C/M/S/ Cameron McKenna

The heavyweight

Comprehensive coverage of this month's banking and insolvency law

February 2007

Looking forward

Developments scheduled for the months ahead

Date	Item	Significance
Imminent	**Judgment to be handed down in Trident, Exeter City Council case**	**Adminstrators' expenses in relation to council rates**
6 April 2007	**Companies Act 2006: Implementation of Part 28**	**Implements Takeover Directive and makes changes to statutory squeeze out procedure**
May 2007	**EU mortgage credit harmonisation**	**EU action to make the mortgage market more efficient and competitive.**
July 2007	**UCP 600**	**Revised rules on documentary credits to be written into letters of credit.**
1 October 2007	**Companies Act 2006: Implementation of Parts 9, 10, 11, 13, 14, 15 (s 417), 29, 30 and 32**	**Significance for finance: provisions relating to directors (except for conflict of interest duties, directors' residential addresses and underage and natural directors), derivative proceedings, resolutions and meetings.**
6 April 2008	**Companies Act 2006: Implementation of Parts 12, 15, 16, 20, 21, 23, 26, 27 and 42**	**Significance for finance: provisions relating to company secretaries.**
1 October 2008	**Companies Act 2006: Implementation of Parts 1, 2, 3, 4, 5, 6, 7, 8, 10, 17, 18, 24, 25, 31, 33, 34, 35 and 41.**	**Significance for finance: provisions relating to financial assistance, formation of company, constitution, capacity, directors, company charges, restoration to the register and overseas companies.**

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Banking

CASES

Banking

Bank liability

Bank does not have to pay all successful party's costs

National Westminster Bank plc v Kotonou

[2007] All ER (D) 328 (Feb) Court Of Appeal, Civil Division Chadwick, Lloyd Ljj And Stanley Burnton J 26 February 2007

Where a guarantor had succeeded in setting aside a guarantee given to a bank but had fought the case on numerous distinct bases on which he had lost, one of which was an improper allegation of fraud, a judge had been entitled to depart from the normal rule that the unsuccessful party should pay the successful party's costs and make an issue-based split costs order.

The claimant, a bank, brought proceedings to enforce a personal guarantee by the defendant. The defendant, who was at the time a litigant in person, successfully defended the action and the judge dismissed the case against him on the ground that the guarantee had been procured by a material misrepresentation by the claimant. The defendant had raised a number of issues and allegations of fraud against the claimant, but had lost on those grounds. At the costs hearing, the judge ordered that costs be assessed on an issue basis pursuant to CPR 44.3. He found that the defendant had raised a considerable number of issues on which he had lost, and that he had made improper allegations of fraud against the claimant. He ordered, inter alia, that the defendant pay half of the claimant's costs and that the claimant pay half of the defendant's costs. The defendant appealed.

He submitted that the judge had erred in law by treating the case as raising separate issues which justified a partial costs order. He further submitted that the judge had erred in failing to take account of his serious funding difficulties and the gross disparity of resources as between the parties.

HELD appeal would be dismissed.

The first question to be asked in examining the role of the Court of Appeal in relation to costs was not whether it would have made the order which the judge had made, but whether it could be satisfied that the basis on which the judge had made the order was flawed. In that instance, the Court of Appeal could properly interfere in the exercise of the judge's discretion.

The instant case had called for an issue based order in that the defendant had raised and fought issues which, in the judge's view, should never have been raised. The judge had clearly applied his mind to the various factors which he had been required to consider in making a

costs order, and in the exercise of his discretion, had made a split order for costs. It followed that there had been no flaw in his reasoning and no error in principle. In those circumstances it was not for the Court of Appeal to interfere.

Summit Property Ltd v Pitmans [2001] All ER (D) 270 (Nov) applied.

Was settlement term re fraud against public policy?

Australia and New Zealand Banking Group Ltd v Compagnie Noga D'Importation et D'Exportation SA and another

[2007] All ER (D) 257 (Feb) [2007] EWHC 293 (Comm) Queen's Bench Division (Commercial Court) David Steel J 21 February 2007

Contract – Enforceability – Non-repetition of claims clause – Bank settling litigation – Term of settlement precluding allegations of fraud against bank in litigation involving other defendants – Whether term precluding allegations in existing litigation – Whether term contrary to public policy.

In 1979, the USSR and Nigeria concluded a deal relating to a construction project in Nigeria. As part of the deal Nigeria issued a series of bills of exchange. Problems arose with the result that the Russian Federation, as successor to the USSR, acting through a state entity 'TPE' was left with a number of the bills under which no payment had been received. According to the defendants to the instant case, 'Noga', in 1992 they concluded a contract with TPE by which they became the owners of the bills or at least obtained a proprietary interest in the bills or their proceeds. The face value of the bills exceeded DM1.8 billion. In the event, Noga did not obtain possession of the bills or the proceeds from TPE. In 1996, TPE sold the bills to P Corp, a company in which it was said that a number of Russian government ministers had an interest. P Corp sold the bills to M Inc, a company said to have substantial Nigerian interests. M Inc sold the bills to Nigeria. Sizeable profits were made by P Corp and M Inc on their respective sub-sales. Noga issued two separate proceedings: (i) against the claimant, which had acted as arranger and escrow bank in respect of the 1996 transaction; and (ii) against the Russian Federation and all the other defendants to enforce arbitration awards which Noga had obtained against Russia. The bank served a defence contending that it had performed only an ordinary arms-length transaction, and assumed no further steps would be taken against it. Five years later, however, Noga stated that it wished to make new claims against the bank of knowing receipt and knowing assistance, including express allegations of fraud. In the event the claim was settled. Clause 9.1 of the settlement agreement provided: 'Each of the Claimants and the Claimants' Associates undertakes not to repeat, procure the repetition, or authorise the publication to any person of, any allegations or claims made by it or him in the Proceedings or otherwise in any way related to the Proceedings save that the Claimants shall not be prevented, in pursuing the Claimants' claims in the Queens Bench Division (Commercial Court) of the High Court action numbers 1999 Folio 404 and 405 against all persons other than ANZ and the ANZ Associates and their

respective Affiliates, from making factual statements and submissions in court regarding ANZ's involvement in the subject matter of those actions. For the avoidance of doubt this Clause prohibits the Claimants and the Claimants' Associates from alleging dishonesty on the part of ANZ, the ANZ Associates and their respective Affiliates.' A dispute arose during the subsequent trial against other defendants concerning allegations Noga wished to make. The bank brought a CPR Pt 8 claim seeking a declaration that cl 9(1) was valid and effective.

Noga contended: (i) the first part of the clause (i.e. the first sentence up to the section commencing 'save that') was solely directed at repetition or publication of the allegations in 1999 folio 404 to third parties (i.e. those other than any parties to folio 404); (ii) the second part preserved Noga's entitlement to pursue folio 404; and (iii) the third part (i.e. the second sentence), in prohibiting an allegation of dishonesty, was referring back to the allegations and claims referred to in the first part and thereby permitted folio 404 to be pursued with any existing allegations against the bank. In the alternative, it contended that the clause was contrary to public policy.

The court ruled:

(1) The construction preferred by Noga could not be accepted. The true construction of the policy was that: (a) the first part prohibited the repetition or publication of the allegations made in the proceedings, including folio 404; (b) the proviso, by way of exception to the first part, permitted Noga to make 'factual statements and submissions' in folio 404 in respect of the bank's involvement in the subject matter of the action; and (c) given the room for misunderstanding between 'an allegation' on one hand and 'a factual submission' on the other, the second sentence (i.e. the third part) made it plain that no allegation of dishonesty against the bank was permitted.

(2) There was no basis for contending that cl 9(1) contained a restraint contrary to public policy. There was no restraint on the prosecution of a crime or anything akin thereto. There was no restraint on Noga's pursuit of compensation in folios 404 and 405. The agreement had no public implications; it involved the arms length settlement of proceedings.

There would be a declaration as to the validity of the settlement agreement.

Arbitration question in film finance

Film Finance Inc v The Royal Bank of Scotland

[2007] All ER (D) 171 (Feb) [2007] EWHC 195 (Comm) Queen's Bench Division (Commercial Court) Andrew Smith J 14 February 2007

Contract – Construction – Contractual term – Claimant guaranteeing completion and delivery of film in which defendant investing – Agreement containing provisions in relation to arbitration – Dispute arising in relation to completion of film – Whether arbitration clauses applying to parties' dispute – Arbitration Act 1996, s 32.

The defendant bank had entered into a facility letter with a third party film production company, and made advances of over €4.8m under it, that amount to be applied towards the production of a film. Under the terms of that facility, the

provision of a completion guarantee was a condition precedent for the funds being advanced. The purpose of such a guarantee was to ensure that the producer of the film completed and delivered the film to its distributors on schedule in order that the film's financers, including the defendant, could commercially exploit the film, and thereby recoup its investment. The defendant entered into a completion agreement (the agreement) with the claimant. Under the terms of the agreement, the claimant guaranteed the completion and delivery of the film, and, in the event that it failed to fulfil that obligation, covenanted to pay to the defendant any sums outstanding on the facility. Clause 14 of the agreement, so far as material, provided: 'In the event of a dispute relating to delivery hereunder, the provisions for arbitration specified in Schedule III attached hereto shall apply. Any dispute other than a dispute relating to delivery shall be submitted to the jurisdiction to the courts of law of England … '. Schedule III to the agreement contained provisions relating to delivery disputes arising between the claimant and the distributors of the film. In the event, the film was not completed and delivered to the distributors on time. That failure was in part attributable to the defendant, it having delayed the completion of the film because of concerns it harboured over its marketability. The defendant sought to enforce the terms of the agreement against the claimant. The claimant maintained that the defendant was barred form relying upon the agreement on the basis that its actions had contributed to the failure to meet the completion and delivery deadlines. An issue arose between the parties as to whether their dispute concerning the completion and delivery of the film was subject to the arbitration provisions under the agreement. The claimant sought a determination under s 32 of the Arbitration Act 1966, that the dispute between the parties was governed by the terms of the agreement, and, therefore, subject to its arbitration clauses.

The primary issue that fell to be determined was the scope of the interpretation of cl 14 of and the provisions of Sch III to the agreement.

The claimant submitted that the disagreement between the parties constituted a dispute relating to delivery, and that, under cl 14, such a dispute fell to be arbitrated. The defendant submitted, inter alia, that cl 14 fell to be given a narrow interpretation. By the terms of cl 14, the parties had agreed that only disputes such as those to which Sch III were directed were to have been subject to arbitration. As Sch III referred only to disputes between the claimant and the distributors of the film, the instant dispute was not covered by the arbitration provisions of the agreement.

HELD The court ruled: In the instant case, whilst there was a tension between the provisions of cl 14 and those of Sch III, the agreement fell to be interpreted in such a way that cl 14 applied to some disputes that might have arisen between the claimant and the defendant. That conclusion required the provisions for arbitration, contained within Sch III to be modified so that they were to be read as referring to delivery disputes between the claimant and the defendant. That interpretation of the agreement would

give better effect to the intentions of the parties than the narrow interpretation proposed by the defendant.

In those circumstances, the arbitrator appointed under the agreement had jurisdiction to hear the parties' dispute in relation to the alleged failure of the claimant to ensure completion and delivery of the film.

Documentary credits

Cheques

Undated cheque no bar to recovering payment

Aspinall's Club Ltd v Al-Zayat

[2007] All ER (D) 362 (Feb) [2007] EWHC 362 (Comm) Queen's Bench Division (Commercial Court) David Steel J 28 February 2007

Gaming – Club – Cheque – Cheque undated – Claimant gaming club presenting cheque for payment – Defendant refusing to pay – Defendant contending agreement not to pay – Whether defendant liable for cheque or underlying loan.

The claimant was a well-known gambling club. The defendant was a wealthy individual who joined the club in October 1994. Between that date and April 2006, the defendant visited the club on over 600 occasions, purchasing gaming tokens to the value of over £91,000,000 and in the process losing over £23,000,000. His biggest loss occurred on 10 March 2000, in the sum of £2,000,000 in one sitting. During the course of the playing session that day, the defendant drew four separate script or house cheques for £500,000 each. They were dated 10 March 2000 and drawn on a joint account of the defendant and his wife. He was then given gaming tokens to the value of each cheque. On a number of occasions during the playing session, the defendant requested the croupier be changed but was told that there was no other available. At about 3.30am, however, the defendant discovered others were present and a heated argument ensued with members of the management team of the club. Thereafter, at the request of the claimant, an undated substitute cheque was brought to the defendant in the sum of £2m. He alleged subsequently that he had only signed it on the understanding that it would not be dated and that it would not be presented until the dispute with the croupier had been resolved. On 14 March the claimant presented the substitute cheque, which had been dated 10 March. It was dishonoured as the defendant had sent a fax to his bank in Switzerland countermanding payment. Discussions occurred from time to time until the claimant issued proceedings. It applied for summary judgment.

The defendant contended that the claimant was in breach of the agreement not to date or present the cheque, that the cheque had been post-dated within the meaning of s 16(2) of the Gaming Act 1968, and that he had only provided the cheque on the understanding that it would not be dated or presented until the 'dispute' had been resolved, which amounted to the unlawful provision of credit. He contended that the transaction was a sham, since there had been no common expectation of payment on

presentation within two days; alternatively, that the claim on the cheque and the underlying loan should fail because the claimant had agreed not to date the cheque and/or present it and/or agreed not to sue on the loans.

HELD

The cheque was not invalid by reason of the fact that it was not dated. It was not invalid by being ante-dated. Even if there had been an agreement not to date or present the cheque, the cheque remained a valid and unconditional offer to pay. The cheque was no more than the record of a loan. The proposition that the scheme was a 'sham' was incorrect. In any event, alongside any claim on the cheque, the claimant was entitled to enforce the underlying loan agreement. Each script cheque constituted a conditional repayment of a loan of cash in the form of gambling tokens. Those cheques were redeemed and substituted by the substitute cheque. The dishonour of those cheques led to the revival of the loans. The claimant had not agreed not to enforce the debt.

The claimant was entitled to judgment on the debt.

Finance and Security

Lending

No consent to assignment of debt

Barbados Trust Co Ltd (Formerly Ci Trustees (Asia Pacific) Ltd) V (1) Bank Of Zambia (2) Bank Of America NA

[2007] EWCA Civ 148 CA (Civ Div) (Waller LJ (V-P), Rix LJ, Hooper LJ) 27/2/2007

In the circumstances the necessary consent to assignment of a debt had not been given and the claimant therefore lacked title to sue.

The appellant company (C) appealed against a decision ((2006) EWHC 222 (Comm), (2006) 1 CLC 311) that it could not claim against the first respondent bank (Z) as the beneficiary of a declaration of trust of a debt admittedly due from Z, and Z appealed against a decision that the debt had been validly assigned. The debt due from Z had been traded in the distressed debt market. According to its terms the debt could only be assigned to another bank or financial institution with the prior written consent of Z, such consent being deemed to have been given if Z failed to reply within 15 days to a request for such consent. The debt had been assigned on Emerging Markets Traders Association terms to the second respondent bank (B). Under those terms the assignment was effective before the 15 day period for obtaining Z's consent expired. B had then declared a trust in respect of the debt in

favour of C. C claimed on the debt, joining B as a defendant, and the judge held that the assignment to B was valid because in the circumstances Z was deemed to have consented to the assignment not having replied to B's request within 15 days, but that C could not sue on the declaration of trust because that would be inconsistent with the non-assignment clause. C submitted that the non-assignment clause had no application to an acknowledged debt. Z submitted that since it was entitled to 15 days in which to consider whether to give consent that consent could not be deemed to have been given until 15 days after the request with the result in the instant case that there had been no prior consent and the assignment was invalid.

HELD: (Waller, L.J. dissenting on the issue of consent) (1) The non-assignment clause did apply to established debts. (2) On the true construction of the non-assignment clause and in the circumstances prior written consent or deemed consent to the assignment had not been given. Therefore the assignment to B was invalid and C had no title to sue.

Appeal dismissed, cross-appeal allowed.

Security

Mortgages

Privy Council case on sale of property under mortgage

Jobson v Capital and Credit Merchant Bank Ltd and others

[2007] All ER (D) 178 (Feb) [2007] UKPC 8 Privy Council Lord Hoffmann, Lord Hope Of Craighead, Lord Scott Of Foscote, Lord Walker Of Gestingthorpe And Lord Carswell 14 February 2007

Contract – Construction – Contractual term – Mortgage – Claimant executing instrument of mortgage over property in return for loan from respondent bank – Mortgage instrument permitting bank to sell claimant's property without notice to claimant in event of default – Bank selling property at auction following claimant's default on mortgage payments – Whether relevant legislative provisions permitting bank to sell property without notice to claimant – Registration of Titles (Jamaica) Act, ss 105, 106, 128.

In 1980, the claimant bought a small fruit farm. In 1989, she borrowed $JJ 50,000 from the respondent bank to repair hurricane damage. As security, on 8 September 1989, she executed an instrument of mortgage of the property which recited that it was made under the Registration of Titles (Jamaica) Act and contained covenants to pay monthly sums by way of interest and in reduction of the outstanding capital. Clause 10 provided that the powers of sale and of distress and of appointing a receiver and all ancillary powers conferred on mortgagees by the Act should be conferred upon and be exercisable by the mortgagee under the instrument without any notice or demand to or consent by the mortgagor not only on the happening of the events mentioned in the said laws but also whenever the whole or any part of the principal sum or the whole or any part of any monthly instalment of interest should remain unpaid for thirty days after the dates hereinbefore covenanted for payment thereof respectively or whenever there shall be any breach or non-observance or non-performance of any covenant or condition herein contained or implied. In

October 1989, the claimant paid the first monthly instalment but nothing more. On 14 February 1990, the bank sent her a standard form letter, notifying her that she was in arrears with her payments and stating that unless she paid within ten days, it would exercise the power of sale. The letter was sent by hand but the claimant never received it. On 26 April 1990, the bank sold the property by auction for $JJ 260,000 and subsequently executed a transfer to the purchasers, whose title was registered on 23 August 1990. However, the claimant refused to yield up possession. The purchasers commenced proceedings against her and she issued a third party notice against the bank, claiming that it had not been entitled to exercise the power of sale. The trial judge decided that the purchasers had acted in good faith and that, whatever might be said about the bank's right to sell, the purchasers title was unassailable. A challenge to that finding was unsuccessful in the Court of Appeal of Jamaica. The only remaining point was whether, despite the provisions of cl 10 of the mortgage, it was necessary for the bank to have given the claimant notice that she was in default. Sections 105 and 106 of the Act provided for notice to be given to the mortgagor before the transfer of property subject to a mortgage. The trial judge accepted the bank's submission that cl 10 prevailed. The Court of Appeal disagreed, taking the view that the statutory provisions were mandatory and that it was impermissible to contract out of them. However, the Court of Appeal dismissed the claimant's appeal against the bank. She appealed to the Privy Council, seeking an inquiry as to damages.

The bank submitted that the Court of Appeal was wrong to hold that the statutory provisions could not be modified and that the appeal should for that reason have been dismissed. In support of its contentions, the bank relied principally upon s 128 of the Act, which provided that every covenant and power to be implied in any instrument by virtue of the Act might be made invalid or modified by express declaration in the instrument. The bank argued that the power of sale was a power implied in the mortgage by virtue of the Act and could therefore be modified by express declaration in the instrument, and was so modified by cl 10.

The appeal would be dismissed.

Regulation

FSA/Bank

FSA application to wind up LLP

Re Inertia Partnership LLP

[2007] All ER (D) 316 (Feb) Chancery Division Jonathan Crow QC Sitting As A Deputy Judge of The High Court 23 February 2007

Financial services – Financial Services Authority (FSA) – Powers – Respondent limited liability partnership entering into arrangements with relevant companies – FSA petitioning for respondent to be wound up on basis that involved in 'boiler room' activities – Whether respondent in breach of general prohibition – Whether respondent falling within relevant exemption – Whether just and equitable that respondent be wound up – Financial Services and Markets Act 2000, s 367 – Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25, 26.

Section 367 of the Financial Services and Markets Act 2000 provides: '(1) The Authority may present a petition to the court for the winding up of a body which (a) is, or has been, an authorised person; (b) is, or has been, an appointed representative; or (c) is carrying on, or has carried on, a regulated activity in contravention of the general prohibition …. (2) In subsection (1) 'body' includes any partnership … (3) On such a petition, the court may wind up the body if (a) the body is unable to pay its debts within the meaning of section 123 or 221 of the 1986 Act (or Article 103 or 185 of the 1989 Order); or (b) the court is of the opinion that it is just and equitable that it should be wound up … '

The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (as amended by SI 2001/3544) provides: '25 (1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is (a) a security, (b) a relevant investment, or (c) an investment of the kind specified by article 86, or article 89 so far as relevant to that article, is a specified kind of activity … (2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity … 26 There are excluded from article 25(1) and article 25A(1) articles 25(1), 25A(1), 25B(1) and 25C(1) arrangements which do not or would not bring about the transaction to which the arrangements relate.'

The respondent was a limited liability partnership whose business had originally been that of management consultancy. The respondent's only member was S. P Ltd was a company incorporated in the Seychelles. S introduced P Ltd to a number of United Kingdom public companies, including V, PL and P 5, with a view to assisting them in raising capital. P Ltd was subsequently engaged by V to help it raise capital; however the respondent did not take any active part in arranging for the sale of V's shares. With regard PL, the arrangements were formal and the respondent's role was more active. Pursuant to a written agreement, the respondent provided administration services designed to facilitate the sale of PL's shares. The respondent also entered into a similar arrangement with P 5, but in that instance it not merely provided completion services but also made arrangements for P 5 to enter into agreements with investors. The Financial Services Authority (FSA) had become concerned with the activities of certain off-shore entities that were known as 'boiler rooms'. These were generally off-shore entities which were not authorised or exempt for the purpose of the Financial Services and Markets Act 2000 (FSMA). They would cold-call private individuals in the UK and try to encourage them to buy shares in unlisted companies. The shares tended to be significantly overpriced and the sales techniques of boiler rooms were typically persistent, often high pressure. They sometimes made misrepresentations, usually concerning the imminent flotation of the company on an investment exchange, and/or the likely resale value of the shares currently on offer, and their

activities were pernicious. The FSA presented a petition pursuant to s 367 of the FSMA, for the respondent to be wound up on the ground that it had carried on a 'regulated activity' in contravention of the 'general prohibition'. The general prohibition as set out in art 25 of the FSMA precluded making arrangements for another person to buy and sell a relevant investment. The respondent contested the petition.

The issue arose as to whether: (i) the respondent had carried on specified activities within the (Regulated Activities) Order 2001, SI 2001/544 (as amended by SI 2001/3544) (the Order), art 25, and if so whether it could avail itself of the exception in art 26 of the Order; and (ii) it was just and equitable that the respondent be wound up.

The court ruled:

(1) Having regard to the manner in which the words 'arrangements' and 'transaction' were used in arts 25 and 26 of the Order, a person could make 'arrangements' within art 25 even if his actions did not involve or facilitate the execution of each step necessary for entering into and completing the transaction. The availability of the exception in art 26 was essentially a question of fact. As a matter of causation, did the arrangements bring about the transaction, i.e. the purchase, sale etc of the shares.

In respect of V, the respondent's introduction to P Ltd did not involve the respondent in any violation of the general prohibition under FSMA. That was because the introduction was too nebulous and too remote an act to fall within the concept of 'making arrangements' within art 25 of the Order. In respect of PL and P 5, the services that the respondent had provided had 'brought about' the transaction (a sale and purchase of shares) with P Ltd and accordingly, it had acted in breach of art 25 of the Order.

(2) In exercising its jurisdiction under s 376 of the FSMA and s 124A of the Insolvency Act 1986, with a view to protecting the public interest, the court needed to balance all relevant interests against each other in order to ascertain the just and equitable result.

Applying that test to the facts of the case, it was just and equitable that that a winding-up order should made against the respondent.

Re Walter L Jacob & Co Ltd [1989] BCLC 345 considered.

A winding-up order will assist the FSA in clarifying the scope of the general prohibition, and it will enable it to provide further publicity to protect consumers in the future and to deter others who might be tempted to break the general prohibition. This will in turn make it harder for boiler rooms to avail themselves of receiving agents located in the UK whose participation in share placement is calculated to lend comfort and reassurance to consumers who might be discouraged from sending cheques to overseas entities.

LEGISLATION

Banking

Clearing systems

The Uncertificated Securities (Amendment) Regulations 2007 No 124

These Regulations implement in part Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (OJ No L 145, 30.4.2004, p.1) ("the Directive"). The Directive is also implemented by other statutory instruments, including the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007 (S.I. 2007/126), the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No. 3) Order 2006 (S.I. 2006/3384) and the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) (Amendment) Regulations 2006 (S.I. 2006/3386), and by the Financial Services Authority using powers under the Financial Services and Markets Act 2000 (c. 8). The Regulations amend Schedule 1 to the Uncertificated Securities Regulations 2001 (S.I. 2001/3755) which sets out the requirements for approval of a person as an operator of a computer-based system which enables title to units of a security to be evidenced and transferred without a written instrument. They add a new requirement, transposing in part Article 34 of the Directive, for any person approved as an operator to maintain transparent and non-discriminatory rules governing access to any settlement facilities he provides. The rules must grant investment firms (within the meaning of the Directive) and credit institutions (as defined in Directive 2006/48/EC (OJ No L 177, 30.6.2006, p.1)) authorised in other EEA States access to those settlement facilities on the same terms as access is granted to firms and institutions established in the United Kingdom.

http://www.opsi.gov.uk/si/si2007/20070124.htm

(Date in force, 1.11.07)

Company

Companies Act Timetable

The Government has announced the commencement timetable for the provisions of the Companies Act 2006.

Note from a finance perspective:

- Most finance provisions come into effect October 2008 – eg. abolition of financial assistance provisions will come into effect then.
- But the new statutory directors duties and changes to the resolution procedures come into effect in October 2007
- Dissolution and restoration to the register changes October 2008

The DTI have published a checklist on the Act for small private companies and an

updated note on frequently asked questions on the Act.

28 February 2008

The Companies Acts (Unregistered Companies) Regulations 2007 No 318

These Regulations, which are made under section 1043 of the Companies Act 2006 (the Act), apply Part 28 of that Act (takeovers etc), and certain ancillary provisions, to unregistered companies and in doing so further implement Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids. There are considered to be no costs and benefits arising from this instrument as it replicates for unregistered companies provisions which are currently in force under the Takeovers Directive (Interim Implementation) Regulations 2006 (S.I. 2006/1183). A Transposition Note is available from the Company Law and Governance Directorate, Department of Trade and Industry, Bay V565, 1 Victoria Street, London, SW1H 0ET. A copy has also been placed in the libraries of both Houses of Parliament. The full text is available at http://www.opsi.gov.uk/si/si2007/20070318.htm

(Date in force, 6.4.07)

The Companies Act 2006 (Commencement No. 2, Consequential Amendments, Transitional Provisions and Savings) Draft Order 2007

This is the second Commencement Order made under the Companies Act 2006 (c.46) The Order brings various provisions of the Act into force on 6th April 2007. Article 2(1)(a) brings into force section 2 of the Act (the Companies Acts) subject to a transitional adaptation. Article 2(1)(b) brings into force Part 28 of and Schedule 2 to the Act (takeovers etc). Two existing regimes apply to takeover offers. The Takeovers Directive (Interim Implementation) Regulations 2006 (S.I. 2006/1183) ("the Interim Regulations"), which apply to offers covered by Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids (O.J. No. L142, 30.4.2004) (" the Takeovers Directive"), are revoked by article 8 as from 6th April 2007. The repeals of Part 13A of the Companies Act 1985 (c.6) and Part 12 of the Companies (Northern Ireland) Order 1986 (S.I. 1986/1032 (N.I. 6)), which apply in the case of offers not covered by the Takeovers Directive, are brought into force by this Order as from that date (article 6). Article 7 makes amendments to primary and secondary legislation consequential on Part 28. In relation to takeovers, article 9 and Schedule 6 save the effect of the 1985 Act and the Interim Regulations as follows. Paragraph 1 of Schedule 6 makes provision in relation to squeeze-out and sell-out for non-Takeovers Directive bids, paragraph 2 makes provision in relation to squeeze-out and sell-out for Takeovers Directive bids, and paragraph 3 saves regulation 8(2)(b) of the Interim Regulations in respect of offences committed before 6th April 2007. Article 2(1)(d) brings into force section 1284(1) (extension of the Companies Acts to Northern Ireland) for the purpose of extending to Northern Ireland the provisions on community interest companies contained in Part 2 of the Companies (Audit, Investigations and

Community Enterprise) Act 2004 (c.27). The repeal of Part 3 of the Companies (Audit, Investigations and Community Enterprise) Order 2005 (S.I. 2005/1967 (N.I. 17)) ("the 2005 Order"), which made corresponding provision for Northern Ireland and is not yet in force, is brought into force by this Order. Article 7(2) and Schedule 4 amend the 2004 Act, and the Community Interest Company Regulations 2005 (S.I. 2005/1788) made under it, so that they can work alongside the existing Northern Ireland companies legislation pending the implementation of a single UK companies regime. They also make consequential amendments of other enactments. Article 11(2) restores the application to limited liability partnerships of a provision of the 1985 Order the repeal of which had been brought into force by S.I. 2006/3428 without a saving in respect of its application to limited liability partnerships. The full text is available at http://www.opsi.gov.uk/si/si2007/draft/20075771.htm

(Anticipated date in force, 6.4.07)

Consumer

The Consumer Credit Act 2006 (Commencement No. 2 and Transitional Provisions and Savings) Order 2007 No 123

This Order brings into force certain provisions of the Consumer Credit Act 2006, which amend the Consumer Credit Act 1974. The provisions in Schedule 1 come into force on 31st January 2007 and the provisions in Schedule 2 come into force on 6th April 2007. The remaining provisions of the Consumer Credit Act 2006 will be brought into force by subsequent Orders.

http://www.opsi.gov.uk/si/si2007/20070123.htm

(Made, 23.1.07)

Green Paper on the review of the consumer acquis

A European Commission Green Paper concerning EU consumer rules has been adopted which reviews the existing rules as they relate to guarantees, refunds and cooling off periods. The Paper consults on reinforcing the notion of delivery for cross-border purchases to strengthen the protection given to consumers; clarifying and simplifying the rules on how to return products; setting common rules on the right and costs of returning goods; simplifying with common rules the remedies available to consumers; clarifying the rules covering "cooling off periods"; and whether current guarantees and rights that cover products should be extended to certain services.

http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf

(European Commission, February 2007)

Finance and Security

Leasing

Equipment leasing tax regulations

Two sets of regulations have been made as part of the revised tax regime for equipment leasing which applies from 1 April 2006. One set of regulations specifies plant and machinery leased with land ("background plant and machinery") which are outside the new rules. The other set of regulations permits lessors to elect to bring certain equipment leases within the new rules.

Both sets of regulations were made on 6 February 2007.

- The Capital Allowances (Leases of Background Plant or Machinery for a Building) Order 2007/303 applies with effect from 1 April 2006.
- The Long Funding Leases (Elections) Regulations 2007/304 apply to leases finalised on or after 1 April 2006.

ARTICLES

Banking

Clearing systems

Interconnecting law of securities holding and transfer – a chance for seamless international improvements

To increase the efficiency of both local and cross-border transfer and collateral transactions, today the vast quantity of securities are being held, transferred and pledged by entries to securities accounts with intermediaries (eg bank, brokers, clearing and settlement systems, etc), rather than in physical form by the investors or directly with the issuers. Unfortunately, more often than not choice-of-law and substantive law rules continue to reflect assumptions that securities were held, transferred and pledged by physical delivery and were supposedly mainly purely domestic transactions.

(M. Hitching: BTIBFL, 1 2007, 9).07.07.091

Capital markets

The Shareholder Rights Directive and the challenge of re-enfranchising beneficial shareholders

Improving rights of beneficial owners of securities held by intermediary

In its 2003 communication Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, the EU Commission identified the strengthening of shareholder rights as both one of the key tenets of the integration of the EU capital markets and a means of strengthening corporate governance within Europe. The latest initiative in this area is the Commission's proposal for a directive on the exercise of voting rights by shareholders having their registered office in a Member State and whose shares are admitted to trading on a regulated market (the "Shareholder Rights Directive").

The directive, currently in draft form and due to be published in final form within the new few months, aims to remove hindrances to the participation of beneficial owners of shares in the corporate governance process, with particular reference to holders of interests in shares held through securities intermediaries in a custody chain.

(A Hainsworth: LFMR, 01.07, 11) 07.05.042

Derivatives

Tales of the unexpected

The credit derivatives market has expanded faster than all other over-the-counter derivatives markets but a wave of buyouts and corporate restructurings has left users struggling to come to terms with the fall-out.

(N de Terán: Banker, 02.07, 44) 07.06.066

Credit derivatives and operational risk, or why a credit default swap is not like a bond

The credit derivatives market is the fastest growing of all the over-the-counter (OTC) derivatives markets. It also presents the greatest legal and operational risks this article will discuss the reasons why this is so, some of the industry and regulatory responses to those risks on two recent decisions that each, in its own way, illustrate a number of them.

(S K Henderson: LFMR, 01.07, 31) 07.05.044

CDS investors step up the fight for their rights

The influence of investors in credit default swaps has conspicuously failed to match the growth of the market itself. But a recent restructuring could be the watershed moment that changes the credit markets for ever. Has the ground shifted beneath corporate issuers' feet without them even noticing?

(L Bowman: Euromoney, 1.07, 64) 07.04.056

Documentary credits

Trade finance

Payments and financial security – an overview

This article serves to present the use of various payments and financial security arrangements. The International Chamber of Commerce (ICC) a long time back established the Uniform Customs and Practice related to letters of credit, the latest version 1993, and the Uniform Rules on demand guarantees from 1993 related to on demand guarantees. The international convention on Independent guarantees from 1995 drafted by UNCITRAL, has however, gained little recognition. ICC has adopted an amended version of UCP, UCP 600, which will enter into force during 2007.

(L. Gorton: EBLR, 2.07, 141) 07.07.101

Finance and Security

Lending

Loan-only credit default swaps

This article highlights the different motivations of the participants in the fast developing syndicate secured loan market and how the US and European markets deal with the effect of such motivations on the LCDS documentation.

(M. Bartlam and K. Artmann: BIBFL, 07.07, 16).07.07.092

The funding of consortium bids

Consortium bids have become an increasingly common feature of M&A activity both in the UK and elsewhere, with bids made by combinations of financial buyers being commonplace. However,

although much less common for the reasons described below, it is a route also available to trade buyers. This article briefly considers the main types of consortium bid that exist, and their differing uses and characteristics, and then focuses on the relevant financing considerations that apply.

(M. Hitching: BTIBFL, 1 2007, 4).07.07.090

A material difference

Hedge funds have brought much-needed liquidity to the syndicated loans market – and a nightmare for arrangers trying to manage market-sensitive date. The author offers a practical guide for confused debt professionals.

(D Campbell: Legal Week, 8.2.07, 20) 07.07.063

How committed is a 'Committed Facility'?

Issues to look out for when reviewing a credit facility for the purpose of providing a cash confirmation statement

In order to provide the certainty of funding required by General Principle 5 of the City Code on Takeovers and Mergers, certain modifications need to be made to a credit facility. This article examines those modifications.

(M Isaacs & L Ferera: BJIBFL, 01.07, 40) 07.07.035

Behave yourself

Banks' disclaimers on debt deals will be ineffective if their behaviour doesn't match up.

(GR Skene: BJIBFL, 01.07, 14) 07.07.034

Basel II – market liquidity and borrower issues

The introduction of Basel II on 1 January 2007 creates a number of opportunities for sophisticated banks to offer more competitive pricing to borrowers. However, it may also result in less liquidity in certain financial markets and raises a number of issues for borrowers.

(G Mclellan: BJIBFL, 01.07, 38) 07.07.033

Amending a syndicated loan agreement

A syndicated agreement may need amending for a number of reasons. For example, the commercial terms of the facilities contained within the loan agreement may need to be amended as part of primary syndication, the existing covenant package may prohibit something which the borrower's group wishes to do, or an amendment may be required to prevent an anticipated breach of a term of the loan agreement. This article looks at some of the practical and legal issues which may arise when a borrower seeks to amend a syndicated loan agreement governed by English law. (The article does not examine the impact of loan agreement amendments on guarantees, as highlighted by the case of *Triodos Bank NV v Ashley Charles Dobbs [2005]*, as this is a subject in its own right.)

(S Hughes: BJIBFL, 01.07, 36) 07.07.032

Transferability in syndicated lending

"Transferability", the procedure that enables a new lender to replace, wholly or partly, an existing lender in syndicated loan, is undoubtedly one of the defining

characteristics of a contemporary syndicated loan agreement.

(M Hughes: LFMR, 01.07, 21) 07.05.043

US

Disclosure of Loan Level Information to Investors

Structured Finance Notes Bulletin

http://www.tpw.com/Page.aspx?Doc_ID=6755

Project finance

Lending a hand

The author explains why specialist care operators are such an attractive funding prospect for banks.

(G Sargent: H Inv, 02.07, 25) 07.07.052

Bring your umbrella

Project financiers should consider umbrella agreements as a way to avoid disparate arbitration proceedings.

(S Beaton: IFLR, 02.07, 35) 07.07.053

The mother of invention

Basel II is forcing project finance lenders into the arms of securitisation.

(N Bliss & V Hand: ILFR, 02.07, 38) 07.07.054

Getting on board

Last October foundation trusts were issued a new corporate governance code. The author examines what's in it and, more critically, what's not.

(O Pritchard: H Inv, 02.07, 22) 07.07.055

BSF – back to first principles

The CSF programme has certainly identified the extent to which the maturity of the PFI market has brought with it a lack of understanding of the first principles that underpin standard PFI contracts.

(A Fraiser & S Boyd: PFI, 02.07, 44) 07.07.056

Property finance

A Reit map

The regional idiosyncrasies of real estate investment trusts:

(IFLR, 02.07, 16) 07.07.036

Securitisation

Protected cell companies

A new trend in the securitisation industry analysed from a Luxembourg and international perspective

The article describes the particularities of a securitisation transaction operated by a Protected Cell Company established under Luxembourg law and covers the creation, management, accounting, taxation and liquidation of such issuer. The article briefly analyses the situation in the Isle of Man, Jersey and Ireland.

(Q Rutsaert: (2007) 2, JIBLR, 101) Pt 1 06.50.002 07.06.042

Security

Charges

Pledging shares in German limited liability companies

The pledge of shares in German limited liability companies has always been an important means of creating security for bank loans and in connection with purchase price payments under mergers and acquisitions transactions in Germany.

With the increasing presence of foreign investors and lenders on the German market and a continuing trend for corporate transactions to be financed by third parties, the pledge of shares in German limited liability companies increasingly plays an important role also in the context of international acquisition financing. This article provides a systematic overview of the most important issues that need to be considered when drafting agreements for the pledge of shares in German limited liability companies.

M L Bruhns CMS Hasche Segle Germany LFMR January 2007

Fraud

Money laundering

Caught up

Suspicious banks must guard against civil claims. Discusses the Court of Appeal judgment in *Abou-Rahmah v Abacha* on whether a bank had dishonestly assisted in a fraud, where a bank manager had suspected that a client could be engaged in money laundering and had complied with reporting obligations, but did not have any suspicions about the particular transactions concerned. Analyses the court's confirmation of the objective test of dishonesty, required for liability as an accessory in breach of trust. Highlights the possibility that a bank's compliance with money laundering obligations under the Proceeds of Crime Act 2002 may still leave them open to possible civil actions.

New Law Journal N.L.J. (2007) Vol.157 No.7260 Page 239 16/2/2007 Andrew Howell and Susanna Long

Regulation

MiFID,

Markets in Financial Instruments Directive ('MIFID'): organisational arrangements and conflicts of interest

This is the third of a series of six articles on the Markets in Financial Instruments Directive ('MiFID'). This part discusses organisational arrangements, including general organisational requirements, including systems and controls and outsourcing; conflicts of interest. Part two is summarised at 06.49.084.

(B Penn: JIBFL, 12.06, 486) 07.04.057

TECHNICAL

Banking

Competition

Commission sector inquiry finds major competition barriers in retail banking

The European Commission has published the final report of its competition inquiry into the retail banking sector. The inquiry has found a number of competition concerns in the markets for payment cards, payment systems and retail banking products. Particular indicators are large variations in merchant and interchange fees for payment cards, barriers to entry in the markets for payment systems and credit registers, obstacles to customer mobility and product tying. Some market participants have already offered voluntary reforms following the publication of preliminary findings on payment cards in 2006. The Commission will use its powers under the competition rules to tackle any serious abuses, working closely with national competition authorities. The outcome of the inquiry should boost retail banking competition in the run-up to the creation of the Single Euro Payment Area.

(CEC, 31.01.07)

See also Law-Now "Final European Commission verdict on competition in EU retail banking" www.law-now.com

Payment system

Payment Systems Oversight Report

The Bank of England has published its third Payment Systems Oversight Report.

The report summarises the developments in the key UK payment systems over the past year and explains the focus of the Bank's work in this field.

In common with the two previous Oversight Reports, the overall message is encouraging: the main UK payment systems continue to exhibit a high level of robustness by international standards. In particular, the high-value payment systems come close to observing fully the internationally recognised standard of the Core Principles for Systemically Important Payment Systems.

(BoE, 27/02/07)

Capital markets

Derivatives

ISDA's notes of IASB February Board meeting

Definition of a Derivative

It was decided to amend the definition of a derivative in IASB's 2007 Annual Improvements Process to be issued on 1 Oct 2007 effective for period ends beginning 1 Jan 2009. The amendment

relates to whether the exclusion from the definition of a derivative in IAS 39 (p.9) for contracts linked to non-financial variables that are specific to a party to the contract is restricted to just contracts accounted for under IFRS 4 and whether changes in an entity's own revenue (EBITDA) should be considered as financial or non-financial variables. The IASB concluded that the exclusion is restricted to contracts that are accounted for under IFRS 4 and therefore decided to amend IAS 39 (p.9) for clarification purposes. Thus, a contract that is indexed to an entity's own revenue or EBITDA meets the definition of a derivative. The IASB did not address the question whether the underlying was financial or non-financial, as the underlying would be in the scope of IAS 39 anyway.

Financial Instruments – Due Process Document (DPD) on measurement of financial instruments

The IASB discussed whether a 3rd party contractual guarantee affects the fair value to the debtor of the liability related to the contractual guarantee. The Board concluded that such a contractual guarantee does not affect the fair value unless payment of the guarantee by the guarantor to the creditor results in the release of the debtor from its obligation. In addition, the Board agreed that if payment of the guarantee by the guarantor to the creditor results in the release of the debtor from its obligation, the debtor should recognize an asset as well as measuring the fair value of the liability based on the combined probability of cash flows from the debtor and cash flows from the guarantor.

The Board also agreed that statutory deposit insurance and similar non-contractual guarantees do affect the debtor's obligation and should be included in the valuation of the liabilities with statutory and similar non-contractual guarantees by the debtor.

Hedge accounting

On hedge accounting, IASB staff noted that the Due Process Document treats hedge accounting as a departure from normal recognition, measurement and presentation principles. They presented a number of situations and asked the Board which, if any, of the situations justified a departure from the general principles. There was general agreement that the DPD should express a Preliminary View that there is no justification for an exception to normal accounting principles for a number of items, including for exposures to changes in the fair value of a recognized item in the scope of the DPD, exposures to changes in the expected future cash flows of a recognized item in the scope of the DPD, and exposures to changes in the expected cash flows of a forecast transaction to buy or sell an item that, when recognized, would be within the scope of the DPD. The staff noted that hedges of the foreign currency exposure of a net investment in a foreign operation were not in the scope of the DPD.

The Board was sympathetic to permitting a 'fair value option' for exposures to changes in fair value outside the scope of the DPD, for example, commodities traded other than for normal purchase and sale. Such an approach would permit both the

hedged item (the purchase commitment) and the hedging instrument to be marked to market through profit and loss. Designation would be required. Board members stated that the risk components of hedged items could not be hedged. A hedge need not be for the entire period of the commitment, nor for the entire quantity of the purchase commitment. Any gains and losses on such hedges would be recognised in profit and loss.

There were some concerns expressed among IASB members that they were creating more accounting mismatches, and other Board members thought that by permitting hedge accounting they would create further confusion. It was noted that IFRS 7 should address many of these concerns.

Michelle Marusic [MMarusic@isda.org] Tue 27/02/2007 10:55

NOTICES

Banking

Consumer

"Treating customers fairly"

FSA & OFT submissions to the 2007 review of the Banking Codes

The OFT and FSA have published their individual submissions to the Independent Banking Code Review.

FSA submission

The FSA concentrates on the Banking Code but some comments also apply to the Business Banking Code. The FSA makes a number of arguments in favour of introducing an overarching fairness objective within the Banking Code and makes recommendations about how such an objective could be applied in practice. The FSA recommends that a radical approach is taken to the review, not least because the Banking Code must remain fit for purpose until its next review in 2011.

OFT submission

The OFT flags a number of recent activities (both its own work and studies and the work of the Competition Commission) that would suggest that customers are not being treated fairly. OFT highlights a number of specific areas where the current Banking Code, Business Banking Code and guidance should be revised, including: transparency; pre-notification of charges; new consumer protection legislation; Payment Systems Task Force recommendations; and small and medium-sized enterprise (SME) banking services.

The revised versions of the Banking Codes are due to be released in March 2008.

Payment system

Final report of the Payment Systems Task Force

This is the final report of the Payment Systems Task Force. It reflects its progress from May 2006 to November 2006 when the Chancellor of the Exchequer agreed to wind up the Task Force.

The full text is available at http://www.oft.gov.uk/NR/rdonlyres/0FA0087B-903F-4FB2-A99B-6822BE60AAC5/0/oft901.pdf

(OFT901: February 2007)

European payment systems should comply with data protection law

EDPS calls on ECB

The European Data Protection Supervisor has issued his opinion on the role of the European Central Bank in the SWIFT case. The ECB's position in the context of the payment system is threefold, being an overseer, a user, and a policy maker. When deciding to use SWIFT's services in its own payment operations, the ECB was placed in the position of a joint controller. As such, it is co-responsible

for ensuring full compliance with data protection rules. This includes ensuring respect for the purpose limitation principle, information to data subjects, and adequate guarantees when personal data are transferred to third countries.

(CEC, 01.02.07)

Fraud

Corruption

Wolfsberg Group guidance on anti-corruption measures

The Wolfsberg Group has issued a Statement against Corruption (the paper).

Corruption is associated with organised crime, money laundering and sometimes even the financing of terrorism. The paper discusses examples of how the financial system might be misused for the purposes of corruption and sets out minimum measures financial institutions might take in order to at least prohibit their employees and officers from becoming involved in illicit acts. An appendix to the paper sets out guidance on some of the risks a financial institution might face from a customer's financial activity through it, and suggests possible measures to counteract the following key risks:

(1) Services risk.

A variety of the services offered by financial institutions might be used to effect the payment and receipt of bribes. The paper outlines the risks, possible mitigating measures and transactional "red flags" (which can be identified in the course of anti money laundering monitoring) in relation to private banking, project finance/export credits and retail banking.

(2) Country risk.

The Wolfsberg Group has identified separately those that have significant levels of corruption.

(3) Customer risk. Risks and red flags are outlined with respect to politically exposed persons, use of intermediaries/agents, correspondents and certain industries.

The guidance in the paper is based on existing Wolfsberg guidance on anti-money laundering principles for private banking and correspondent banking, and should also be read in conjunction with the Group's recent paper on a risk based approach to identifying money laundering risks.

16 February 2007

INSOLVENCY

Cases

Contentious business agreement in liquidation context

In the matter of Wilson Properties Uk Ltd (In Liquidation) Sub Nom Pierre Wilson V (1) The Specter Partnership (2) Official Receiver (3) Joint Liquidators Of Wilson Properties UK Ltd

[2007] EWHC 133 (Ch) Ch D (Mann J) 1/2/2007

The fact that an agreement between a firm of solicitors and their client was not referred to anywhere as a contentious business agreement was not determinative of the issue as to whether it was in fact such an agreement. If an agreement fulfilled the criteria for a contentious business agreement then it would be one, regardless of whether the parties referred to it as such.

The appellant (W) appealed against a decision dismissing his application to rescind a winding-up order made in respect of the company (X) of which he was a director and creditor. W also applied for an order removing the liquidators or directing them to assign to him what was alleged to be a good cause of action that X had against the first respondent solicitors' firm (S). X had engaged S to act for it in litigation with one of its former solicitors. There was a dispute about S's bill of costs, and S subsequently served a statutory demand on X. When the amount was not paid, S presented a winding-up petition. X was wound up in July 2005. W had claimed not to have a copy of the agreement between X and S; he was provided with it in September 2005. Having received it, he complained that the costs exceeded an estimate given in the terms of the agreement, and he wrote to the liquidators asking them to deal with the unfair winding-up of X. In early 2006, W made the application to rescind the winding-up order on the ground that the petition debt arose on a contentious business agreement (CBA) within the meaning of the Solicitors Act 1974 s.59 so that there could be no petition until a court had ruled on enforcement under s.61 of the Act. The judge below held that the agreement was not a CBA because there was no reference to the agreement being a CBA, and because there was nothing in it to indicate that S could be remunerated at a higher rate than normal. The judge also concluded that, even if he was wrong, the delay that had occurred prevented W from succeeding in his application, since there was nothing in the facts of the case that justified him exercising his jurisdiction to extend the seven-day time limit in the Insolvency Rules 1986 r.7.47(4) and as he did not have inherent jurisdiction to set aside the order. W submitted that (1) the agreement was a CBA; (2) the order ought to be rescinded

on the basis of the evidence and because the judge had erred in considering that he could not exercise his r.7.47(4) jurisdiction; (3) if the fees were due under a CBA then the petition and winding-up order were a nullity and could not be allowed to stand no matter how long the delay was; (4) the judge had erred in finding that he had no inherent jurisdiction and in finding that, in exercising that jurisdiction, he could only take into account factors that could not have been raised at the original hearing.

HELD: (1) A winding-up petition was an action for the purposes of s.61 of the Act, In re a Debtor (No88 of 1991) 4 All ER 301 applied. The reasoning of the judge below was unsatisfactory: the fact that the agreement was not referred to anywhere as a CBA was not necessarily relevant and was certainly not determinative. If an agreement fulfilled the criteria for a CBA then it would be one, regardless of whether the parties referred to it as such. The judge had erred in finding that the agreement did not indicate that S could be remunerated at a greater rate than normal. Although the judge's reasoning was flawed, the result he reached was correct. The essence of a CBA was certainty. The agreement between S and X lacked the requisite certainty, *Chamberlain v Boodle King (A Firm)* (1981) 125 SJ 257 applied. There was no signed agreement relating to the specific piece of litigation that gave rise to the bill, and the terms as to charging were not sufficiently fixed. The agreement did not constitute a CBA for the purposes of the 1974 Act. (2) (Obiter) The judge had been correct in finding that there was no good explanation for W's delay in launching the application to rescind and that accordingly he should not exercise his discretion to extend the time limit in r.7.47(4). (3) (Obiter) It might be that it could originally have been argued that the debt was disputed, but that did not make the proceedings and winding-up order a nullity. The winding-up order having been made, the point about the CBA could not be taken. Even if the CBA point were good it did not make the proceedings a nullity. The court had jurisdiction to make the winding-up order, and while there was jurisdiction to set it aside, time limits applied. X failed to observe the time limits so the order stood. (4) (Obiter) There was no inherent jurisdiction to do what W asked should be done. There was no general jurisdiction to set aside. Even if there were, the unjustifiable delay in applying would be fatal to the exercise of such a jurisdiction. (5) The application to remove the liquidators was hopeless: the allegations on which it had been made were not particularised and appeared to be baseless. The liquidators had declined to assign the chose in action, if there was a chose in action, because they did not know enough about it to form any view as to its assignability, merits or value. W had failed to provide the liquidators with information on those matters. The liquidators' stance was entirely reasonable.

Appeal dismissed.

Opposition by creditor to administration

Re Auto Management Services Ltd

[2007] All ER (D) 146 (Feb) Chancery Division Warren J 9 February 2007

Company – Administration – Order – Petitioning creditor opposing company's application for administration order – Whether administration order likely to achieve purpose of administration – Whether administration order should be made.

AMS Ltd (the company) traded as a motor car dealer, predominantly over the internet. It also operated a car dealership and car rental business. The company's director applied for an administration order on the company's behalf on the basis that the company was unable to pay its debts, but that a better result would be obtained for the company's creditors in an administration than in a compulsory winding up. The application for an administration order was supported by four witness statements made by the director. In his witness statements, the director identified certain intangible assets which could be sold for a valuable consideration in an administration and which might be difficult to realise in a liquidation, namely: (i) lease of the premises from which the company operated its car dealership and car rental business, (ii) the company's trading name 'autozone', under which the company operated a website, and (iii) a claim against HG Ltd. The director further stated that the company's bank had agreed to extend the company's credit line during administration, but not if the company was in liquidation. The application was opposed by a creditor, OFUK Ltd (the petitioner), which had petitioned for the compulsory winding up of the company. Following a hearing at which the petitioner called for a better explanation of the advantages of administration, the company's application was adjourned and its director served a further witness statement. It was common ground that pursuant to para 11(1)(b) of Sch B1 to the Insolvency Act 1986, the court might make an administration order in relation to a company only if satisfied (a) that the company was or was likely to become unable to pay its debts, and (b) that the administration order was reasonably likely to achieve the purpose of administration, set out in para 3 of Sch B1 to the Act.

HELD: The application would be allowed.

Having taken all the relevant factors into account, it was clear that the company was likely to achieve the purpose of administration, namely, achieving a better result for the company's creditors as a whole than would be likely if the company were wound up.

COMI

Zvonko Stojevic v (1) Komercni Banka As (2) Yvonne Venvil (Trustee In Bankruptcy Of Zvonko Stojevic) (3) Official Receiver

Ch D (Bankruptcy Ct) (Registrar Jaques) 20/12/2006

In principle and in the instant case, the centre of main interests of an individual, who was neither a professional nor someone carrying on business in his own right, was his place of habitual residence.

The applicant debtor (S) applied for annulment of a bankruptcy order made against him. The bankruptcy order had been made on the petition of the first respondent bank (K) on the basis that S's centre of main interests was at an address in London where S carried on business. The address given for S was also a London address. S had not given evidence that his centre of main interests was elsewhere. S submitted that the bankruptcy order should not have been made because at the relevant time, which was the date when the bankruptcy petition was presented, S's centre of main interests under Council Regulation 1346/2000 Art.3.1, meaning his habitual residence, was in Austria and not in England so that the English court had lacked jurisdiction to open insolvency proceedings. K submitted that a debtor's centre of main interests under the Regulation meant the focal point of his economic activity, that the centre would be where he managed and controlled his most important economic interests, and that S's centre of main interests at the relevant time was in the United Kingdom so that the bankruptcy order was properly made.

HELD: (1) The starting point when considering the location of the debtor's centre of main interests was recital 13 of the Regulation, which provided that it should correspond to the place where the debtor conducted the administration of his interests on a regular basis and was therefore ascertainable by third parties. The concept had an autonomous meaning and had to be interpreted in a uniform way, independently of national legislation, Eurofood IFSC Ltd, Re (C-341/04) (2006) ECR I-3813 applied. However, recital 13 did not define "centre of main interests". Creditors of an individual, who was neither a professional nor someone carrying on business in his own right, would expect his interests to be administered from his place of habitual residence since that was where he could be contacted, Skjevesland v Geveran Trading Co Ltd (2002) EWHC 2898 (Ch) , (2003) BCC 391 applied. In principle, the centre of main interests for natural persons would be the place of their habitual residence. (2) On the evidence, in the three years before the bankruptcy petition was presented, S had spent more of his time in the UK than anywhere else, working in London and running a limited liability company. That business was not S's own sole trader business. The company was plainly not a sham. Recital 13 referred to the place where the debtor conducted the administration of his interests. S had been conducting the administration of the company's interests at its London address, Eurofood applied. Even if discharging the duties of a director could amount to the administration by the director personally of his own interests, S had never been a de jure director of the company and the company had gone into provisional liquidation before the petition was presented, *Cross Construction Sussex Ltd v Tseliki* (2006) EWHC 1056 (Ch) considered. It would be wrong to equate S's indirect economic interests in the company and in other English companies that owned properties in London with his own interests. S's centre of main interests at the date when the petition was presented was where he was habitually resident in Austria. The bankruptcy order ought not to have been made and was discharged.

Application granted.

For related proceedings see *Komercni Banka AS v Stone & Rolls Ltd* (2002) EWHC 2263 (Comm), (2003) 1 Lloyd's Rep 383. For European Court of Justice case cited above see *Eurofood IFSC Ltd, Re* (C-341/04) (2006) ECR I-3813.

Voidable preference

In The Matter Of Sonatacus Ltd Sub Nom Ci Ltd v Joint Liquidators Of Sonatacus Ltd

[2007] EWCA Civ 31 CA (Civ Div) (Smith LJ, Hooper LJ, Sir Martin Nourse) 25/1/2007

In the circumstances the recipient of a benefit from a payment by a company that was voidable as a preference under the Insolvency Act 1986 s.239 could not retain that benefit because it had not shown that it had acted in good faith within s.241(2) of the Act.

The appellant company (C) appealed against the decision that a payment to C by an insolvent company (S) had been a transaction at an undervalue. The person (P) who controlled S was a friend of the person (R) who controlled C. C had lent £65,000 to P. The money had been paid directly to S in circumstances that imposed an obligation on S to repay P. Just before the term of the loan expired S had repaid £50,000 to C. S was insolvent at that time or became insolvent as a result of the transfer. A few weeks later S ceased trading and went into creditors' voluntary winding-up. The respondent liquidators of S issued an application against C claiming that the payment of £50,000 made by S to C constituted a preference under the Insolvency Act 1986 s.239. C's evidence was that the loan had been made to P personally and that C was therefore a creditor of his and not of the company. The liquidators then made an alternative application claiming that the payment was, on that basis, a transaction at an undervalue within s.238 of the Act because C had not provided consideration. The district judge held that the payment was a transaction at an undervalue. The judge upheld that decision on appeal. C submitted that S had given consideration of £50,000 and received the consideration of the pro tanto discharge or release of a debt due to P so that the value of the consideration given by S was identical to the value of the consideration received by S at the time the payment was made.

HELD: On the payment of the £65,000 by C to S, P became a debtor to C for that amount and S became a debtor to P for that amount. On the payment of the £50,000 by S to C the debts of S to P and of P to C were, to that extent, respectively discharged. In so far as the payment of the £50,000 discharged the debt of S to P, S gave a preference to P within s.239. The payment was therefore voidable by the liquidators. On that basis the judge had held, applying *Phillips v Brewin Dolphin Bell Lawrie Ltd (Formerly Brewin Dolphin & Co Ltd)* (2001) 1 WLR 143, that that payment, since it fell within s.239, could not properly be treated as constituting valuable consideration for the purpose of taking the payment made by S to C outside the scope of s.238, *Phillips v Brewin Dolphin* considered. That reasoning had been challenged but it was not necessary to decide whether the consideration given by C should be left out of account as precarious because it was liable to be set aside as a preferential payment. The liquidators could rely on s.241(1)(d) to seek an order against C,

even though it had not been given the preference, as a person which received a benefit from the preference given by S to P. Therefore if C was to retain the £50,000 it had to show that it had received that sum "in good faith" within s.241(2). C's evidence failed to establish good faith. With his previous knowledge that the £65,000 had been paid into S's bank account and that P's companies had been in some financial difficulty, R must have known that it was likely that the £50,000 had been repaid by S and, moreover, at a time when it was insolvent, or he must at the least have shut his eyes to that possibility. An appropriate order for payment should be made and a declaration that the payment of £50,000 made by S to C constituted a preference given by S to C within s. 239 to s.241 of the 1986 Act.

Appeal dismissed.

Articles

The effect of a voluntary arrangement on the right to forfeit for non payment of rent

Discusses a forthcoming legal challenge to an attempt by the electrical retailer PRG Powerhouse Ltd to avoid its leasehold liabilities through a company voluntary arrangement (CVA) following the Court of Appeal decision in *Thomas v Ken Thomas Ltd*. Reviews the operation of such arrangements, the facts of the *Thomas* case, including whether a voluntary arrangement prevented a landlord from holding a lease forfeit for rent arrears which accumulated before the CVA was concluded, and the range of issues before the court. Notes its reasons for holding the lease could not be forfeited and considers the implications for the Power House litigation.

Landlord & Tenant Review L. & T. Review (2007) Vol.11 No.1 Pages 19-22 1/1/2007-1/2/2007 Phillip Sissons (Falcon Chambers)

Judicial assistance in cross-border insolvency at common law

Reviews the Privy Council decision in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* on whether a Chapter 11 plan confirmed by a New York court, concerning a group of companies registered in the Isle of Man and financed by loans raised on the New York bond market, should be recognised and bond holders' request for assistance in giving effect to its terms granted. Highlights the importance of the case for recognition and assistance at common law.

Company Lawyer Comp. Law. (2007) Vol.28 No.3 Pages 73-74 1/3/2007 Adrian Walters

The microeconomics of Chapter 11 – Part 1

The argument that chapter 11 professional fees are too high is largely dead, at least in academic circles. Several recent studies, admittedly based on rather humble sample sizes, have put the level of fees in large chapter 11 cases at about 2.5 percent of assets or less. This compares favourably with other significant corporate transactions.

(S.T. Lubben: (2007) 4(1), ICR, 31) 07.07.070

Administration expenses: T&N insurers denied

In *Freakley and others v Centre Reinsurance Company and others* [2006] UKHL45 the House of Lords was required to determine whether an insurer's right to recover the cost of handling claims should be categorised as an administration expense. In 2001, T&N was faced with a large number of tort claims arising out of the use of asbestos in its products. The company benefited from an asbestos liability policy with an excess of GBP 690m and an overall limit of GBP 500m. The policy allowed the insurers to elect to have the exclusive right to handle and defend

claims upon an 'insolvency event', which included a petition to appoint an administrator.

(S. Fuller: (2007) 4(1), ICR, 50) 07.07.071

Farepak Food and Gifts Ltd

On 15 December 2006, Mr Justice Mann heard an application for directions by the administrators of Farepak Food and Gifts Ltd ('the Company'). The application turned on whether certain monies held by the administrators were held on trust for the customers who had provided them and how, it at all, these monies should be distributed. The administrators felt that if customers were entitled under some trust, then those monies should be paid to them to be enjoyed during the Christmas period. The matter was argued in one day under heavy media scrutiny.

(W. Wilson: {2007 4(1), ICR, 52) 07.07.072

Avoiding secondary proceedings in EU insolvency regulation cases

In the four years since the introduction of the EU Insolvency Regulation (the 'Regulation'), much has occurred and been written to suggest that the flexible interpretation of the Centre of Main Interest provisions ('COMI') can add incremental value when used to permit the administrative if not substantive consolidation of a group of companies whose business activities are spread across Europe and which are intertwined to create significant mutuality of interest. One of the major difficulties faced by practitioners when attempting to carry out such a manoeuvre is the threat of secondary proceedings. This article looks at some of the ways in which that threat may be dealt with.

(S. Taylor: (2007) 4(1), ICR, 7) 07.07.073

Debtors' choice

The number of debtors entering into individual voluntary arrangements rather than using cheaper bankruptcy methods has risen since the introduction of the Enterprise Act. The author examines the reasons why.

(N. Smith: Legal Week, 8.2.07, 22) 07.07.074

International rescue

The boom in online publishing contributed to Europe's largest independent printing group facing debts in excess of £1bn. The authors describe the innovative steps taken to restructure the Polestar Group.

(R. Tett & C. Howard: Legal Week, 8.2.07, 26) 07.07.075

Increasing importance of Islamic finance products: implications for insolvency practitioners

It has always been a fundamental tenet of the practice of law that a lawyer must understand the business of his or her client. For insolvency lawyers, this has typically required the development of an in-depth understanding of how banks operate. As banks increasingly give way to asset-based lenders, hedge funds and private-equity firms as the core providers of commercial capital, insolvency lawyers have had to keep pace with the development of complex lending and recovery businesses. This trend has been spurred, in part, by the excess liquidity in

the global marketplace over the last few years that has allowed borrowers to become more demanding about what types of lending vehicles and products they wish to avail themselves of. Islamic finance is poised to achieve, or arguably already has achieved, this status in the Western world. A recent Economist article stated that Islamic financial products have grown at approximately 15% for the past three years, with Standard & Poor's estimating the total market at USD 400 billion. It also noted that DP World of Dubai's takeover of the international ports operator P&O, which had caused much political controversy in the US and Britain last year, was completely financed by an Islamic bond-like product called Sukuk. The purpose of this article is to provide insolvency practitioners with a primer on Islamic finance and the potential issues it may raise in an insolvency context.

(M. Uttamchandani & L. Lang: [2007] 4(1), ICR, 3) 07.07.027

International insolvencies: Parmalat

Europe's largest ever financial fraud at Parmalat raised significant issues, not only on a corporate criminal level, but also on an international insolvency level. This article deals with the domestic and international implications of the Parmalat case, including the application of the European Regulation on International Insolvencies and the bankruptcy protection measures adopted in jurisdictions outside of Europe.

(B Cova: (2007) 2, JIBL, 72) 07.06.048

Technical

First application for recognition under the Cross-Border Insolvency Regulations

The court has made a set of practical directions at the hearing of the Rajapaske recognition application. These will serve as guidelines for future recognition cases.

The application was made by a US chapter 7 trustee who had been appointed in respect of the estates of Mr and Mrs Rajapakse in US Bankruptcy Court proceedings (Northern District of Georgia). The US Trustee applied to the English courts for recognition as a foreign representative and sought further assistance in recovering property of the estate located in England.

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