

C/M/S/ Cameron McKenna



The heavyweight

Comprehensive coverage of this month's banking and insolvency law

May 2007

Looking forward

Developments scheduled for the months ahead

Date	Item	Significance
1 July 2007	CrestCo changes name to Euroclear	CRESTCo is changing its legal and operating name to Euroclear UK & Ireland Limited with effect from 1 July 2007.
1 July 2007	UCP 600	Revised rules on documentary credits expected to be written into most letters of credit come into effect.
16 July 2007	European Commission Green Paper on retail financial services	The Commission invites comments on the Green Paper by 16 July 2007 and intends to hold a public hearing on the issues raised in it during September 2007.
1 October 2007	Companies Act 2006, partial implementation	Sections relating to e.g., loans to directors, AGMs and meetings, written resolutions.
1 November	Markets in Financial Instruments Directive	MiFID will be implemented.

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Banking

CASES

Banking

Bank liability

Limited duty of disclosure between workout banks

National Westminster Bank plc v Rabobank Nederland

[2007] All ER (D) 186 (May) [2007] EWHC 1056 (Comm) Queen's Bench Division (Commercial Court) Colman J 11 May 2007

Misrepresentation - Fraudulent misrepresentation - Agreement between syndicated lenders to food group - Defendant bank taking over claimant bank's liability - Defendant bank contending claimant making misrepresentations concerning food group - Whether claimant making innocent or fraudulent misrepresentations.

The claimant and the defendant were both syndicated lenders to a group called Yorkshire Food Group (YFG) which, although based in the UK, had significant operations in the United States, under a credit facility of March 1996. In the course of 1996, YFG encountered financial difficulties, and the lending was placed by the parties into 'work out'. By September 1997, YFG was nearing insolvency, but the defendant came up with a proposal to purchase the claimant's lending at a discount so it could pursue its own re-financing plans in relation to YFG. That

proposal was put into effect in October 1997 by a deed of transfer (DoT). The defendant's refinancing plans failed and in December 1997 receivers were appointed over YFG. The defendant took the view that the claimant had failed to disclose information which, had it been disclosed, would have meant that the defendant would not have advanced sums during the 'work out period' or purchased the claimant's lending. The claimant denied the allegations. Proceedings were issued in both the United States and England by the parties, the instant case starting as an action by the claimant seeking, inter alia, an indemnity for costs incurred in Californian proceedings, which it contended had been wrongly commenced by the defendant. The Californian proceedings were all either dismissed summarily on the merits, or on forum non conveniens grounds. The costs claimed were approximately £5.5m. The defendant counterclaimed (see [2005] All ER (D) 221 (Jun)), contending that by reason of misrepresentations made to it by the claimant which led to advancing money to YFG and in entering into the DoT, it was entitled to rescission of the DoT (in whole or at least in part) or a declaration that it had already rescinded it (see [27]). It also sought damages for deceit based on the allegation that the claimant had made fraudulent misrepresentations upon which it relied in

entering into the agreements to advance funds and in entering into the DoT.

HELD:

(1) On the evidence, it was considered good practice among London banks in the 1990s for co-workout banks to disclose to each other what those concerned with the workout personally considered to be material information, to the effect that in the absence of a specific contract to go beyond that, there could be no justifiable reliance on any wider or more specific disclosure. On the facts of the instant case, the claimant had not made representations which it knew to be untrue or as to the truth of which it was reckless. The counter-claim on misrepresentation, whether fraudulent or otherwise, had to fail. The defendant had failed to establish that the claimant had procured others to act in breach of duty. The counterclaim would fail.

(2) On the facts, the claimant was entitled to damages for breach of the agreement not to bring proceedings. Damages would be assessed at a future date.

The claimant was entitled to judgment and the counterclaim would be dismissed.

EC case: "inside information"

Ipourgos Ikononikon and Proistamenos DOI Amfissas v Charilaos Georgakis

The European Court of Justice (ECJ) has issued a judgment on the meaning of 'inside information' and 'taking advantage of inside information' under Articles 1 and 2 of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing (the directive on insider

dealing before the Market Abuse Directive (2003/6/EC or MAD)).

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0391:EN:HTML>

Company

Director's misuse of company funds

UK (Aid) Ltd v Mitchell and others

[2007] All ER (D) 111 (May) [2007] EWHC 1052 (Ch) Chancery Division David Richards J 8 May 2007

Company – Director – Breach of duty – Company claiming alleged misappropriation of company funds and assets – Company applying for summary judgment – Whether first defendant having real prospect of successfully defending claim.

The first and second defendants were formerly the directors of the claimant (the company), which was in creditors' voluntary liquidation. By its claim, the company sought an order, inter alia, that the first and second defendants account to it for the funds and assets of the company misappropriated and/or diverted by them in breach of their fiduciary duties to the company, together with all income and profits derived from those funds and assets, and an order for the payment of all sums found due upon the taking of the account. It was alleged that substantial payments were made to an account in the name of a company incorporated in the British Virgin Islands (LCI) that was beneficially owned and/or controlled by the defendants and that funds had been paid out to a number of payees. The signatories to the account were the second defendant and his son, the third defendant. Most of the payees were either

entities which were fronts for the defendants, or accounts in the names of the defendants or third parties for the purchase of villas, cars and other goods which were for the use and benefit of the defendants. It was alleged that the defendants wrongfully concealed the existence of LCI and their control of it, and the payments into and out of its account. The company, applied, inter alia, for summary judgment against the first defendant on the grounds that it had an overwhelming case that the payments to LCI were misappropriations and that the first defendant's defence, that they were commission payments for orders received by the company through introductions made by F and his associates, was wholly incredible. The first defendant denied all allegations of wrongdoing.

HELD The application would be granted.

The case against the first defendant was overwhelming and his defence was incredible. The evidence as to the uses to which the sums paid to LCI's account and the links between the relevant entities and the defendants was by itself enough to establish the company's case at a summary stage. The total absence of any evidence of any connection with F or his alleged associates was to be contrasted with the first defendant's close personal involvement in many of the payments. His defence rested entirely on what he said he was told by the second defendant about the payment of commissions for F and about the subsequent use of the monies paid to LCI's account. The evidence as a whole demonstrated that the first defendant had no prospect of establishing that he was told those things by the

second defendant or, if he was, that he believed them.

Capital markets

Repos

Taxation of repos

Revenue and Customs Commissioners v Bank of Ireland Britain Holdings Ltd

[2007] All ER (D) 273 (Apr) [2007] EWHC 941 (Ch) Chancery Division Henderson J 30 April 2007

Income tax – Avoidance – Arrangement – Tripartite repo transactions – Whether deemed recipient of deemed payment of interest interim holder or recipient of repurchase price – Whether payment of manufactured overseas dividend deemed to have been made by taxpayer deductible as charge in income – Income and Corporation Taxes Act 1988, ss 730A(2)(a), 338(5)(b).

Section 730A of the Income and Corporation Taxes Act 1988 provides: '(2)The difference between the sale price and the repurchase price shall be treated for the purposes of the Tax Acts-(a) where the repurchase price is more than the sale price, as a payment of interest made by the repurchaser on a deemed loan from the interim holder of an amount equal to the sale price'.

Section 338 of the Income and Corporation Taxes Act 1988 provides: '(5) No such payment made by a company as is mentioned in subsection (3) above shall be treated as a charge on income if-(b) the payment is not made under a liability

incurred for a valuable and sufficient consideration’.

The taxpayer company was a private limited company incorporated and registered in England and Wales and resident for tax purposes in the UK. It was a wholly owned subsidiary of the Bank of Ireland and entered into the relevant transactions through its head office in Dublin. The issue to be determined was whether a tax avoidance scheme had succeeded in its object of generating a loss for tax purposes in a situation where the taxpayer suffered no corresponding commercial loss. The scheme involved a transaction for the sale and repurchase of securities, known as a ‘repo’. The ‘repo’ involved three parties, and dividends were paid on the securities during the period of some four months for which it operated, namely November 2000 to March 2001. The amount of the loss, if the scheme worked, was equivalent to the dividends actually paid to the Bank of Ireland during its period of ownership of the relevant securities, a sum of approximately £3.6m. That sum also comprised most of a so-called ‘manufactured overseas dividend’ which was deemed to have been paid by the taxpayer, and which was prima facie deductible by the taxpayer as a charge on income in computing its taxable profits. Both Bank of Ireland and the taxpayer received dividends on the securities for their respective periods of ownership amounting to £3,617,321 for Bank of Ireland and £358,151 for the taxpayer. The total dividends paid were therefore £3,975,473. That was also the amount of the deemed manufactured overseas dividend for which the taxpayer claimed to be entitled to a deduction by virtue of s

737A of the Income and Corporation Taxes Act 1988. There was no dispute that the taxpayer was prima facie entitled to a deduction for the full amount of £3,975,473 in computing its profits for its accounting period ending 31 March 2001. The issues arose whether the taxpayer was also deemed to have received a matching payment of interest of the same amount pursuant to s 730A and whether the payment of the manufactured overseas dividend deemed to have been made by the taxpayer under s 737A was deductible as a charge in income. The Special Commissioners found in favour of the taxpayer. The Revenue appealed.

On the first issue, the question arose whether the deemed recipient of the deemed payment of interest was, as the taxpayer contended, the interim holder, namely the Bank of Ireland, or, as the Revenue contended the recipient of the repurchase price, the taxpayer. On the second issue, it was not disputed that the deemed manufactured overseas dividend was a charge on income paid by the taxpayer within s 338 of the Act and therefore allowable as a deduction, unless it was prevented from being a charge on income by s 338(5)(b). The Revenue contended that in order to answer the question posed by s 338(5)(b) whether or not the deemed payment by the taxpayer was made ‘under a liability incurred for valuable and sufficient consideration’ it was necessary to enter the deemed world. The appeal would be dismissed.

(1) The wording of s 730A(2)(a) was clear and unambiguous. The deemed loan was still from the interim holder, notwithstanding the tripartite nature of

the arrangements, and that deemed loan was the only source, albeit a deemed source, from which taxable interest could arise. The interest had therefore to be taxable in the hands of that source, the interim holder, whether or not the interim holder also received the repurchase price. The legislative scheme was to treat the interim holder as the deemed lender of the original sale price for the life of the repo, and it was therefore in the hands of the interim holder that the deemed interest was taxable.

In the instant case the deemed interest of £3,975,473 was not income of the taxpayer. It was income of the interim holder, the Bank of Ireland.

(2) Section 338(5)(b) was a general provision relating to charges on income and its language only made sense in relation to transactions in the real world.

Parliament could not have contemplated an investigation of the value and sufficiency of the consideration for a transaction which was only deemed to have occurred. There was no indication of how such an unreal exercise was supposed to be performed, or of the assumptions that would have to be made for the purpose.

Since it was conceded that the taxpayer had received full and valuable consideration for the transactions which it entered into in reality that was the end of the matter.

Finance and Security

Lending

Financial assistance case

(1) Anglo Petroleum Ltd (2) Paul Sutton V TFB (Mortgages) Ltd

[2007] EWCA Civ 456 CA (Civ Div)
(Mummery LJ, Smith LJ, Toulson LJ)
16/5/2007

In the circumstances a credit agreement and a security agreement entered into by company did not involve the giving by the company of financial assistance for the purpose of the acquisition of its own shares or to reduce a liability incurred for that purpose contrary to the Companies Act 1985 s.151.

The appellants (P and S) appealed against a decision ((2006) EWHC 258 (Ch)) on a trial of preliminary issues that certain credit transactions that they had entered into were not in breach of the Companies Act 1985 s.151. The shares in P had been sold by P's parent (R) to another company (K) for £1. At the same time under a compromise agreement R agreed to release P's indebtedness to R of £30 million and P agreed to pay R £6 million immediately and £9 million after six months. To secure that debt P gave R a charge over a number of petrol stations. Under the share purchase agreement, K guaranteed the performance by P of its obligations under the compromise agreement and that guarantee was secured by a charge granted by K to R over the shares in P. Three months later P

borrowed £15 million from the respondent (T) under a credit agreement and used £9 million to effect early repayment of the £9 million owed to R. The charge given by P to R was released and replaced by a security agreement between P and T relating to the same or substantially the same properties. S had given a guarantee of P's liabilities under the credit agreement. P went into receivership and T claimed against P and S. P claimed against T on the ground that the security agreement was in breach of the Companies Act 1985 s.151. Preliminary issues were tried as to whether the credit transactions were accordingly illegal and void. P argued that, by entering into the compromise agreement and giving the charge to R, P incurred liabilities and thereby gave financial assistance for the purpose of the acquisition of its shares by K within the meaning of s.151(1) and that by borrowing money from T and using it to discharge the balance of its indebtedness to R, P gave financial assistance for the purpose of discharging liabilities incurred for the purpose of the acquisition of the shares within the meaning of s.151(2), and that T knew the purpose of the loan and was therefore not entitled to enforce it; alternatively that the guarantee given by K under the share purchase agreement and the supporting charge over the shares in P were liabilities incurred by K for the purposes of its acquisition of the shares in P, and that P's repayment of its outstanding indebtedness to R, using money borrowed from T, amounted to giving financial assistance for the purpose of discharging K's outstanding liabilities to R.

HELD: (1) The nature of the compromise agreement was that P's liability to R was reduced and it should not be characterised as giving financial assistance to the purchaser on account of the fact that it thereby made the company a more attractive acquisition and could thus be said to have smoothed the path to its acquisition. Nor could the charge by which P gave security to R for its reduced indebtedness properly be described as financial assistance to the purchaser. The purpose of the transactions from P's viewpoint was a bona fide restructuring of P's indebtedness with a significant reduction in exchange for security. R's reason for wanting to restructure P's indebtedness was in order to sell the shares to K and to obtain security for the reduced amount of the indebtedness, but that did not make P's purpose in entering into the restructure that of giving financial assistance to the purchaser. In any event the liabilities undertaken by P under the compromise agreement did not come within any of the categories identified in s.152(1) as capable of amounting to financial assistance. The giving of security over a company's assets could come within s.152(1)(a)(ii), but the charge given by P to R did not amount to giving financial assistance within s.151 in circumstances where it was merely a means of enforcing an obligation of P which did not involve the giving of financial assistance. (2) P's payment of £9 million under the compromise agreement was not unlawful. The repayment by a company of its lawful indebtedness was not prohibited by s.151. Whether the payment contravened the section did not depend on how the money was obtained, *Gradwell (Pty) Ltd v Rostra*

Printers Ltd (1959) (4) SA 419 considered. There were bona fide reasons for P wanting to repay R when it did. If it was lawful for a company to repay its own indebtedness and there was a genuine commercial justification it must also equally be lawful for the company to assist that repayment by providing security, Harlow v Loveday (2004) EWHC 1261, (2004) BCC 732 distinguished. (2) P by repaying its own indebtedness to R did not give financial assistance for the purpose of discharging K's liabilities. (3) P was not required under the terms of the credit agreement with T to do anything that was illegal, nor had T entered into the contract with an illegal purpose in mind. Even if the use of the funds had involved a breach of s.151, the credit transactions were not illegal. It would not be just to equate T's knowledge of P's intended use of the loan with knowledge of its alleged illegality, nor would it be just to draw an inference of a shared unlawful design if a reasonable person in the position of T would have seen it as an ordinary commercial transaction, JM Allan (Merchandising) v Cloke (1963) 2 QB 340 considered.

Appeal dismissed

Security

Charges

Benichou v Mauritius Commercial Bank

[2007] UKPC 36 PC (Mau) (Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Carswell) 23/5/2007

Where a debtor had not objected to crystallisation of a floating charge, or contested its validity as he could have done under the Mauritian Civil Code, he could not contest the validity of the charge in later proceedings for validation of attachment orders.

Mortgages

Halifax Plc V Okin

CA (Civ Div) (Smith LJ, Lloyd LJ) 22/5/2007

Where a mortgagor had been unable to keep up even her current mortgage instalments, still less additional sums towards the arrears, it had to be concluded that she simply could not afford to service the mortgage, and there was no reason to interfere with a decision refusing to stay the execution of a warrant of possession granted to the mortgagee.

LEGISLATION

Real Estate Investment Trusts

The Real Estate Investment Trusts (Joint Venture Groups) Draft Regulations 2007

The draft REITs (Joint Venture Groups) Regulations and the draft REITs (Financial Statements of Group REITs)(Amendment) Regulations will extend the treatment described in Current rules to property rental joint ventures carried on through a group of companies, rather than a single company. The group can comprise either UK or overseas companies or a mixture of both.

The full text is available at http://www.hmrc.gov.uk/finance_bill2007/group-joint-ventures.pdf

(Date in force, unknown)

The Real Estate Investment Trusts (Breach of Conditions) (Amendment) Draft Regulations 2007

These Regulations amend the Real Estate Investment Trusts (Breach of Conditions) Regulations 2006 (S.I. 2006/2864). These Regulations [to be continued]. [There may well have to be a paragraph dealing with retrospection matters.] [And the final paragraph will need to deal with the matter of a regulatory impact assessment.]

The full text is available at http://www.hmrc.gov.uk/finance_bill2007/reits-breach-of-conditions.pdf

(Date in force, unknown)

The Real Estate Investment Trusts (Financial Statements of Group Real Estate Investment Trusts) (Amendment) Draft Regulations 2007

These Regulations amend the Real Estate Investment Trusts (Financial Statements of Group Real Estate Investment Trusts) Regulations 2006 (S.I. 2006/2865). These Regulations revoke regulation 7 of the principal Regulations, which dealt with the treatment of certain exceptional items, and substitute a new regulation 9 which deals with joint ventures. The new regulation contains additional provisions which apply if the joint venture takes the form of a group of companies.

The full text is available at http://www.hmrc.gov.uk/finance_bill2007/reits-financial-statements.pdf

(Anticipated date in force, unknown)

ARTICLES

Banking

Accounts

Standing orders v direct debits

This article explains the difference between standing orders and direct debits.

(M Dempster: *CSR*, 18.4.07, 206)
07.18.002

Company

Rome I – the uncertainty remains?

This article explains why the continuing negotiations on Rome I matter to English lawyers and the financial services industry.

(S. Jones: *BJBFL*, 05.07, 256) 07.22.032

Life after death for companies which are dissolved or struck off

Sections 651 and 653 of the Companies Act 1985 provide means of declaring the dissolution of a company void (s 651) or restoring a company's name to the register after it has been struck off (s 653). The sections are similar but the conditions differ in certain respects.

(P. Fidler of CMS Cameron McKenna: *IL&P*, 03.07, 43) 07.19.035

Consumer

Banking on keeping consumers happy

Outlines the investigations being carried out by the European Commission into retail financial services, in particular the administration of bank accounts and the charges imposed on consumers. Highlights aims to increase information given to consumers about financial products and advises financial legal practitioners on the areas in which they will need to maintain knowledge.

Law Society's Gazette L.S.G. (2007)
Vol.104 No.20 Page 10 17/5/2007 June
O'Keeffe

Environment

Mind the gap – environmental liabilities could prove expensive

This article considers the European Union's Environmental Liability Directive.

(B. Martin: *Liability, Risk and Insurance*, 04.07, 18) 07.18.059

Hedge Funds

Hedge fund fraud: an English law perspective on the potential exposure of prime brokers

It was revealed in early January 2007 that the Financial Services Authority ('FSA') is conducting a study with the Federal Reserve Bank of New York and the US Securities and Exchange Commission

(amongst others) to examine counterparty credit risk exposures to hedge funds, and collateral policies, procedures and practices. One concern of the regulators is that prime brokers may be allowing hedge funds to reduce their margin requirements by using illiquid collateral (such as credit default and total return swaps) that may lose its value in the event of a financial crisis, in an attempt to secure a competitive advantage. This article reviews a New York case in which Bear Stearns has recently been ordered to pay US\$125m plus interest to the estate of Manhattan Investment Fund ('MIF') because Bear Stearns ignored clear signs (and its suspicions) that MIF's manager was defrauding investors. Allegations were also made that margin requirements were waived or reduced. We analyse how this case might be treated under English law.

(K Tamis: BJIBFL, 04.07, 187) 07.18.006

Payment system

Delay creates breathing space

The delay of the Payments Services Directive means that the Single Euro Payments Area will go live in a phased approach.

(F Maguire: Banker, 04.07, 46) 07.17.093

Capital markets

Bonds

A critical time for bonds

The European Commission is reviewing pre-trade transparency in the bond market. The author asks if the bond market's self-regulation could prevent mandatory transparency requirements, similar to the equities market.

(F. Maguire: Banker, 05.07, 91) 07.21.015

Structured covered bonds

The UK covered bond market has developed into a mature market, allowing UK issuers to diversify and expand their existing funding sources. This article considers the structural differences between the UK model and that of the US which have arisen primarily due to the requirements of the US insolvency regime.

(A. Clist and S. Onions: BJIBFL, 05.07, 261) 07.22.034

Derivatives

Negotiating the Schedule to the ISDA Master Agreement

At a recent London conference, the authors looked at negotiating the schedule to the ISDA Master Agreement and considered some frequently negotiated provisions that parties might wish to include.

(A Ward and J Berry: Bankers' Law, 04.07, 31) 07.22.057

ISDA master agreement: some key features

In the derivatives market the swift execution of transactions is essential. The ISDA Master Agreement is the most commonly used standard form agreement used to document derivative trades. The 1992 and 2002 versions of this agreement (published by ISDA) are the most commonly used. This article provides an introduction to the key aspects of the Agreement and its functioning.

(M. Chandy & S. Kody: *BJIBFL*, 05.07, 268) 07.22.036

Foreign Exchange

What will it take to stay top of the FX class?

Financial markets are always dynamic places and constantly evolving as they embrace change. Today's foreign exchange market is no exception and it is arguably developing at a faster pace than at any other time in its history. So how will it look in five years' time? The author asks leading FX participants to peer into the crystal ball.

(L. Oliver: *Euromoney*, 05.07, 187) 07.21.021

Structured Investment Vehicles

Force of nature

Only a couple of years ago there were questions in the market as to whether it would make economic sense for anyone to establish a new structured investment vehicle (SIV), given the enduring tight spread environment. But now the SIV sector is experiencing unprecedented

growth, both in terms of numbers of vehicles coming to the market and assets under management.

(A Mattinson: *ISR*, 05.07, 25) 07.20.092

Finance and Security

Lending

Financial assistance and the EU's second Company Law Directive: here we go again

Note: this article was written on the assumption that the UK will adopt the relevant provisions of the Directive. In fact, the UK does not currently intend to adopt them so it is unlikely there will be any relaxation of the rules for the giving of assistance by public companies.

With the prohibition on the giving of financial assistance by private companies set to be abolished, EU Directive 2006/68/EC will, when implemented, relax the rules for the giving of financial assistance by public companies. Will the new rules make life easier for those involved in mergers and acquisitions involving PLCs, or should lawyers be cautious about the implications of the new regime?

(H.Ullah: *BJIBFL*, 05.07, 251) 07.22.030

Red hot or red herring?

The author looks at the European Commission's plan to extend the Financial Collateral Directive to encompass 'credit claims' and asks whether the market needs

this development, and how practical it will prove to be.

(D. Turing: BJBFL, 05.07, 254) 07.22.031

Cash flow mis-matches in limited recourse structures

The coincidence in the timing of the receipt of payment from sales and the payment of interest and principal under a credit agreement can be critical. This article considers some of the techniques used to reduce the potential for mismatches and discusses some unusual structural solutions.

(N Ward: BJBFL, 04.07, 229) 07.22.058

Better due diligence could reduce M&A fraud

Various industry sources reckon that fraud has blossomed in tandem with the boom in mergers and acquisitions.

(J Pugsley: Acquisitions M, 05.2007, 58) 07.22.002

Property finance

REITs: changes to rules for joint ventures and new property funds

HMRC has published three sets of draft regulations concerning REITs. (See *the Legislation section of this bulletin*). The draft regulations:

- 1) Introduce new rules allowing joint ventures carried on through a group of companies to be included in the REITs regime.
- 2) Impose a tax charge on companies new to the REITs regime that breach the requirement that at least 75% of their assets must be rental properties.

Parliament has agreed minor changes to the provisions in the Finance Bill that ensure continuity of treatment where a REIT de-merges a subsidiary, which also qualifies for REIT treatment

Trends

Trend-spotting for FIGs

The Banker's round table panel debate the hot issues likely to affect the financial institutions arena this year.

(Banker; 05.07, 68) 07.21.014

Guarantees

Power to the landlords?

Reviews the Chancery Division judgment in *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* that a company voluntary arrangement (CVA) agreed by the majority of a company's creditors unfairly prejudiced its landlords, a minority group of creditors, who had received the benefit of parent company guarantees in respect of lease obligations. Looks at the CVA's terms, the release of the guarantees by reason of the CVA, and its unfairly prejudicial nature. Comments on the significance of the case for landlords whose tenants are the subject of a CVA.

Property Law Journal P.L.J. (2007) No.190
Pages 5-8 1/5/2007 Bryan Johnston

Fraud

Corruption

The "costs" for banks and financial intermediaries of managing corruption and money laundering risk

Discusses the impact of bribery and corruption on the financial services industry. Introduces Transparency International (TI), an anti-corruption body. Describes measures taken by TI to combat the laundering of corruption proceeds. Outlines anti-corruption action by the UK government and the involvement of the Serious Fraud Office. Identifies the costs of failing to tackle corruption, including loss of value of contracts, criminal penalties and loss of reputation. Considers the opportunities for corruption offered by offshore financial structures and calls for more effective regulation.

*Company Lawyer Comp. Law. (2007)
Vol.28 No.6 Pages 183-185 1/6/2007
Graham Rodmell (Transparency
International (UK))*

Money laundering

POCA in practice – issues arising from compliance with Pt7 of POCA

This article examines four issues that arise in the situation where a bank receives a suspicious deposit and carries out its duties under Pt 6 of POCA. First, what is the meaning of 'suspicion'. Second, how does the definition of 'criminal property' impact upon the operation of a customer's account. Third, what is the scope for a

bank to be liable to its customers for freezing an account. Finally, what is the potential for using s.333(3) as a means of communicating with the customer without any risk of committing the offence of tipping off.

*(P. de Verneuil Smith: BJIBFL, 05.07, 258)
07.22.033*

Regulation

MiFID

Kick-starting your MiFID implementation

The clock is ticking: MiFID (Markets in Financial Instruments Directive), the central pillar of the European Commission's Financial Services Action Plan to liberalise Europe's capital markets and establish common investor protection standards across Europe, comes into effect on 1 November 2007. The author looks at how firms that have delayed setting a change management programme can start to make up lost ground.

(M. Manzoor: CM, 05.07, 7) 07.22.045

MiFID -IT and operations

The authors summarise the key principles of MiFID, and set out areas of relevance to IT and operations contracts in the financial services sector and look at the implications for outsourcing.

(Y Moodley & A Saluj of CMS Cameron McKenna: SC4, 02/03.07, 29) 07.17.133

MiFID: Where did it come from, where is it taking us?

MiFID, European Markets in Financial Instruments Directive, is a key legislative

measure aimed at creating a pan-European capital market. MiFID's history begins with the Investment Services Directive (ISD). The ISD, adopted in 1993, was the first piece of legislation that sought to develop a European framework for investment services. MiFID develops this further.

(N Aubry & M McKee: JIBLR, 04.07, 177)
07.17.092

NOTICES

Banking

Competition

OFT launches Market Study into Personal Current Accounts

The OFT has launched a market study into personal bank current account pricing, alongside a formal investigation into the fairness of charges for unauthorised overdrafts and returned items. The study will help the OFT consider the current level and incidence of the charges in the broader context of efficiency, transparency, value and consumer choice within personal current accounts. This will be the most wide-ranging study into personal banking to date.

(OFT, 26.04.07)

Consumer

Council of Ministers consider draft Consumer Credit Directive

The Council of the European Union were due to consider the draft Consumer Credit Directive on 21 May 2007.

In its current form, the CCD aims to open up the market in cross border credit by giving key information to consumers across the EU in a standard, comparable format. In particular, consumers will be given access to key facts and figures in advertisements, they

will receive information on credit offers within a new comparable EU-wide Credit Information Form and they will benefit from a single, comparable, EU-wide Annual Percentage Rate of charge (APR).

The CCD will also set out two essential rights for consumers:

- (1) Consumers will have a right to a cooling-off period after they conclude a credit contract and will be able to withdraw from the credit without having to give any reason and without any charge. (This will be a new feature for almost half of the member states.) and
- (2) Consumers will have the right to repay credit early at any time and the compensation that creditors are entitled to claim in this event will be harmonised in order to lower market entry barriers.

The proposed directive has been substantially modified by the European Parliament and Commission since it was originally published in 2002.

EC press release 15 May 2007,

Payment system

The UNIDROIT Convention on Substantive Rules regarding Intermediated Securities - Updated Advice to HM Treasury

The Law Commission's updated advice to HM Treasury on the draft Unidroit Convention on Intermediated Securities

regarding transactional certainty and market stability is available from http://www.lawcom.gov.uk/docs/intermediated_securities_advice-May2007.pdf

(Law Commission, May 2007)

CRESTCo: change of name to Euroclear

CRESTCo is changing its legal and operating name to Euroclear UK & Ireland Limited with effect from 1 July 2007.

There will be no change in the business carried on with the company. Euroclear UK & Ireland will continue in its role as the central securities depository for the UK and Ireland, and will continue to operate CREST, the real-time settlement system. References to CREST will be maintained until at least the launch of Euroclear's Single Platform in 2009/2010.

Amendment to the calendar for the phasing-out of marketable tier two assets eligible as collateral for eurosystem credit operations

The European Central Bank is providing further details on assets eligible as collateral for Eurosystem credit operations. The Governing Council has decided that the marketable assets which have been issued prior to 31 May 2007 and are traded on non-regulated markets that currently fulfil the Eurosystem's requirements for safety and accessibility, but not for transparency, will remain eligible until 31 December 2009 and will become ineligible thereafter. The uncovered marketable tier two assets issued by credit institutions will be

phased out on 31 May 2007 and become ineligible after that date.

(ECB, 25.05.07)

Cross-Industry Plans to Roll-Out Contactless Technology on Credit and Debit Cards

The UK banking industry has confirmed plans for the national introduction of contactless technology on UK credit and debit cards

09/05/2007

Fraud

Assets Recovery Agency

Annual Report 2006/07: making sure crimes does not pay

Copies of the Assets Recovery Agency's annual report 2006/07 are available.

http://www.assetsrecovery.gov.uk/NR/rdo_nlyres/256E4B48-8844-46AE-B823-DBE1132B9B7E/0/AnnualReport200607.pdf

Its Business Plan 2007/08 is at

http://www.assetsrecovery.gov.uk/NR/rdo_nlyres/6D78CD75-FF16-4A12-BD45-940D6D0CFC8E/0/BusinessPlan200708.pdf

(Asset Recovery Agency, May 2007)

Regulation

MiFID

CESR adopts recommendations on passporting and a protocol on notifications under MiFID

The Committee of European Securities Regulators has published its recommendations on passporting and a protocol on passport notifications under the Markets in Financial Instruments Directive.

The passporting recommendations contain a number of practical proposals:

- (1) A harmonised approach and a common interpretation to the implementation of the notification procedures contained in Articles 31 and 32 of MiFID.
- (2) A commitment to carry out further work to develop a common model of practical cooperation for the supervision of branches.
- (3) Clarifications on aspects regarding the supervision of tied agents (where CESR also considers that further work is required), Multilateral Trading Facilities (MTFs) and representative offices.
- (4) Transitional arrangements for the transition from the Investment Services Directive passport to the MiFID passport.

The protocol on notifications contains a framework for cooperation between supervisory authorities in relation to the passport notification process. It sets out, among other things, the content and

nature of the information to be provided by the home to the host supervisor in the initial notification, the means of transmitting the notification, the timelines for transmission and the practicalities for dealing with notifications of changes to the information provided in the initial notification.

CESR issues Questions and Answers on best execution under MiFID

The Committee of European Securities Regulators has issued a Questions and Answers document which aims to clarify key aspects of its recent consultation on best execution under the Markets in Financial Instruments Directive.

The document presents CESR's answers to practical questions raised by firms and competent authorities about how firms should be complying with the MiFID best execution regime. It covers the content of execution arrangements, the content and degree of differentiation of the best execution policy, the possibility of using single execution venues, the assessment of the relative importance of the best execution factors, the notion of total consideration and fees and commissions, disclosure of information, consent and the requirements for monitoring and review.

CESR adopts guidelines on transaction reporting under MiFID

The Committee of European Securities Regulators has published guidelines on three aspects of transaction reporting

under the Markets in Financial Instruments Directive.

(1) Reporting by branches. The MiFID reporting requirements would require branches to send transaction reports to the competent authority within both the host and the home member state in certain situations. CESR members have agreed a practical solution to this problem that allows investment firms to elect to report all transactions executed by their branches to the host state's competent authority. Firms may still choose to use two reporting channels if they prefer and the host competent authority should not challenge this.

(2) What constitutes execution of a transaction (to be reported). CESR members have agreed a common treatment of collecting transaction information. In particular, they commit themselves to collecting information on transactions:

- (a) conducted by the investment firms transacting directly with or as an execution venue;
- (b) where the investment firm is undertaking the transaction on its own account (whether either on market or off-market).

In addition, they have agreed that they should be able to exchange the information necessary to identify the ultimate client or the investment firm which is dealing with the ultimate client.

(3) Approval of reporting channels. CESR members have agreed to take account of any prior approval by another CESR member for reporting channels when conducting their work under Article 25

of MiFID and Article 12 of the Implementing Regulation. To the extent permitted by national law, they will adapt their internal processes to rely on the evaluation of other members and to avoid unnecessary duplication of documents.

CESR adopts recommendations on inducements under MiFID

Further to its second consultation on inducements in April 2007, the Committee of European Securities Regulators has issued six recommendations that are intended to facilitate the consistent implementation of Article 26 of the MiFID implementing Directive without imposing further obligations on investment firms. The recommendations are accompanied by a number of illustrative examples that indicate some of the circumstances in which Article 26 is relevant.

CESR's recommendations:

(1) Clarify the scope of application of the regime, in particular that, although it is entitled "inducements", Article 26 covers any fee or commission or non-monetary benefit that an investment firm may receive or pay in connection with the provision of investment and ancillary services to clients.

(2) Clarify that the application of Article 26 is the same in relation to a payment or non-monetary benefit provided to or made by a legal entity within the same group as the investment firm as it is to one provided to or made by any other legal entity.

(3) Set out some factors that should be considered in determining whether arrangements within Article 26(b) may be deemed designed to enhance the quality of the service provided to the client and not impair the duty of the firm to act in the best interests of the client.

(4) Clarify the effect of Recital 39 in interpreting how Article 26 operates.

(5) Provide some direction about what information a "summary disclosure" should contain in order to comply with Article 26(b).

EU

Oversight framework for card payment schemes

The Eurosystem has been monitoring developments in the use of payment cards (e.g. for cross-border transactions and payments over the Internet) and the risks to which card payment schemes are exposed. The Eurosystem has developed an oversight framework for Card Payment Schemes that process euro payments with three aims in mind:

- to promote the reliability of CPSs,
- contribute to the maintenance of public confidence in card payments and
- promote "a level playing field" across the euro area,.

(ECB, 03.05.07)

European Commission publishes Green Paper on retail financial services

On 2 May 2007, the European Commission published for consultation a

Green Paper on retail financial services in the single market.

This builds on the Commission's White Paper on Financial Services 2005-2010, its findings on its sector inquiry into retail banking and its interim report on business insurance.

The Green Paper sets out the Commission's overarching policy objectives in relation to retail financial services. These include reducing prices and increasing consumer choice, enhancing consumer confidence and empowering consumers. It also sets out the actions currently being undertaken to ensure that consumers obtain the benefits of integrated EU financial markets. The Commission requests feedback from stakeholders on the direction being taken and also on a number of specific issues where it believes there is scope for more action to ensure that European financial services markets reach their potential.

The Commission invites comments on the Green Paper by 16 July 2007 and intends to hold a public hearing on the issues raised in it during September 2007. The results of the consultative process will be incorporated into the Commission's Single Market Review, which is due to be published in the autumn of 2007

Insolvency

Cases

Set off and the meaning of “account” in R4.90

Swissport (UK) Ltd v Aer Lingus Ltd

[2007] All ER (D) 197 (May) Chancery Division Peter Prescott Qc Sitting As A Deputy Judge Of The High Court 14 May 2007

Insolvency – Set-off – Mutual dealings – Action for payment of ground handling fees – Deputy master granting summary judgment in favour of claimant company – Whether defendant having counterclaim or set-off exceeding value of claim in summary judgment – Whether difference between legal set-off and insolvency set-off – Whether summary judgment appropriate – Insolvency Rules 1986, SI 1986/1925, r 4.90(2).

Rule 4.90(2) of the Insolvency Rules 1986, SI 1986/1925 provides: ‘An account shall be taken of what is due from each party to the other in respect of the mutual dealings, and the sums due from one party shall be set off against the sums from the other.’

The claimant company, a ground handling business, brought a claim against the defendant company in respect of charges for ground handling services performed for the defendant at an airport. The claimant successfully applied for summary judgment against the defendant. Following that decision the claimant, who was insolvent, went into liquidation. As a result of the

collapse of its business, the claimant dismissed some 750 employees. A number of those employees, or trade unions claiming to represent them, brought claims not only against the claimant but also against the defendant. The employment claims, or a segment of those claims, came before the employment tribunal, but they were unresolved. The defendant appealed the summary judgment.

The defendant contended that summary judgment was not appropriate because it had a counterclaim whose value exceeded the ground handling charges, alternatively, a set-off. Further, the value of that counterclaim or set-off was said to be affected by the unresolved employment proceedings which might have affected the outcome of the case.

The issues arose as to:

- (i) the difference between, on the one hand, a counterclaim or legal set-off, and, on the other hand, insolvency set-off; and
- (ii) the meaning of ‘account’ under r 4.90 of the Insolvency Rules 1986, SI 1986/1925 (the Rules).

HELD The appeal would be dismissed:

In the case of a personal insolvency the decision-maker did not have to take the cross-claim at face value. He was entitled and was required to estimate it. If the cross-claim was, to say the least, shadowy,

nobody was forced to proceed on the basis of a fiction. A similar rule would apply in the case of an insolvent company. Thus under, r 4.90 of the Rules the 'account' which was required to be taken properly involved a valuation of a cross-claim. However, that did not mean that once any sort of cross-claim was shown to be barely arguable, it had to be estimated at face value and then set off for summary judgment purposes against an undoubted claim on which summary judgment would otherwise have been available.

Applying those principles to the instant case, the defendant might possibly have had a cross-claim against the claimant arising out the employment claims that, if successful, might have been set off against the sum found to be due on the ground handling charges as held by the deputy master. On the evidence, the cross-claim was not utterly unarguable but it was pretty unlikely that all the relevant conditions would have been satisfied. In exercising the court's discretion justice would be done by upholding the deputy master's order, with an appropriate updating of the interest, but subject to a condition, which was intended to deal with the eventuality that the decision of the Employment Appeal Tribunal might put the case in a different light.

Stein v Blake [1995] 2 All ER 96 and Secretary of State for Trade and Industry v Frid [2004] 2 All ER 1042 applied; Bolton Pharmaceutical Co 100 Ltd v Doncaster Pharmaceuticals Group Ltd [2006] All ER (D) 389 (May) considered.

Economic torts House of Lords case

OBG Limited and others v. Allan and others [2007] UKHL 21

The House of Lords stated that inducing breach of contract and causing loss by unlawful means are two separate torts, and that it is not possible to convert contractual rights.

This case combined the appeals of three cases (including that of Catherine Zeta-Jones claiming Hello had infringed her privacy).

In the case of wrongly-appointed receivers acting in the OBG case, and an argument over whether they had negotiated the best deal available, the Court of Appeal (Peter Gibson, Mance and Carnwath LJ) had unanimously upheld the first instance judge's rejection of a conversion claim (upheld in the Lords) but by a majority (Mance LJ dissenting) allowed the appeal against the finding of wrongful interference with contractual rights. OBG appealed both points. Lord Hoffman said,

"... the question remains as to whether there is a tort of the breadth contemplated by Mance LJ, by which a purported agent can be strictly liable for causing the principal loss by making him liable, by virtue of ostensible authority, under a disadvantageous contract. In my opinion, there is not the slightest authority for such a tort."

The House of Lords has unanimously reinstated the distinction between inducing breach of contract (for which an actual breach of contract must be established) and causing loss by unlawful

means (for which unlawful means is an ingredient).

Guarantee-stripping CVA disapproved

Prudential Assurance Co Ltd and others v PRG Powerhouse Ltd and others

[2007] All ER (D) 21 (May) [2007] EWHC 1002 (Ch) Chancery Division Etherton J 1 May 2007

Insolvency – Voluntary arrangement – Company – Unfair prejudice to creditors' interests – Whether company voluntary arrangement effective to release company's parent company from liability in respect of guarantees provided by it to landlords of premises let to company – Whether company voluntary arrangement unfairly prejudicing interests of claimants as creditors of company – Insolvency Act 1986, ss 5(2), 6(1)(a).

PRG Powerhouse Ltd (Powerhouse) was a subsidiary of PRG Group Ltd (PRG), registered in New Zealand. In September 2003 it acquired the assets of the Powerhouse business including 24 high street stores and 110 superstores. A number of the landlords of those stores, including the claimants, took parent company guarantees or indemnities from PRG in respect of Powerhouse's obligations under the leases. Powerhouse got into financial difficulties and its directors informed its creditors that it needed to close 35 underperforming stores and to retain 53 stores which they hoped would enable it to trade profitably. The directors of Powerhouse proposed a company voluntary arrangement (CVA) which was approved at a meeting of Powerhouse's creditors on 17 February 2006. In two sets of proceedings the

claimants (the Luctor applicants and the Prudential applicants), challenged the validity of the CVA. They claimed against the respondents a declaration that the CVA was ineffective and/or invalid in so far as it purported to affect their rights against persons other than Powerhouse, or alternatively in so far as the CVA purported to constitute an express release by the claimants of their rights against persons other than Powerhouse. They also claimed an order that the creditors' approval of the CVA be revoked pursuant to s 6 of the Insolvency Act 1986 because the CVA was unfairly prejudicial to the claimants as creditors of Powerhouse. At the trial of preliminary issues the issues arose (i) whether or not on the correct interpretation of s 5(2) of the 1986 Act and on the true construction of the CVA and of the guarantees the CVA was effective to release PRG from liability in respect of the guarantees and (ii) whether the CVA unfairly prejudiced the interests of the claimants within the meaning of s 6(1)(a) of the 1986 Act.

HELD:

(1) Each creditor was a party to the arrangement by virtue of being, and in the capacity of, a creditor of the company. It was the company, and not any third party which had the benefit of and could enforce, the rights and obligations conferred by the CVA. The hypothetical agreement resulting from approval of a CVA was not, therefore, one between creditors as to rights and obligations between themselves in a capacity other than as creditors of the company. An arrangement would not cease to be an arrangement between a company and its relevant creditors or members merely

because the scheme was part of a wider scheme involving outsiders.

On the true construction of the CVA and of the guarantees, the claimants were obliged to Powerhouse (by cl 3.14 of the CVA), to treat the guarantees as having been released and there was nothing to preclude Powerhouse from enforcing that obligation.

Shaw v Royce [1911] Ch 138 and *Re Primlaks (UK) Ltd (No 2)* [1990] BCLC 234 considered.

(2) There was no single and universal test for judging unfairness in the context of s 6 of the 1986 Act. It was necessary to consider all the circumstances, including in particular, the alternatives available and the practical consequences of a decision to confirm or reject the arrangement. Unfairness might be assessed by a comparative analysis from a number of different angles. They included vertical comparison with the position on winding up, or, in the case of individuals, bankruptcy and horizontal comparison with other creditors or classes of creditors. In that context another, another helpful guide, in the case of a CVA, was comparison with the position if, instead of a CVA, there had been a formal scheme of arrangement under s 425 of the Companies Act 1985 on which different classes of creditors would have been required to meet and vote separately. Depending on the circumstances, differential treatment might be necessary to ensure fairness. If a reasonable and honest man in the same position as the claimants might reasonably have approved the CVA, that would be a powerful and probably conclusive, factor against the

issue of fair prejudice, however the fact that no reasonable and honest man in the same position as the claimants would have approved the CVA was not necessarily conclusive in favour of the claimants.

Applying those principles, in the circumstances the CVA unfairly prejudiced the interest of the claimants as creditors of Powerhouse within the meaning of s 6(1)(a) of the 1986 Act. The CVA left the guaranteed landlords in a worse position than without the CVA, having regard both to the present and also future liabilities.

Re T&N Ltd [2005] 2 BCLC 488 and *Sisu Capital Fund Ltd v Tucker* [2005] All ER (D) 200 (Oct) applied.

Jurisdiction

(1) AWB Geneva Sa (2) Pioneer Metal Logistics Co Ltd BVI V North America Steamships Ltd (A company incorporated under the laws of British Columbia, Canada) (In Bankruptcy) (2007)

[2007] EWHC 1167 (Comm) QBD (Comm) (Field J) 17/5/2007

An exclusive jurisdiction clause in a contract applied where one of the parties was seeking a judicial determination of the rights or obligations of one or both of them existing under the contract, and an application by the trustee in bankruptcy of one of the parties to the Canadian court under a Canadian insolvency statute was not a breach of the clause and would not be restrained by the English court.

No wrongful trading where it was not known the company could not avoid insolvent liquidation

In The Matter Of Hawkes Hill Publishing Co Ltd (In Liquidation) Sub Nom Barry John Ward V (1) Jayne Rosemary Perks (2) Philip Charles Drinkwater

Ch D (Lewison J) 24/5/2007

Where a company secretary and a company director had not known or concluded that there was no reasonable prospect that the company could have avoided going into insolvent liquidation, both having thought that the company could trade its way out of difficulties, there had been no wrongful trading on their part.

Articles

Forum shopping is dead: long live migration!

The author considers some of the difficulties that may be encountered in the process of corporate migration to take advantage of more sophisticated insolvency regimes.

(R. Hickmott of CMS Cameron McKenna: BJIBFL, 05.07, 272) 07.22.038

The Cross-Border Insolvency Regulations 2006 - a practical guide

Assesses the Cross-Border Insolvency Regulations 2006, introducing a new legislative regime for cross-border insolvency cases, focusing on the substantive law and procedure concerning requests for assistance in UK courts from foreign office holders acting in foreign insolvency proceedings. Compares the Regulations with other cross-border insolvency proceedings. Looks at: (1) the recognition application, including the prescribed form of the application and evidence, exhibits to the evidence, and the consequences of the recognition application and the recognition order; (2) the relief available on recognition; and (3) procedural matters, including the service of applications.

Insolvency Law & Practice I.L. & P. (2007) Vol.23 No.2 Pages 37-401/3/2007-1/4/2007 Sharif A. Shivji (4 Stone Buildings)

Recent trends in French Cross-border Insolvency Matters (ECIR 1346/2000)

Almost five years after the entry into force of EC Regulation 1346/2000 (the Regulation) and more than one year after the reform of French insolvency law, it is time to ask (1) whether the recent French court decisions on COMI issues support the view adopted by other European jurisdictions that EC Regulations should apply to pan-European groups of companies and (2) whether the French *sauegard* procedure may be a successful restructuring tool in a cross-border context.

Roland Montfort & ors, *Lefevre Pelletier & Associes Euromoney Yearbook 2007/8*

Pulling the strings

The new stakeholders in insolvent companies, and the rise of a rescue culture, mean the next wave of restructurings will be radically different from the last.

(IFLR, 04.07, 16) 07.18.014

COMI at the relevant time

Stojevic v Komerčni Banka AS [2006] EWHC 3447, Ch D (Bankruptcy Ct) (Registrar Jaques), December 20, 2006. The perils and pitfalls attendant upon the operation of the EC Regulation on Insolvency Proceedings were starkly displayed in the case of Mr *Stojevic* (S), whose outcome can scarcely be described as satisfactory or sensible. On December

20, 2006 Registrar Jaques granted the application of S for annulment of the bankruptcy order previously made by Registrar Derrett in March 2003, on the basis that, on the evidence presented in support of the application for annulment, at the time when the bankruptcy order was made and when the petition was presented in England (the relevant time). S's centre of main interests (COMI) was in Austria and not in England, thus depriving the English court of jurisdiction to open a main insolvency proceeding against S under Art.3(1) of the Regulation.

(I F Fletcher: *Insol Int*, 05.07, 60) 07.18.015

The Insolvency Directive relating to employment rights

Directive 80/987 (the Insolvency Directive) requires Member States to establish "guarantee institutions" that will guarantee outstanding claims resulting from contracts of employment relating to pay in the event of employers' insolvency. The Directive allows Member States to strike a balance between the rights of the employee and the obvious limits on social welfare budgets by allowing them to define what constitutes pay, and by limiting it to pay corresponding to a particular period for eight weeks in total.

(A Serr: *Insol Int*, 05.07, 59) 07.18.016

Beyond the sphinx – is chapter 15 the sole gateway?

"In "Mystery of the Sphinx – COMI in the US", I set out a detailed analysis of the judgment of Judge Drain in *Sphinx Ltd*, Re. That was a case of a Cayman registered

company which had no substantial connection with Cayman and where the main connection was with the United States. I suggested that since the attempted use of c.15 judicial assistance in that case was an abuse of process because it had an improper ulterior purpose, Judge Drain was absolutely correct in refusing recognition as a main proceeding. However, I could see no basis for his recognition of the Cayman Liquidation as a non-main proceeding, since there was no evidence of any "establishment" in Cayman, as that term is defined in c.15, even though the definition is less restrictive than that in the EC Regulation on insolvency proceedings (1346/2000)."

(G Moss: *Insol Int*, 05.07. 56) 07.18.017

Release of guarantors and co-debtors by means of a voluntary arrangement

When a debtor proposes a voluntary arrangement, whether individual or corporate, often he will owe a debt guaranteed by another or be jointly liable with another for the same debt. The guarantor/co-debtor is frequently related to the debtor – a blood relative or close friend/associate in the case of an individual or another company in the same group in the case of a company, or a person connected with the company, such as a director or major shareholder. It is not uncommon for the debtor to want to obtain a release of the guarantor or co-debtor as part of the voluntary arrangement. Sometimes the guarantor or co-debtor may provide funds for the voluntary arrangements on condition, express or implied, that he obtains a release from the guarantee or joint debt.

Where the guaranteed creditor with the benefit of the guarantee or joint debt agrees, there is no problem. The problem arises when he does not. This raises two questions: first it is possible for a voluntary arrangement to affect the right of a creditor against a third party without the creditor's consent and secondly, is it unfairly prejudicial for the majority of creditors to vote in favour of something which adversely affects only one or a few creditors?

(R Ritchie: *Insol, Int*, 05.07, 52) 07.18.018

A wake-up call for landlords

Comments on the Chancery Division ruling in *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* on whether a tenant was permitted to use a company voluntary arrangement to reduce its liability for future rent and to prevent a landlord from bringing a claim under a parent company guarantee. Considers the impact which CVAs may have on the landlord and tenant relationship and describes the background to the Powerhouse CVA. Discusses whether the release of the parent company guarantee was unfairly prejudicial to the landlords.

Estates Gazette E.G. (2007) No.0721 Pages 122-124 26/5/2007 Katie Bradford and Simon Hartley

Schemes of arrangement and junior creditors – does the US approach to valuations provide the answer?

There has been much discussion in the last few years about the impact of US bankruptcy practice on UK and European restructurings. As is widely recognised, US

methodologies and models have found their way to Europe with the influx into European markets of experienced US bankers, investors and professionals. This has resulted in a major shift in thinking and practice and a desire in some quarters to replicate the style and methods of the c.11 process. One area of English restructuring law in which there is increasing pressure to adopt the US approach is that of schemes of arrangement – in particular, schemes for financially distressed debtors which are designed to implement a restructuring involving senior and junior, subordinated, debt.

(N Segal: *Insol, Int*, 05.07, 49) 07.18.019

Darwin and restructuring

Darwin's theories reveal much about today's restructuring market, according to the author.

(L Edwards: *IFLR*, 04.07, 18) 07.18.020

Study of administration cases: summary of report to the insolvency service

Reviews research into the increase of administrations compared to other methods of insolvency, in particular liquidation, since the introduction of the Enterprise Act 2002. Quantifies the extent to which those cases should not have been dealt with as administrations, and the consequences of this abuse of process. Sets out statistical analysis of numbers of administrations, administrative receiverships, creditors' voluntary liquidations and compulsory liquidations during 2002 to 2005.

Insolvency Law & Practice I.L. & P. (2007)
Vol.23 No.2 Pages 57-62 Date: 1/3/2007-
1/4/2007 Authors: Alan Katz and Michael
Mumford (University of Lancaster)

The Sonatacus case - the Court of Appeal leaves the point open

Reviews the Court of Appeal decision in Re Sonatacus arising out of a tri-partite satisfaction of debt, concerning a liquidator's attempt to reclaim money paid to a third party by the company in satisfaction of a loan owed to the third party by one of the company's creditors, in return for the release of a loan owed to the creditor by the company. Assesses whether the dealings that the liquidator sought to reverse should be categorised as a transaction at an undervalue or a preference.

Insolvency Law & Practice I.L. & P. (2007)
Vol.23 No.2 Pages 41-42 Date: 1/3/2007-
1/4/2007 Hugh Lyons and Iain Tucker

Rescue culture speared by Trident

The Enterprise Act 2002 was heralded as a great leap forward in favour of the rescue culture, furthering the original aims of the Insolvency Act 1986 and its introduction of administration orders. It remains to be seen whether the principal changes, including the ability to appoint administrators out of court, have really assisted the rescue culture or simply opened up more avenues of abuse. However, we can already tell, as a result of the decision in *Exeter City Council v Bairstow (Trident)*, that the rescue culture has been seriously damaged by the

changes in the Insolvency Rules which accompanied the Enterprise Act.

(G Moss: IL&P, 06.07, 72) 07.22.070

Sealing administration expenses, puncturing rescue culture?

Considers the proper approach to the assessment of administration expenses, arguing that it is purely a matter of statutory construction and should not be determined by judicial discretion. Reviews the Companies Court decision in *Exeter City Council v Bairstow*, also known as *Re Trident Fashions*, on whether non-domestic business rates that accrued on company premises after it entered into administration were payable as administration expenses under the Insolvency Rules 1986 r.2.67. Discusses the equitable principle of benefit and burden. Highlights the need for legislative revision given the impact of *Exeter City Council v Bairstow* on the rescue culture underpinning administration.

Insolvency Law & Practice I.L. & P. (2007)
Vol.23 No.2 Pages 26-31 1/3/2007-
1/4/2007 Look Chan Ho

Fiduciary duties and office holder remuneration

Explores the conflict between the fiduciary duties of insolvency office holders and their remuneration. Considers the traditional assessment of remuneration using a "time cost" basis and the move towards a "value added" basis to reflect the value of the office holder's services. Notes the comments by Justice Peter Smith in *Jacob v UIC Insurance Co Ltd* that the "overheads burden" to which a partner in

an accountancy firm could be subject should not necessarily be reflected in their office holder rates. Highlights the need for office holders to consider their overriding duties as fiduciaries and not to simply rely on procedural guidance to support remuneration claims.

Insolvency Law & Practice I.L. & P. (2007)
Vol.23 No.2 Pages 32-33 1/3/2007-
1/4/2007 Susie Meikle

Charging orders and limitation periods after *Gotham v Doodes*

Reviews the Court of Appeal decision in *Gotham v Doodes* concerning the law regarding the limitation period applicable to charging orders under the Insolvency Act 1986 s.313, clarifying that time starts

to run for the purposes of the Limitation Act 1980 s.20 when the court has made an order for the possession and sale of property charged in a trustee in bankruptcy's favour and not when the initial charging order is made. Considers the public policy of charging orders and the Cork Report's conclusions, including the need to balance a trustee in bankruptcy's claims for possession with the competing claims of the debtor's family to remain in their home. Notes the implications of rising house prices.

Insolvency Law & Practice I.L. & P. (2007)
Vol.23 No.2 Pages 34-36 1/3/2007-
1/4/2007: John Townsend (Maitland
Chambers)

Notices

Insolvency regulation

Report to the insolvency service for the year ended 31 December 2006

At the end of 2006 the Institute had licensed 710 insolvency practitioners compared to 706 the previous year, out of a UK total of approximately 1,700 (including active insolvency practitioners and non-appointment takers - those who hold the licence but are not currently practising). The Institute granted 26 new licences to insolvency practitioners during 2006. Twenty were granted to Institute members and 6 to non-members who became affiliates, of whom the majority were in firms controlled by Institute members. In addition, 16 new licence applications were granted to take effect from 1 January 2007. The Institute's Insolvency Licensing Committee considered 97 monitoring visit reports and took regulatory action where appropriate - in many cases, no action is needed as the insolvency practitioner is complying with the regulations or has appropriate plans in place for improving performance. Two licences were withdrawn during the year and regulatory penalties were issued in five cases.

The full text is available at
<http://www.icaew.com/index.cfm?route=147623>

(ICAEW, April 2007)

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