the debt an estimated minimum value for the purpose of entitlement to vote and admits the claim for that purpose; (b) as at the date the company entered administration only part of the HMRC claim was liquidated or ascertained; (c) the chairman's decision to reject the HMRC Claim (in part) could not be faulted because the notices of amendments constituted provisional quantifications of liability for tax as most of the notices were under appeal at the time of the meeting and it was clear that the others would be appealed in due course.

The Trustee in Bankruptcy of Louise St John Poulton v Ministry of Justice [2010] EWCA Civ 392 CA (Pill LJ, Lloyd LJ, Pitchford J), 22 April 2010

Proceedings were brought by the Trustee against the Ministry on the grounds that the Ministry was vicariously responsible for Her Majesty's Court Services. In breach of r. 6.13 of the Insolvency Rules, the court staff failed to send notice of the presentation of a bankruptcy petition to the Chief Land Registrar for notice to be entered in the register pursuant to the Land Charges Act 1972. The debtor sold the property to a purchaser who claimed to have no notice of the petition and who set off a debt against the purc hase price. The Trustee alleged that the net proceeds of some £45,000 received by the debtor could not be recovered. The Trustee claimed that there had been a breach of statutory and/or common law duty by the court staff, that this breach caused loss to the bankrupt's estate and that the Ministry was vicariously liable for the default of the court staff.

Judge Marshall QC held on a preliminary issue that the Trustee had an action for breach of statutory duty but no action at common law. The Ministry appealed the holding of statutory duty and the Trustee cross-appealed the decision that there was no action at common law. The Court of Appeal decided that the Trustee had neither an action for breach of statutory duty nor an action at common law.

Lloyd LJ (with whom the other Judges agreed) held that the decisive point was to be found in the comparison of the Land Charges Act and the Land Registration Act in 1925, when the original version of rule 6.13 was introduced. The LRA expressly provided for immunity from suit for the Land Registrar and in return provided an indemnity which was specifically extended to a trustee in bankruptcy if he suffered loss caused by a failure to enter a creditors' notice on the title to the relevant land. There was no such provision in the Land Charges Act.

Lloyd LJ concluded that the explanation for the right of indemnity in relation to the Land Registration Act was that the risk of the failure in the system was sufficiently substantial as loss under that statute could arise in several different situations. By contrast under r. 6.13 and the Land Charges Act the only risk was the failure to perform a relatively simple duty. He therefore concluded that, in the proper context of the bankruptcy rules (analysed in his judgment) it was not intended that a failure to comply with the duty would give rise to a private claim for damages; the fact that on occasion there may be an oversight was not sufficient reason to find a private remedy for the breach of this duty. This was supported by the fact that the petitioning creditor can, itself, make a request to the Chief Land Registrar on payment of a small fee.

[Gabriel Moss QC]

PROFESSIONAL NEGLIGENCE

Digested by Georgina Peters

Georgina Peters

Robert Matthew Griffin v UHY Hacker Young & Partners (A Firm) [2010] EWHC 146 (Ch) (Vos J), 4 February 2010

In circumstances where a firm of accountants (H) applied to strike out the respondent's (G) claim to recover damages allegedly flowing from H's negligent advice, Mr. Justice Vos found H had failed to establish that there was no real prospect of G's claim succeeding. H relied on the ex turpi causa rule as expounded in Gray v Thames Trains Ltd [2009] UKHL 33, contending G's claim was barred. G, director of a company that had gone into liquidation, claimed H had failed to advise him that his becoming a director of another company using a trade name of the company in liquidation without leave of the court, might contravene section 216(3) of the Insolvency Act 1986. G was fined £1,000 and claimed he had suffered, inter alia, loss of a shareholding, earnings and earnings capacity.

The main issues were: (i) whether the narrow rule as set out in Gray includes losses flowing from a conviction as well as from the sentence imposed; and (ii) what level of culpability or negligence ought to be proved where an ex turpi causa defence is raised on offences of strict liability. As to the first issue, it was held the narrow rule in Gray only applies to losses flowing from the sentence imposed, not the conviction. On the second issue, it was found unnecessary to decide the point as H could not succeed in demonstrating no real prospect of G defeating the ex turpi causa defence. However, it was observed that in professional negligence cases, the question of the level of culpability required to support an ex turpi causa defence is the mirror of the question whether there is a duty of care. In the result, a trial of the claim was judged necessary, to evaluate the issues of personal fault on G's part and question of causation as to the losses claimed.

TAX CASES

Digested by Andreas Gledhill

Andreas Gledhill

Thorpe v HM Revenue & Customs [2010] EWCA Civ 339 (Dyson LJ, Lloyd LJ and Sir Scott Baker), 15 March 2010

The appellant taxpayer ("T") was a beneficiary under a self-administered pension scheme. By 1998 he was the sole extant beneficiary of the scheme and eligible to retire. Instead of retiring and drawing benefits, however, T purported to invoke the rule in Saunders v Vautier to require the pension fund trustees to make over the entire accumulated fund to him. As a result, in 2004, HMRC withdrew the scheme's approval and raised a tax assessment to tax on T pursuant to s. 591C of the Taxes Act 1988. On appeal against the S.591C assessment to the Special Commissioners, T argued that: (1) althought there were contingent beneficiaries of the scheme beside himself, in circumstances where he could have retired and drawn benefits which would have exhausted the fund, he was entitled to invoke Saunders v Vautier to bring the scheme to an end; (2) HMRC's 2004 decision to withdraw the scheme's approval and assess him to tax under s. 591C was consequently Wednesbury unreasonable; and, (3) it was open to him to raise that public law point on an appeal to the Special Commissioners. The Special Commisioners and Sir Edward Evans-Lombe (on appeal) disagreed. On further appeal to the Court of Appeal, it was held that: (1) T was not entitled to rely on Saunders v Vautier given that there were contingent beneficiaries; (2) the 2004 decision was not Wednesbury unreasonable; and, (3) even if it had been, it was not open to T to rely on that point on an appeal against the s. 591C assessment. Judicial review represented T's sole remedy (Wandsworth BC v Winder [1985] 1 AC 461 (HL) and Oxam v HMRC [2009] EWHC 3078 (Ch) distinguished). **[Andreas Gledhill]**

Micro Fusion 2004-1LLP v HM Revenue & Customs [2010] EWCA Civ 260 (Sir Andrew Morritt C, Rimer LJ and Etherton LJ), 19 March 2010

The taxpayer ("T") acquired a feature film called Mrs. Henderson Presents at cost from a film production partnership. It thereafter sold the master negative to a distributor and leased out the intellectual property rights for a 21 year term. The issues were: (1) whether T's retention of the reversionary interests in the IP rights sufficed for it to be conducting "a trade or business wich consists of or includes the exploitation of films" within s. 42 of the Finance (No 2) Act 1992, so as to entitle it to deduct its acquisition expenditure in the relevant years of assessment; and, if so, (2) whether relief was barred by s. 42(8), on the basis that the film was trading stock. The Special Commissioners found in favour of T, but Davis J allowed HMRC's appeal. The Court of Appeal allowed T's further appeal, however, holding that (1) the term "film" in the Films Act 1985 and s. 42 is wide enough to cover IP rights by themselves; (2) T had exploited the IP rights to Mrs. Henderson Presents, and had consequently exploited the "film"; (3) if (contrary to the first conclusion) a "film" was confined to the media on which it was recorded, T had exploited those media by selling them; and, (4) relief was not barred by s.42(8), since T had not sold the IP rights to the distributor.
[Andreas Gledhill]

HM Revenue & Customs v Halcyon Films LLP [2010] EWCA Civ 261 (Sir Andrew Morrit C, Rimer LJ and Etherton LJ), 19 March 2010

The taxpayer (T) purchased three feature films from a distributor and leased them back. T claimed relief on one third of its acquisition expenditure in each of three relevant years of assessment under s. 42 of the Finance No 2) Act 1992. It was common ground between T and HMRC that: (1) on the facts, s. 101 of the Finance Act 2002 precluded T from claiming 100% first year relief under s. 48 of the Finance (No. 2) Act 1997; and, (2) s.48 did not create a separate relief, but took effect only by way of modification of s. 42 in the case of low budget films. S. 101 bars "relief under s.48" in cases where it applies. The issue was whether the wording precluded T from claiming 3-year relief under s. 42 as well as 1-year relief under s. 48. The Special Commissioners held that it did not and Davis J. (on appeal) agreed. The Court of Appeal dismissed HMRC's further appeal, holding that in cases where s. 101 applied, s.48 was inapplicable, such that taxpayers remained able to claim the less generous 3-year relief provided by s. 42. **[Andreas Gledhill]**

Keeping the fruits of execution

Review of Nationwide Building Society v Wright [2009] EWCA Civ 811; [2009] BPIR 1047 by **John Briggs**.

Interim charging orders and interim third party debt orders are made without notice (CPR r.73.3 (application for charge order) and r.72.3 (application for third party debt order) and will initially be dealt with by a judge without a hearing (CPR r.73.4 and CPR r.72.4). In the case of an interim charging order the judge imposes a charge over the judgment debtor's interest in the asset to which the application relates and fixes a hearing to consider whether to make a final charging order. In the case of an interim third party debt order the judge likewise fixes a hearing to consider whether to make a final third party debt order and directs that until that hearing the third party must not make any payment which reduces the amount he owes the judgment debtor to less than the amount specified in the order.

Under CPR r.72.5, the third party and the judgment debtor must be served well before the date fixed for the hearing. In the case of an interim charging order, however, by CPR r.73.5, service must be effected, inter alia, on the judgment debtor and such other creditors as the court directs.

Since the court has a discretion whether or not to make a charging order and it may not be equitable to do so where there are other creditors, the judgment debtor is insolvent or there is about to be an IVA, the judgment creditor is required to state other creditors of the judgment debtor of whom he is aware in his application notice (73 PD1, para 1.2(5)) and the court has power to direct service on them (CPR r.73.5(1)(b), which it usually does.

However, it is to be noted that as things currently stand it is not the practice of DJs to order that a bankruptcy search be made against the debtor, although the existence of bankruptcy proceedings may already have been discovered by the judgment creditor seeking a charging order through registration of the petition as a "creditors notice" against the bankrupt's property at HM Land Registry.

The commentary in the current edition of the White Book (Civil Procedure Vol 1, 2010, para 73.8.5) states: "… once a petition has been presented the court is unlikely to make a final charging order as this would prefer one creditor; see *Roberts Petroleum Limited v Bernard Kenny Ltd* [1982] 1 WLR 301 …".

In the recent case of *Nationwide Building Society v Wright*, Sir John Chadwick, giving the judgment of the court, and considering previous case law[1], considered that a court should not make a charging order/third party debt order absolute in circumstances where it knows of pending insolvency proceedings. The fact that in corporate insolvency the winding up commences on the presentation of a winding up petition whereas in bankruptcy it only commences on the day that the bankruptcy order is made is not a material distinction.[2]

The fact that in corporate insolvency the winding up commences on the presentation of a winding up petition whereas in bankruptcy it only commences on the day that the bankruptcy order is made is not a material distinction

However, what is the position if the judgment creditor (and the court) not knowing of the bankruptcy proceedings obtains a charging order absolute before the bankruptcy? These were the facts in the *Nationwide* case where following the Building Society obtaining an interim charging order over the debtor's interest in the matrimonial home, the supervisor presented his bankruptcy petition against the debtor alleging default in his IVA. Subsequently, the charging order over the property was made final, neither the court nor the Building Society being aware of the petition. A bankruptcy order was subsequently made against the debtor and following his appointment the trustee in bankruptcy applied to discharge both the interim and final charging orders. On these facts, is the creditor to be deprived of its security thereafter on application by the trustee in bankruptcy pursuant to the provisions of section 3(5) of the Charging Orders Act 1979?

This section provides:

"(5) *The court by which a charging order was made may at any time, on the application of the debtor or of any person interested in any property to which the order relates, make an order discharging or varying the charging order.*"

In the opinion of Sir John Chadwick, a creditor is not to be deprived of his security, in the form of a charging order/third party debtor order absolute, by reason of the bankruptcy order alone. In Sir

John Chadwick's view it requires "special circumstances" to justify the exercise of the court's discretion to discharge the charging order absolute. In this regard, he referred as an instance of special circumstances to the case of *Industrial Diseases Compensation Limited v Marrons*[3] where it was held to have been wrong for the court to have made an order absolute in the period between the presentation of a bankruptcy petition and the making of the bankruptcy order since the claimant applied for and obtained the garnishee orders nisi with knowledge of the bankruptcy petition. On application by the trustee in bankruptcy, Judge Behrens set aside the garnishee orders on the grounds that they should not have been made as the DJ was aware of the pending bankruptcy petition at the time when he made the orders nisi and the County Court Judge was similarly aware at the time when he made those orders absolute.

Before the Court of Appeal, the Nationwide argued that it should not be deprived of its security since it had completed execution before the commencement of the bankruptcy in accordance with the provisions of s.346(1) and (5)(b) (Enforcement procedures) of the IA 1986 could retain the beefits. Unsatisfactorily, the trustee in bankruptcy was not represented at the hearing having taken the view that in the interests of saving costs to the bankrupt's estate, he should not oppose the appeal.

Sir John Chadwick considered it to be clear that the legislature intended by dint of the provisions of section 346(1) & (5)(b) of the IA 1986 that a creditor who had completed execution should not be deprived of his security by reason of the bankruptcy alone and some additional feature was needed. Sir John Chadwick contrasted the current scheme relating to personal insolvency both with that which operated under the 1914 Act and with the current position in corporate insolvency. Whereas bankruptcy commences with the day on which the bankruptcy order is made[4] in corporate insolvency the winding up is deemed to commence at the time of the presentation of the petition for winding up. Accordingly, Sir John Chadwick considered that there is no doubt that the legislature intended to alter the position in bankruptcy from the position in corporate insolvency.

This writer would point out that while it does appear that the legislature must have given some thought and consideration to the date on which the bankruptcy commences (see Chapter 11 *Procedural Changes in Corporate and Personal Insolvency, the White Paper "A revised framework for insolvency law" (CMND 9175 - paras 57-69)*, there appears to be no good or logical reason why the position in bankruptcy in respect of charging orders and third party debt orders should differ from the position in corporate insolvency. Moreover, while in corporate insolvency s.128(1) of the IA 1986 avoids any execution against the estate of the company after the commencement of the winding up[5] [ie presentation of petition], in bankruptcy s.285(1) of the IA 1986 enables the court to stay "any action, execution or other legal process against the property or person of the debtor" at any time when bankruptcy proceedings are pending. This power is, however, restricted in the case of corporate insolvency to staying "any action or proceeding against the company" after the presentation of a winding up petition[6] since s.128(1) of the IA 1986 makes "any attachment, sequestration, distress or execution put in force against the company after the commencement of the winding up" (ie presentation of the petition) void.

Accordingly, it is submitted that there is perhaps more legislative force for regarding the position in personal insolvency and corporate insolvency as closer than Sir John Chadwick envisaged, and as therefore having a greater influence on the operation of the court's discretion in s.3(5) of the Charging Orders Act 1979.

John Briggs

The writer is a Deputy Registrar of the High Court in Companies and Bankruptcy and one of his colleagues has suggested that a way round what is regarded as an unsatisfactory distinction between corporate and personal insolvency is for DJs to adopt the practice as a condition of making an interim charging order or an interim third party debtor orders to require the creditor applicant to conduct a bankruptcy search. In this way courts will not unwittingly make such orders absolute where bankruptcy proceedings are outstanding.

1. D Wilson (Birmingham) Ltd v Metropolitan Property Developments Limited [1975] 2 AER 814 and Industrial Diseases Compensation Limited v Marrons [2001] BPIR 600.
2. As to the former see s.129(2) of the IA 1986 and as to the latter, see s.278 of the IA 1986.
3. [2001] BPIR 600.
4. s.278(1) and s.284.
5. s.129(2).
6. IA s.126(1)(a).

Choice of Law and the Assignment of Debts

Joanna Perkins disusses the new choice of law rules relating to the voluntary assigment of debts

Until recently, the English choice of law rules relating to the voluntary assignment of debts were to be found in Article 12 of 1980 Rome Convention on the Law Applicable to Contractual Obligations.[1] On December 17 of the last year the Convention was replaced by the Rome I Regulation (EC 593/2008) and, immediately beforehand, the Ministry of Justice published a discussion paper seeking stakeholders' views as to whether and how the-as yet untested-new Article 14 on assignments should be amended in a planned review by the European Commission later this year. The consultation is now closed and responses to the discussion paper have been received expressing a wide variety of views.

They serve as a timely illustration of the fact that choice of law issues for cross-border assignments are likely, if anything, to become a great deal more complicated and litigious under the new Regulation. The purpose of this article is to highlight several reasons why the choice of law rules in Article 12 proved to be relatively non-contentious and to suggest that, with the coming into force of Article 14, this may be about to change.

In the course of its twenty-year history Article 12 generated only one truly significant case law authority.[2] This is all the more surprising given the prevalence of debt in its many forms in established economies and the universal tendency of financial markets to view debts as "assets" which can be "funded" by being lent, sold or charged to investors or financiers (and moved around the world from one market to another, as the demands of tax and regulatory efficiency dictate).

In fact, the cross-border assignment of debt is, one might say, what the global financial markets do. And in the course of this activity, market participants spend enormous sums on legal advice to protect-or at least forearm-themselves against aspects of foreign legal systems which they fear will undermine the economic bargain they believe themselves to have made. How can it be, then, that the Rome Convention's choice of law rules for the cross-border assignment of debts can have received such scant attention from lawyers? One reason for this lack of interest may be that financial markets participants are notoriously reluctant to litigate but it seems more likely that the explanation lies elsewhere.

The choice of law rules set out in Article 12 provided, roughly, that questions arising from the contract of assignment would be governed by the applicable law of that contract (paragraph (1)) and that questions about any party's relationship with the debtor would be governed by the applicable law of the underlying debt (paragraph (2)). In other words, Article 12 exclusively contemplated questions about how the various parties were constituted vis-a-vis one another by agreement and it referred those questions to the *lex contractus* in each case. This approach is highly intuitive to English lawyers familiar with the principle of freedom of contract and so self-evidently necessary and desirable were both these rules in a commercial setting that parties could, in most cases, rely upon the approach taken in Article 12-or rather ignore it completely-without ever having been aware of the Convention's application to their financial arrangements.

A second reason for the apparent

1 As enacted in the Contracts (Applicable Law) Act 1990.

2 See *Raiffeisen Zentralbank Osterreich AG v. Five Star Trading LLC* [2001] EWCA Civ 68; [2001] 2 WLR 1344 (CA) (discussed below). The application of Article 12 was also considered in *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1996] 1 W.L.R. 387 (CA), although only in relation to transfers of securities.

lack of controversy is that the general schema of the Rome Convention, with its detailed provisions for different contracts, led most of those who did take Article 12 into account to assume that it was intended to be exhaustive as far as contractual debts and their assignment by contract are concerned. That is, that the choice of law rules in Article 12 would leave no difficult residue of issues looking for a rule of their own. Indeed, those in the financial markets who were concerned by the possibility of such a residue were greatly reassured on the point by the judgment of Lord Justice Mance, as he then was, in *Raiffeisen Zentralbank Osterreich AG v. Five Star Trading LLC [2001] EWCA Civ 68; [2001] 2 WLR 1344 (CA).*

On appeal from summary judgment in favour of the claimant bank, Mance L. J. considered the appellants' argument that French law, and not English law, should govern questions about the effectiveness of an assignment of an insurance policy, and the proceeds thereof, to the bank: questions which the appellants had raised in the light of a subsequent assignment to them under a provisional attachment order made by a French court.

Given that both the assignment to the bank and the insurance policy were governed by English law, there was no doubt about which system of law would apply to any question within the scope of paragraphs (1) and (2) of Article 12 of the Rome Convention.

However, the appellants argued that the question at issue fell within a residue of "proprietary questions" which are outside the scope of Article 12 and which therefore fall to be determined under the common law. That residue includes, they claimed, questions about the effectiveness of an assignment against third parties and/or questions of priority as between competing assignments. Issues of this nature, they said, should be referred under the common law to the lex situs of the debt which, happily for them, was French law (on the basis that the underlying debtor/insurer was resident in France). Mance L. J. rejected the appellants' arguments, taking the view that questions about the proprietary effect of an assignment could be characterised as questions about whether the assignment had effectively constituted the assignee as the person now entitled as against the underlying debtor; that is, as questions falling within Article 12(2). If the assignment had indeed constituted the assignee as the person entitled against the debtor then the rights thereby acquired would also be effective against third parties. His judgment on this point is generally regarded as having resolved any uncertainty about whether Article 12 would apply to so-called "proprietary questions".

If *Raiffeisen* had the effect of reinforcing Article 12 and preserving its sphere of application, in another respect a tacit consensus on the meaning of "assignment" had the effect of severely limiting it.

Lord Mance

How can it be that the Rome Convention's choice of law rules for the cross-border assignment of debts can have received such scant attention from lawyers?

Joanna Perkins

"Assignment" under Article 12 has always been taken to mean an outright transfer of the debt in question and to exclude contracts conferring any lesser right than title to the debt, such as the grant of a charge or other security interest.[3]

From an English law perspective this unquestioning interpretation is, perhaps, surprising given that "assignment by way of charge" is a familiar concept in both legislative and common law contexts. However, it may be that "assignment" has a narrower settled meaning in most European jurisdictions which should be implied into the Convention.[4]

Certainly, whatever the reason for this tacit consensus, the effect of it has been to minimise the instances of competing assignments which have been taken to fall under the Article. The circumstances in which a creditor will retain sufficient possession of a debt after a title transfer to another person, in such a way that he may then reassign the same debt to a second assignee without notice of the first assignment, are very limited.

For this reason, any study of successive assignments under Article 12 has tended to ignore this possibility, focusing instead on the possibility of sub-assignments by the first assignee to the second assignee, a situation which rarely gives rise to disputes between assignees in practice.

There are then, three reasons why litigation involving Article 12 has been scarce: first, its substantive provisions are intuitive and restate lawyers' expectations that the contractual terms will apply; secondly, the decision in *Raiffeisen* eliminated any uncertainty about its application to residual issues arising from successive assignments; and thirdly, its very narrow application to assignments by way of transfer means that there are few situations within its contemplation which are likely to involve any genuine competition between assignees' interests.

Is litigation likely to increase now that Article 12 of the Rome Convention has been replaced by Article 14 of the Rome I Regulation? At first blush Article 14 looks remarkably similar to Article 12, paragraphs (1) and (2) are virtually identical (save that they now apply to contractual subrogation as well as to assignment):

"The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged."

However, paragraph (3) of Article 14, which appears in the guise of a rule of interpretation providing that "assignment" includes the grant of security interests in the manner of a charge or pledge, makes a very important addition to these provisions. That is, an addition which is likely greatly to increase the instances of competition between assignments which fall within the scope of the article and thus to bring

3 Dicey & Morris, for example, equate "assignment" with the "transfer of intangible property" at the outset of their discussion of Article 12 (para 24-051).

4 This may perhaps be inferred from the fact that the Official Giuliano and Lagarde Report on the Rome Convention states quite clearly, if erroneously, that the interpretation of Article 12(1) can give rise to no difficulty.

A report from the European Commission is due in June

its provisions to bear on a wider range of disputes. Article 14 will now squarely encompass situations where intangible property is first charged and then sold, or otherwise assigned, to a party who is unaware of the pre-existing security interest and who expects to take the property free of any encumbrance. When one considers the fact that charges over financial intangibles are often exempt from registration requirements by virtue of existing provisions of law, such as the Financial Collateral Arrangements (No.2) Regulations (2003), Article 14 now begins to look very much like a choice of law rule that is about to have its day-or days-in court.

If this were not enough, the Regulation's Review clause (Article 27) may have an even greater effect on the future of Article 14. Paragraph (2) of this article provides that the European Commission shall, by June of this year, submit to the Parliament and the Council a report on "the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person". In other words, there will be a review of "proprietary questions" and their place in the Article 14 scheme. This review will take place against the background of the Commission's earlier support for a new choice of law rule, set out in the Proposal for a Rome I Regulation, referring proprietary questions to the law of the assignor's residence, which was sufficiently controversial to be excluded from the final text of the Regulation. If an amending regulation is proposed, following the report, HM Government will argue strongly for a legislative outcome which is as close as possible to the approach taken in *Raiffeisen* and as far as possible from that initially taken by the Commission. The reasons for doing so are not only that new rule would give rise to difficult questions of characterisation-as to whether an issue is proprietary or contractual, of the sort neatly obviated by the approach of Lord Justice Mance in *Raiffeisen*-but also because references to the law of the assignor's residence are themselves inherently question-begging in certain cases involving competing assignments by an assignor from different locations, or successive assignments by assignees in different locations. However, if the U.K. is unsuccessful in its bid to preserve the legal status quo, participants in financial transactions, and their lawyers, cannot expect Article 14 to escape judicial scrutiny for very long.

If the U.K. is unsuccessful in its bid to preserve the legal status quo, participants in financial transactions, and their lawyers, cannot expect Article 14 to escape judicial scrutiny for very long.

news in brief

David Marks QC took part in a BBC World Service broadcast on 26 February 2010. The broadcast was part of the BBC World Service's business daily and weekly series which examined the issues of company "migrations" into the United Kingdom and wider questions of United Kingdom and European-wide insolvency reforms.

Lucy Frazer has been appointed to the Attorney General's A Panel of Counsel. The Attorney General maintains four panels of junior counsel to undertake civil and EC work for all Government Departments. Members of the A Panel deal with the most complex Government cases in all kinds of courts and tribunals.

Online bankruptcy appeal

The government is consulting over a proposed system whereby an individual can apply for bankruptcy online. R3 has claimed that the Insolvency Service's proposals could lead to risks including impulsive, pressurised and 'malicious' bankruptcies, where individuals can apply for bankruptcy in someone else's name. R3 president Peter Sargent said:

"Bankruptcy is a serious matter with dramatic consequences. It's important that people receive proper professional advice before the process begins so they understand what it entails and are aware of the alternative options available to them. Proposed website 'pop ups' along the way are no substitute. Speeding up the application is a laudable aim, but there should also be a 'cooling off' period after submitting the application so people have a chance to reflect and even reconsider."

The Insolvency (Amendment) Rules 2010

The Insolvency (Amendment) Rules 2010, the Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2010, and the Insolvency (Amendment)(No 2) Rules 2010 came into force on 6 April 2010.

These make important changes to both the Rules and the Act in relation to, amongst other things, office-holders' remuneration, pre-appointment administration costs, disclaimer of onerous property, block transfers, electronic communication and the use of affidavits. The Insolvency Service has published on its web site an updated version of the Insolvency Rules 1986, incorporating the amendments made by the Insolvency (Amendment) Rules 2010.

William Trower QC

William Trower QC and Glen Davis are members of the statutory Insolvency Rules Committee which was required to be consulted about the rules before they were laid.

New member at 3-4 South Square

Chambers is delighted to record that Joanna Perkins became a member of Chambers with effect from 29 March 2010. Joanna was called to the Bar in 2001 and worked at the Law Commission between 2003 and 2004. She then worked at the Bank of England as Secretary of the Financial Markets Law Committee between 2004 and 2010. Joanna specialises in banking financial and regulatory law as well as the Conflict of Laws.

Joanna can be contacted at joannaperkins@southsquare.com and her full CV is on the South Square website at www.southsquare.com.

Accountants' claims soar

Professional negligence claims taken out against accountants in the high court have significantly jumped last year as a result of the global downturn.

There were 13 negligence cases against accountants in the High Court last year according to research by law firm Reynolds Porter Chamberlain, compared with just four in the previous five years combined. No claims were brought in 2007 or 2008.

Record levels of individual insolvency…

New figures from the Insolvency Service show the number of people going bust in England and Wales rising to a record 134,142 in 2009.

Individual bankruptcies numbered 74,670 (up 10.7% on 2008), while those entering Individual Voluntary Arrangements totalled 47,641 (up 21.8% on 2008).

The number of people becoming insolvent increased by a quarter in the last three months of 2009 compared with the same period in 2008, according to official data.

Company failures soared to their highest level for 16 years in 2009 with 19,077 firms going into liquidation, up 23% on 2008 and the worst result since 1993.

The numbers suggest that the improvement in the economy seen towards the end of last year is reducing the rate at which personal insolvencies are rising.

Bankruptcies rose 0.9 per cent between the third and fourth quarters of 2009. This was down from rises of 6.6 per cent and 9.3 per cent respectively in the second and first quarters.

Asset Tracing

"International Asset Tracing in Insolvency", edited by Felicity Toube, was published in January 2010 by OUP. Felicity's book provides comprehensive coverage of the legal and practical forensic issues involved in asset tracing in insolvencies. It also considers domestic laws on insolvency and asset tracing from six jurisdictions (including England, USA, Guernsey, Jersey, BVI and Cayman) and provides a toolkit of key information for domestic and international tracing from these sources.

Africa comes to South Square

On Wednesday 14th April, Chambers played host to a party of 15 Zambian lawyers. The visit was arranged by Glen Davis, who chairs the Commercial Bar Association's Africa Committee.

The Zambians were part of a group of 80 visiting London under the auspices of the South London Law Society, who were spending a day organised by the Bar Council.

After lunch in Gray's Inn Hall and a tour of Chambers' facilities, they spent an hour with Martin Pascoe QC, Lucy Frazer and Glen Davis (right) discussing how Chambers is organised and our international practice.

Royal Court Theatre scheme

David Marks QC, long-time Supporter and Advocate of the Royal Court Theatre, invites you to join the theatre's exclusive membership scheme.

Membership of the Royal Court offers you the chance to become closely involved with this leading theatre, renowned for staging new and original contemporary plays, and the launch-pad for many playwriting greats including David Hare and Caryl Churchill.

Riding high after the successes of Enron and Jerusalem, the Royal Court promises to offer yet another stimulating and exciting year of theatre in 2010.

To find out more about its membership scheme and how to join, please contact Penny Saward in the Royal Court's Development Department on 020 7565 5049 or by email at pennysaward@royalcourttheatre.com.

diary dates

2010

19th-22nd May 2010.
R3 Annual Conference.
Vilamoura, Portugal (Tivoli Marina Hotel).

20th-21st May 2010
Cross Border Insolvency Conference. Papers by Gabriel Moss QC and Georgina Peters.
Trier.

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

2011

11th-13th May 2011
R3 21st Annual Conference.
Newport, Wales, UK (Celtic Manor Resort).

22nd-23rd September 2011.
INSOL Europe, Annual Conference.
Venice, Italy.

Consultation on Pre-Packs

On 19 March 2010, Business Minister Ian Lucas announced that the Government will shortly consult on new measures to boost confidence in the 'pre-packaged' administration process, including possible changes to the law. Some of the options that will be considered may apparently include putting SIP16 on a statutory footing with penalties for non-compliance; provision for automatic scrutiny of the directors' and administrators' actions by the Official Receiver; making it impossible for the person advising on a pre-pack to become the administrator; and requiring court or creditor sanction for pre-pack deals involving connected parties.

New Supreme Court justice

Appeal Court judge Lord Justice Dyson has been named as the final justice of the Supreme Court, ending months of speculation over who would fill the role.

Debbie Phillips

On the evening of February 10, 2010, 16-year-old Sarah Phillips picked up her mobile phone and sang Paolo Nutini's "Autumn" into it, without music. Sarah's version was pitch perfect and she intended to sing the song at her Mum's funeral. Four-and-a-half hours later, her mother, Debbie, died.

Family friend, Charlie Mole added an accompaniment, video of family holidays were added, and it was posted on YouTube. It has since had almost 330,000 hits all around the world and raised over £128,000 for research into cervical cancer. Following an internet campaign, "make Autumn a single", it was released and entered the UK charts at number 49.

Debbie Phillips was born on October 22, 1961. After a brilliant school career, she went to Bristol University, and in 1983 she was awarded a First Class degree in Law (with, reputedly, the highest mark ever recorded). At University she met her husband, Mark Phillips QC, and in 1984 they married. They both practiced law, but in 1990 she chose to stop working and became a full-time mother. She and Mark had three children, Katy, Sarah and Jack.

Debbie had regular cervical smear tests. Between 1990 and 2005 these were reported as negative, and when, by 2006, the cancer was finally identified, it had spread beyond her cervix and into her ovaries and lymph system. Debbie fought the cancer for four years but on February 11, 2010, aged 48, she died.

During her illness Debbie discovered that there was no research into cervical cancer therapies anywhere in the world, and compared with cancers such as breast and colon cancer, relatively few treatment options. The Debbie Phillips Cervical Cancer Research Fund has been set up with UCL to fund research into cervical cancer. The intention is that other mothers, daughters and wives will have a better outcome. Sarah's "Autumn" is the start of that fundraising campaign.

To find out more and to donate please go to: **www.ucl.ac.uk/cancertrust/debbie.php**

Sarah's "Autumn" can be viewed on YouTube at: **www.youtube.com/watch?v=jIRQvbhdR58**

Sarah's single has now been released for download on iTunes and all over major download sites and is available NOW for just 79p

Debbie Phillips, left and daughter Sarah below

European Cross-Border Insolvency Challenge

Well here is the next insolvency challenge and this time it is a European cross border one (and that is the first clue!). Obviously what is set out below is a word search and the words can run forwards, backwards, horizontally or diagonally. But some of them are a pair of words (e.g. OFFICIAL RECEIVER) in which case the words run on from each other (i.e. OFFICIALRECEIVER). And a lot of them are not English words and miss out their foreign accents or cedillas etc (e.g. SPRAVCA is missing the accent over the a). There are 29 words/pairs of words to find. And if you identify all of them correctly then a message will be revealed by reading the letters which have not be used. All you have to do is tell us what the message says! Answers to Kirsten Dent please at kirstendent@southsquare.com or by post to the address on the back page. As usual for the winner, if necessary drawn from the wig tin, will receive a Magnum of Champagne. Bon chance!

R	O	T	A	R	T	S	I	N	I	M	D	A	T	R	U	S	T	E	E
E	C	M	A	N	A	G	E	R	S	P	E	C	J	A	L	I	M	R	G
T	O	T	K	O	N	K	U	R	S	G	E	R	I	C	H	T	I	A	E
L	M	R	N	Y	R	E	T	L	A	W	R	E	V	H	C	A	S	C	S
A	M	E	O	F	F	I	C	I	A	L	R	E	C	E	I	V	E	R	T
W	I	U	U	S	A	L	D	U	S	I	S	I	K	C	O	N	G	R	O
R	S	H	F	E	L	S	Z	A	M	O	L	O	I	R	A	R	E	U	R
E	S	A	A	T	U	S	Y	N	D	Y	K	D	L	C	O	R	L	E	J
V	A	N	A	T	I	O	U	N	S	S	U	E	D	T	A	V	I	T	U
S	I	D	Y	O	U	H	A	P	V	J	R	A	A	T	E	E	C	A	D
R	R	E	E	W	O	R	R	K	E	A	Z	D	L	C	E	R	H	D	I
U	E	R	D	O	U	A	T	R	D	R	I	A	S	T	R	W	I	I	C
K	H	A	T	A	V	L	I	E	A	U	V	I	L	E	W	A	D	U	I
N	O	R	D	C	S	A	R	Z	Q	R	D	I	N	A	R	L	A	Q	A
O	E	D	A	E	T	T	F	I	O	O	I	I	S	N	E	T	T	I	L
K	D	A	S	A	U	L	L	F	S	I	M	Q	U	O	I	E	O	L	D
A	J	U	D	I	C	I	A	L	F	A	C	T	O	R	R	R	R	T	O
R	I	N	N	T	H	E	E	U	X	R	C	U	R	A	T	E	U	R	E
G	A	U	L	A	T	I	O	E	V	E	R	E	F	F	E	N	A	A	R
M	I	N	S	O	L	V	E	N	Z	V	E	R	W	A	L	T	E	R	N

February 2010 Insolvency Challenge

The correct answers to the picture clues in the February 2010 Insolvency Challenge were as follows (1) Briggs; (2). David Richards (3) Winegarten (4) Baister (5) Floyd (6) Morgan (7) Sales (8) Kitchen. The link was of course the Chancery Division. There were not as many correct answers as for the November Insolvency Challenge. However there were still enough to make the wig tin come into play. And the winner following the draw is Craig Barrett of Dundas & Wilson LLP to whom go our congratulations and a magnum of champagne.

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