The heavyweight

Comprehensive coverage of this month’s banking and insolvency law

September 2006
Law-Now

Bulletins published this month

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Banking

Cases

Alteration of cheques in breach of Gaming Act
Napoleons Leisure Ltd v Gurpul Singh
[2006] EWHC 1550 (QB) QBD (Judge Foster QC) 9/6/2006

The alteration of cheques in a casino to increase their amount, unless contemporaneous, involved a separate request for credit in breach of the Gaming Act 1968 s.16.

The appellant (S) appealed against summary judgment given in favour of the respondent (N) in respect of dishonoured cheques used to obtain gambling chips at N's casino. S had been a regular customer at the casino. He did not dispute that he had bought and enjoyed the benefit of £145,000 worth of chips nor that he had subsequently dishonoured the cheques. A cheque for £35,000 had been given by S to N in exchange for chips. The cheque had subsequently been increased to £55,000. The defendant had received £55,000 of chips. It was unclear when the value of the cheque had been increased. A second cheque had been written for £30,000 and subsequently increased to £50,000. It had been redeemed at the end of the session in which it had been increased. S had returned to the casino in the next session and had offered the same cheque for chips which he had received. S submitted that he had given cheques for £55,000 and £50,000 but, when those cheques had been tendered, he had only received chips of a lesser value so that there had been a breach of the Gaming Act 1968 s.16 and N could not sue on the cheques.

HELD: (1) Once a cheque had been given it could not be redeemed or taken back except in the circumstances defined in s.16(2A). The terms dealing with redemption illustrated the strict way in which a cheque was to be regarded in such circumstances. It could not be said that the alteration of the cheques was all one transaction. S completed one credit transaction and then asked for more. That was a separate request and could not be described as a redemption under s.16(2A). Therefore both alterations breached the words of s.16. The claim on the first cheque was dismissed. (2) The second cheque was different because, whatever the legality of the alteration, it had been returned to S. It was re-offered by him on the following session and the correct amount of chips had been given for it. A technical breach of s.16 on a previous occasion did not taint the cheque when the same parties chose to use it again on a subsequent occasion. The second passing of the cheque was within the provisions of s.16 and N was entitled to summary judgment on that cheque.

Appeal allowed in part.
Guarantee set aside

National Westminster Bank Plc v Angeli Luki Kotonou  
Ch D (Jules Sher QC) 22/5/2006

The defendant was entitled to have a guarantee set aside where he had been induced to enter into it by the claimant bank’s misrepresentation.

The claimant bank (N) claimed against the defendant (K) under a guarantee by K of the indebtedness to N of a company (C). C was the holding company of a group controlled by K. K had identified that the group required bridging finance of some £3 million. At that stage £500,000 of C’s indebtedness was unsecured because N had allowed a standby letter of credit to lapse. N wished to reverse that unsecured position before providing further long-term finance to the group. To secure a replacement loan following the lapse of the standby letter of credit K gave a guarantee limited to £500,000 and a second legal mortgage over the property he owned with his wife. The bank did not provide any additional facilities and the group quickly collapsed. The bank sought repayment and made a demand on K’s guarantee. K claimed that the guarantee should be set aside because it had been induced by fraudulent misrepresentations by N. K submitted that N had made representations that (1) it would investigate the circumstances of the lapse of the standby letter of credit and release K and his wife if N was found to be at fault; (2) if the guarantee and mortgage were executed, N would advance further funds; (3) if the replacement security was given, C’s account would not be passed to N's debt recovery department.

HELD:

1. On the evidence N had not made any representation that it would relinquish or not require any replacement security if it discovered that the lapse of the standby letter of credit was its own fault. K had made no mention of that allegation at various points in the history when, if it were true, he would have been bound to have mentioned it.

2. N never represented that it intended to make further advances once the security documents had been executed. K had pressed for the execution of the new security to be conditional on the grant of further facilities but N had always rebuffed him. N had made it clear that until the loan was secured and up-to-date financial information was provided, any request for funding would not even be considered.

3. N had indicated that if K did not provide the replacement security C’s account would be transferred to the debt recovery department. The corollary of that was that if the security was provided the account would not be transferred. That representation was made to encourage K to sign the replacement security. By the time the security documents were executed N had changed its mind and did intend to refer the account for transfer. It was important to K that the account was not transferred to new personnel but remained with the employees of N with whom K had a relationship. N’s decision to refer the account for transfer was an important piece of information for K to
have when deciding whether to sign the security documents. By failing to correct the representation N made a material misrepresentation. That misrepresentation was negligent and not fraudulent but meant that the guarantee had to be set aside, Davies v London and Provincial Marine Insurance Co (1878) LR 8 Ch D 469 applied.

Judgment for defendant.

For related proceedings see Kotonou v National Westminster Bank Plc (2006) EWHC 1021 (Ch) and National Westminster Bank Plc v Kotonou (2006) EWHC 1785 (Ch)

Improper allegation of fraud results in split costs order


[2006] EWHC 1785 (Ch) Ch D (Jules Sher QC) 19/9/2006

Where a guarantor had succeeded in setting aside a guarantee given to a bank but had improperly and unreasonably raised allegations of fraud, the justice of the case required a split costs order under which the bank would pay 50 per cent of the guarantor’s costs and the guarantor would pay 50 per cent of the bank’s costs.

The applicant (K) sought his costs of mortgage proceedings on an indemnity basis and his costs of guarantee proceedings in which he had succeeded in having his guarantee to the respondent bank (N) set aside. K had given a guarantee to N in respect of the indebtedness of a company he controlled and a second legal mortgage over his matrimonial home. Proceedings to determine the proper interpretation of the mortgage had been concluded in favour of K. K alleged in the guarantee proceedings that the guarantee had been induced by fraudulent misrepresentations: that the guarantee would be released or relinquished in certain circumstances; that further facilities would be made available if the guarantee was given; and that if the guarantee was given the account would not be transferred to N’s debt recovery department. K succeeded only on the last issue on the basis that before the guarantee was signed the bank had changed its mind and intended to refer the account for transfer and that that was a material matter of which K should have been made aware. N’s misrepresentation was negligent and not fraudulent. The allegation on which K succeeded had been raised by amendment on the second day of the trial.

HELD: (1) N had acted perfectly properly in the conduct of the litigation. It had lost the mortgage proceedings and had to pay K’s costs but the claim for indemnity costs was hopeless. (2) K had won the guarantee proceedings and the normal rule was that the unsuccessful party would be ordered to pay the successful party’s costs. However, an order for N to pay K’s costs would be grossly unjust. The instant case justified departing from the normal rule. K had fought the case on a number of distinct bases on which he had lost. K’s initial complaints had been crystallised by counsel into the misrepresentation claims. It had been wrong for K to assert fraud and that had put N to considerable additional and unnecessary expense. The trial would have been much shorter if the only defence had been the
misrepresentation on which K had succeeded. The time devoted to the first alleged misrepresentation had been out of all proportion to its significance. The separate issues on which K lost and the improper and unreasonable raising of allegations including fraud justified a departure from the normal rule. An order simply depriving K of some of his costs would not meet the justice of the case. It was right to make a split costs order. It was not right to order K to pay the costs down to the time of the amendment to plead the representation on which he succeeded. The evidence supporting that amendment only emerged on disclosure. At least half the time and costs incurred from the beginning of proceedings to the end was wasted by the additional unsuccessful issues raised by K. Accordingly, N was ordered to pay 50 per cent of K’s costs and K was ordered to pay 50 per cent of N’s costs. On a detailed assessment that would mean that there would be a net payment by K because N’s costs were likely to be greater than his.

Judgment accordingly.

Taxation of securitisation

MBNA Europe Bank Ltd v Revenue and Customs Commissioners

[2006] All ER (D) 104 (Sep) [2006] EWHC 2326 (Ch) Chancery Division Briggs J 22 September 2006

The transfer of receivables for the purpose of their being used in the provision of a securitisation service for the transferor did not involve a supply for VAT purposes.

The appellant bank concerned in the business of providing credit card facilities for its customers, employed a securitisation scheme, whereby the debts payable by its credit card holding customers (receivables) were made available for the purpose of raising working capital. The appellant assigned its receivables, in return for a set consideration governed by the terms of the agreement, so that they were beneficially owned by a distinct legal entity, in the instant case, a trust company established solely to facilitate the securitisation scheme. Contained within that agreement was a continuing obligation upon the appellant to service the accounts of the credit card holders. That third party beneficial owner then, directly or indirectly through further entities, borrowed in capital markets, using the assigned receivables as security, and passed the proceeds back so as to temporarily swell the cash flow, and, therefore, the working capital of the appellant. Several issues concerning the appellant’s VAT liability, under the Value Added Tax Act 1994 and the Value Added Tax Regulations 1995, SI 1995/2518, were raised by the Commissioners in relation to that securitisation scheme including, inter alia, whether the assignment methods, employed by the appellant, constituted supplies within the meaning of the VAT regime, and whether the supply of services by the appellant, in performing its obligation under the terms of the assignment agreement to continue to service the accounts of its credit card holders, incurred attributable inputs, on the basis that the payment received from the credit card holders, for the service of their accounts, had already incurred attributable inputs. Those questions were
determined against the appellant by VAT tribunal. The appellant appealed.

The issues on appeal were, inter alia, (i) whether the assignments of the receivables by the appellant should have been classed as supplies; and (ii) whether the assessment of the appellant’s VAT liability should have regarded the continued servicing of the credit card accounts as having incurred attributable inputs.

HELD:

(1) The appellant’s assignment of the receivables constituted a new class of exception to the general rule that any transaction, whereby goods or services were transferred or provided for consideration, was a supply.

In the instant case, the assignments were, viewed separately from the rest of the securitisation scheme, capable in theory of having constituted supplies, but because those assignments were no more than a necessary pre-condition to the supply of a securitisation service to the appellant, performed by the third part entities created specifically for that purpose, they were thereby deprived of the character of a supply by the appellant.

(2) Where a single business activity constituted the supply of a service to two different persons who each paid separately for what they had received, there existed no reason why the inputs incurred in the carrying out of that single activity should have been solely attributable to the supply to the one of them.

In the instant case, the fact that the supply had consisted of a promise to go on making a continuing supply to a third party might have been relevant to the fair and reasonable apportionment of the inputs as between each supply, but that had not justified the conclusion that no parts of the input could have been attributed to the supply to the promisee. Accordingly, the tribunal had erred in its approach and, accordingly, the assessment question would be remitted to the tribunal for reconsideration.
Legislation

Distrain’s possible abolition

Distrain may be abolished by the draft Tribunals Courts and Enforcement Bill.

Landlords are likely to lose the most effective method of collecting rent arrears. The draft Tribunals Courts and Enforcement Bill proposes to abolish the right to distrain. The Bill proposes to replace distrain with a statutory procedure to be known as commercial rent arrears recovery or CRAR. CRAR will share many of the features of distress but with crucial differences likely to make the remedy less effective. Some of the differences are:

- Its use is restricted to commercial premises (i.e., not mixed or residential).
- Only rent arrears can be recovered. Service charges or insurance contributions cannot be recovered even if these are defined as rent in the lease.
- The tenant must be given notice of the intention to take action under CRAR and it may apply to the court to set aside the notice.
- There will be a minimum level of rent arrears for which CRAR may be used. In calculating the minimum amount the tenant may be able to set-off any claims it has against the landlord against the arrears.

The ability of a landlord to seek payment from a subtenant where the tenant is in arrears is preserved.

While recognising the disadvantage that landlords face compared to other creditors in that they may be unable, unilaterally, to bring the lease to an end, concerns that distress is contrary to human rights legislation and disproportionate lie behind the draft Bill.

The Bill is currently undergoing consultation.

This article was published on Law-Now, the firm’s free electronic information service at www.law-now.com.

Tracking legislation

The September issue of CMS CMCK’s Tracker, a guide to the status of bills of interest to commercial organisations has been published.

http://www.law-now.com/law-now/2006/trackersept06.htm

EU Proposal to amend supervisory review process for cross-border mergers and acquisitions in relevant banking, insurance and securities Directives

Discussion paper

This discussion paper considers the rationale for reform of the existing regime, how this reform fits with the domestic consultation document issued in March this year on the reform of the UK’s controllers regime, and seeks views on the content of the Commission’s proposal.

Articles

Consumer credit
Under starter's orders
Outlines the changes to the Consumer Credit Act 1974 and the Financial Services and markets Act 2000 introduced by the Consumer Credit Act 2006.
Explains provisions relating to:

- (1) agreements exempt from the abolition of the GBP 25,000 limit;
- (2) the regular provision of statements;
- (3) procedures for serving notices of arrears, default and interest;
- (4) the definition of credit information services;
- (5) charges for licensing; and
- (6) extended jurisdiction for the Financial Ombudsman Service over consumer credit disputes.


Letters of credit
The autonomy principle of letters of credit: an illegality exception?
Article supports the recognition of an illegality exception to the autonomy principle in relation to letters of credit. Distinguishes between cases where the letter of credit is illegal and where the underlying contract is illegal but the letter of credit is sound, and outlines the current law within the UK compared to that under the US Uniform Commercial Code and Canadian law. Considers arguments for the recognition of the exception and the limits which should be imposed.


Fixed and floating charges
Replacing the default priority rule for secured creditors - some reservations
Evaluates Law Commission proposals in the 2005 report entitled Company Security Interests for replacing the priority rules applicable to secured creditors with a rule based upon time of notice filing. Argues that the existing regime is based upon a default system of priority by security strength which does not undermine the pari passu rule of insolvency distribution and considers why plans to give fixed and floating charges equal status may be unfair. Reviews the origins of the priority rule based on time of notice filing, discusses why it would not produce the same perception of unfairness in the US and explains why the existing UK system should be retained and what the potential consequences may be.

Litigation

No admission

An admission of debt under the Limitation Act 1980 is not protected by the without prejudice rule after a recent House of Lords’ decision says the author. This article discusses *Bradford & Bingley v Rashid [2006] UKHL 37* and the admission of debt or without prejudice communication?

(E. Sautter: NLJ, 8.9.06, 1342) 06.38.019

Money laundering

Suspicious dealings

Discusses the clarification on the position of banks under the Proceeds of Crime Act 2002 provided by the Court of Appeal judgment in *K Ltd v National Westminster Bank Plc* that a customer was not entitled to an injunction obliging a bank to comply with its instructions to make an onward payment of money received in its account, where the bank suspected the money was criminal property. Assesses the reasonableness of the bank’s suspicion and the adequacy of the bank’s disclosure of the basis of suspicion.


Securitisation

Developing a franchise: could securitisation be a serious funding option for franchisors in the United Kingdom?

Reflects on the benefits of securitisation for a range of franchisors, the reasons for its limited popularity and its potential to become a serious funding option. Reviews the legal structure of a typical franchise, its capital requirements, the potential attractions of such securitisation and the extent to which a franchise structure may influence the franchisor’s willingness to seek external funding. Discusses the operation of a typical securitisation, including the ways in which it may be legally customised, its range of advantages, its appeal to investors and the remaining barriers to securitisation within the financial sector.


Taxation

Indofoods - Christmas come early?

The Court of Appeal judgment in *Indofood International Finance Ltd v JP Morgan Chase Bank NA London Branch* on whether the issuer of loan notes was entitled to redeem them under the terms of the agreement when the double tax treaty between Mauritius and Indonesia was abolished, or whether reasonable measures could have been taken to restructure, rely on another treaty and avoid the extra tax. Examines the meaning of beneficial ownership under the anti avoidance rules in double tax treaties, and discusses the implications for international finance deals under UK tax treaties.


Unfair contracts

Limits to The Unfair Contract Terms Act

This article analyses the role of the Unfair Contract Terms Act 1977 and to just
which categories of clause the Act applies in the light of Keen v Commerzbank AG and Baker v Clark.

(R. Lawson: Bus LR, 8/9.06, 202)
06.38.085
Technical

Companies Bill
Issues on statutory reversal of Leyland Daf

Understandably, it is an issue for lenders that the expenses of winding up are going to be paid before they can recover under their charge.

The Financial Law Committee of the City of London Law Society has produced a paper in response to “Policy Proposals for the Rules to be made Pursuant to the Proposed New Section 176ZA to be added to the Insolvency Act 1986”.

The note sets out the comments of the Financial Law Committee on the policy proposals circulated by The Insolvency Service with its letter of 16 May 2006 on the rules to be made under the new section 176ZA of the Insolvency Act 1986 (“IA 86”) to be introduced by the Companies Bill.

New Section 176ZA will provide that, in England and Wales, the expenses of a winding up will, where the unencumbered assets are not sufficient to satisfy those expenses, be paid in priority to unsecured creditors, preferential creditors and floating charge holders.

The paper considers the proposals in particular from the perspective of lenders to companies who extensively rely on floating charges and whose proprietary interests will be significantly affected by section 176ZA.

22 September 2006

Environmental
DEFRA issues new circular on contaminated land

This bulletin was issued on www.Law-Now.com on 22 September 2006.

The statutory provisions dealing with contaminated land contained in Part IIA of the Environmental Protection Act 1990 need to be read in conjunction with the statutory and other guidance issued by, in the case of England, DEFRA.


Circular 01/2006 now combines the guidance on contaminated land with new specific guidance on radioactivity and the extension of Part 2A to address radioactivity. The previous guidance has been updated in the non-statutory sections to take account of developments since 2000, including the Contaminated Land (England) Regulations 2006 which came into force on 4th August 2006, but is otherwise substantively unchanged in most respects. DEFRA has also decided to change the way it refers to Part IIA – now referring to Part 2A.

Section 78YC of Part 2A excluded harm or pollution of controlled waters so far as attributable to the radioactive properties of any substance from the regime. However, it was always contemplated that radioactive contamination would be brought into the Part 2A regime in due
course and the section also provided for the making of regulations to enable that to occur. Following the implementation of the legislative provisions bringing radioactive contaminated land into the Part 2a regime in August 2006 revisions to the guidance were required.

The guidance does not address the position regarding the unimplemented provisions of section 86 of the Water Act 2003 that will introduce the word “significant” into the water pollution limb of the definition of contaminated land. The provisions remain unimplemented in England. They were implemented in Scotland in April 2006.

Mental Capacity

Court of Protection and Office of the Public Guardian Fees

The Mental Capacity Act 2005 received Royal Assent on 7 April 2005.

The Department for Constitutional Affairs (DCA), the Department of Health and the Welsh Assembly Government are working together to implement the Act in April 2007.

The Act establishes a new specialist court, to be known as the Court of Protection, with a new jurisdiction to deal with decision-making for adults (and in certain circumstances persons under the age of 16) who lack mental capacity.

The Act also establishes a new statutory office holder, the Public Guardian, with a range of statutory functions set out at Section 58 of the Act. From April 2007, he will be supported by the Office of the Public Guardian, an executive agency of the DCA, and the Public Guardianship Office will cease to exist.

This consultation paper seeks views on the proposals for this new fee regime. The paper looks at 4 areas of the proposed fees to be charged by the Court of Protection and Office of the Public Guardian in turn: registration of Enduring and Lasting Powers of Attorney and register searches; the Court Reporting Service; fees in respect of the Court of Protection; and fees relating to deputies and their supervision.


DCA, September 2006

Risk issues

The pricing of portfolio credit risk

Equity and credit-default-swap (CDS) markets are in disagreement as to the extent to which asset returns co-move across firms. This suggests market segmentation and casts ambiguity about the asset-return correlations underpinning observed prices of portfolio credit risk. At present, judicious assumptions about this valuation can be used to reconcile observed prices with asset-return correlations implied by either equity or CDS markets. These conclusions are based on an analysis of tranche spreads of a popular CDS index, which incorporate a rather small premium for correlation risk.

The document is available at http://www.bis.org/publ/work214.pdf

Including estimates of the future in today's financial statements

This paper explains why the question is how, not if, today's financial statements should include estimates of the future. Including such estimates is not new, but their use is increasing. This increase results primarily because standard setters believe asset and liability measures that reflect current economic conditions and up-to-date expectations of the future will result in more useful information for making economic decisions, which is the objective of financial reporting. This is why standard setters seem focused on fair value accounting. How estimates of the future are incorporated in financial statements depends on the asset and liability measurement attribute, and on financial reporting definitions of assets and liabilities. The present definitions depend on identifying past transactions or events that give rise to expected inflows or outflows of economic benefits and, for inflows, control over the expected benefits. Thus, not all expected inflows or outflows of economic benefits are recognised. Note disclosures can help users understand recognised estimates, and can provide information about unrecognised estimates. Including more estimates of the future in today's financial statements would result in an income measure that differs from today's income, but arguably provides better information for making economic decisions.

The document is available at http://www.bis.org/publ/work208.pdf


Fair value accounting for financial instruments: some implications for bank regulation

The author identifies issues that bank regulators need to consider if fair value accounting is used for determining bank regulatory capital and when making regulatory decisions. In financial reporting, US and international accounting standard setters have issued several disclosure and measurement and recognition standards for financial instruments and all indications are that both standard setters will mandate recognition of all financial instruments at fair value. To help identify important issues for bank regulators, the author briefly reviews capital market studies that examine the usefulness of fair value accounting to investors, and discuss marking-to-market implementation issues of determining financial instruments' fair values. In doing so, the author identifies several key issues. First, regulators need to consider how to let managers reveal private information in their fair value estimates while minimising strategic manipulation of model inputs to manage income and regulatory capital. Second, regulators need to consider how best to minimise measurement error in fair values to maximise their usefulness to investors and creditors when making investment decisions, and to ensure bank managers have incentives to select investments that maximise economic efficiency of the banking system. Third, cross-country institutional differences are likely to play an important role in determining the effectiveness of using mark-to-market accounting for financial reporting and bank regulation.
Do accounting changes affect the economic behaviour of financial firms?

This study examines whether accounting changes result in changes in the economic behaviour of financial institutions. The results of several papers examining how banks respond to accounting changes that affect their regulatory capital ratios are consistent with Furine's (2000) summary that "capital regulation, broadly speaking, can significantly influence bank decision-making." These papers do not attempt to disentangle the effects of capital regulation versus market discipline. This paper examines banks' response to recent changes in accounting for Trust Preferred Securities that affect how these securities are reported in the balance sheet but do not change the calculation of Tier 1 capital. This provides a good setting to examine whether accounting changes induce changes in banks' economic behaviour in the absence of an effect on regulatory capital. The author tests five hypotheses related to banks' decisions to issue Trust Preferred Stock during the period from 1997 through 2004. Specifically, the author examines whether there was an overall decrease in banks' propensity to issue these securities after the accounting change, whether publicly traded banks and those that access the external debt markets were more likely to issue these securities before the accounting change but not after, and whether banks with low regulatory capital ratios and with high marginal tax rates were more likely to issue these securities both before and after the accounting change. The results suggest that accounting changes can lead to changes in
banks’ economic behaviour even when the change in accounting does not affect regulatory capital calculations. This is consistent with bank managers acting as if they are concerned with the markets’ response to the numbers reported after the accounting change.

The document is available at [http://www.bis.org/publ/work211.pdf](http://www.bis.org/publ/work211.pdf)


Risk and liquidity in a system context

This paper explores the pricing of debt in a financial system where the assets that borrowers hold to meet their obligations include claims against other borrowers. Assessing financial claims in a system context captures features that are missing in a partial equilibrium setting. It is possible for spreads to fall as debts rise, as debt-fuelled increases in asset prices and stronger balance sheets reinforce each other. Conversely, it is possible that deleveraging leads to increases in spreads, as is often observed during crises.

The document is available at [http://www.bis.org/publ/work212.pdf](http://www.bis.org/publ/work212.pdf)


Risk measurement plays a crucial role in the measurement, verification and validation of valuations. It is the basis for giving more prominence to risk and measurement error information in public disclosures. And it could act as more of a focal point in the design of accounting standards, as greater consistency between sound risk management practices and accounting standards can help to narrow the wedge between accounting and underlying economic valuations.

The document is available at [http://www.bis.org/publ/work213.pdf](http://www.bis.org/publ/work213.pdf)


Advances in risk measurement technology have reshaped financial markets and the functioning of the financial system. More recently, they have been reshaping the prudential framework. Looking forward, they have the potential to reshape financial reporting too. Recent initiatives to improve financial reporting standards have brought to the fore significant differences in perspective between accounting standard setters and prudential authorities. Building on previous work, we argue that risk measurement and management technology can be instrumental in bridging this gap and, by the same token, in improving financial reporting.
Notices

New public access to statements of claim will affect banks

Court Files: Rights of Access by Non-Parties

A change to the current rule on third-party access to claim forms at court will widen the scope to allow third parties to see Statements of Claim. This could be of concern to banks. It is possible to apply to court to request a restriction on access by third parties and a bank may need to consider in each case whether the circumstances are such that an application should be made.

The change, introduced as a result of campaigning by the likes of Associated Newspapers, News International and Trinity Mirror, comes into effect on Monday, 2 October 2006.

It appears that the new rule will apply whenever the Statement of Claim was filed.

Website on Conflict of Laws

We have been told about the launch of CONFLICT OF LAWS .NET, which will operate in association with the Journal of Private International Law.

The website, which is freely accessible, will provide a forum for information on developments in private international law from around the world. It also contains information on the publication of books and articles, a discussion forum and a directory of experts.

The website coordinator is Martin George, University of Birmingham (mpg514@bham.ac.uk). Martin would be very pleased to hear from colleagues, including research postgraduates, who are interested in posting news and views in private international law as a national editor for their jurisdiction.

http://www.conflictoflaws.net/

The sale of lifetime mortgage products – mystery shopping results

The FSA wanted to get an indication of whether firms were providing consumers with suitable advice. This was achieved by commissioning two separate waves of qualitative mystery-shopping research.

The purpose of this report is to set out the detailed findings of both research exercises and to draw conclusions based on the assessments completed. It is important to note that this research looked only at sales practices surrounding lifetime mortgages and not home reversion schemes, because the latter do not currently fall within the FSA regulatory regime.

The full text is available at http://www.fsa.gov.uk/pubs/consumer-research/crpr53.pdf

(FSA, September 2006)

Consumers and mortgage disclosure documentation

Statutory regulation of mortgage lenders and intermediaries began on 31 October
2004 when these firms became subject to the FSA’s regulatory regime, and in particular the Mortgage Conduct of Business rulebook (MCOB). A key requirement of MCOB is the provision of standardised disclosure documents - the Initial Disclosure Document (IDD) and the Key Facts Illustration (KFI) – to consumers. These two documents aim to help consumers better understand the services on offer and the features and risks associated with mortgages that they take out, including the affordability risks. The provision of these documents is mandatory. The FSA also produce a factsheet - "You can afford your mortgage now, but what if…?" – that is designed to inform consumers of the affordability risks of taking out a mortgage. This factsheet is referred to as the ‘Affordability Leaflet’ throughout this report. It is not mandatory to provide the Affordability Leaflet. The FSA commissioned BMRB Social Research to undertake a qualitative study with consumers who were either in the market for a mortgage, or who had recently taken out a mortgage, to explore consumer understanding of these three documents.

The full text is available at http://www.fsa.gov.uk/pubs/consumer-research/crpr54.pdf

(Consumer Research 54: FSA, September 2006)
Insolvency

Cases

Injunction to stop winding up refused where rent due
Re A Company NO.0005945 of 2006)
Ch D (Pumfrey J) 25/8/2006
An application for an injunction to restrain the presentation of a winding up petition following a statutory demand for outstanding rent was refused where under the terms of the relevant leases the rental sums remained due.

The applicant company (C) applied for an injunction to restrain the presentation or advertisement of a winding up petition following a statutory demand made by the respondent company (L). According to L, the sums it had claimed in the statutory demand were outstanding rent for a quarter in respect of two units of which L was the landlord and C was the business tenant. C contended that it was not liable to pay the sums because it had given notice to L of its intention to determine the leases in respect of the units, and that L had agreed to terminate them prior to the date specified in the leases. L contended that the notices were invalid and that the leases were not terminated. L also contended that there was no question of apportionment of C’s rent relating to that portion of the lease subsisting to expiration, and therefore the full rental sum fell due.

HELD: On the proper construction of the leases, it was not possible to apportion rent to a lesser period than a quarter on expiry of the term. Whilst there was a triable issue as to whether the leases had been validly terminated, that was not a matter for the court in the instant insolvency proceedings. In those circumstances, the application was refused.

Application refused.

Fraud and charging order
Daniel John Murphy (T/A D J Murphy solicitors) v (1) Roy Harold Goss (2) Official Receiver
CC (Swansea) (Judge Wyn Williams QC) 1/6/2006
Where a bankrupt defendant had sought to avoid the enforcement of a charging order by fraudulently claiming that the charged property had been sold to a non-existent person, the charging order would be enforced without further delay and the case passed to the appropriate body for criminal investigation of the defendant’s activities. The claimant firm of solicitors (M) sought to enforce a charging order against the first defendant (G).

M had acted for G in bankruptcy and other proceedings. G had not paid the consequent professional fees and to secure
them M obtained a charging order absolute against a property, believing that G was its registered owner and holder of the beneficial interest in it. The order could only be enforced with the consent of the trustee in bankruptcy and he obtained possession of the property. G’s new solicitors put forward an offer to buy it, purportedly from a purchaser (H), and the trustee accepted it. The deed of assignment was purportedly signed by the trustee, G and H, and duly witnessed. Normally G would thereupon have been discharged automatically from his bankruptcy but, on account of his non cooperation with the trustee, the court had suspended his discharge. M acted to enforce the charging order and demanded proof of H’s existence. G’s solicitors sent a statement that H had died recently in the United States and an apparent copy of H’s passport. The Identity and Passport Office found no trace of a passport in H’s name and stated that the number of the apparent copy was that of G’s passport. H was never represented in the proceedings. M argued that H did not exist and that the assignment was a nullity.

HELD: G’s evidence, both written and oral, amounted to a case that was incredible and it would be a grave injustice to M to adjourn its application for enforcement any further. For the previous year G had known that M was casting serious doubt on the existence of H and that M was asserting on that basis that the assignment was a nullity. There was overwhelming evidence that H did not exist. G’s whole story was completely ridiculous and a last attempt by him to ward off the inevitable conclusion that he had forged the passport to create a person to whom his property could then be sold. Evidence regarding the witnessing of the deed led to the conclusion that it too was a forgery. The deed was not merely to be set aside but was a nullity. Further G had engaged in fraud and the case would be passed to the appropriate body for criminal investigation of G’s activities.

Judgment for claimant.

Freezing orders against judgment debtors of company pending winding-up order

Revenue & Customs v (1) Clayton Egleton (2) Trade Eazy Ltd (3) Shaheed Vali (4) Frankhhameed Rahman [2006] EWHC 2313 (Ch) Ch D (Briggs J) 19/9/2006

The court had jurisdiction to make a freezing order against a potential debtor of an individual or company against whom the claimant had a cause of action on the footing that enforcement of a judgment against the defendant might lead to its liquidation or (if an individual) bankruptcy whereupon the liquidator or trustee in bankruptcy would be able to pursue claims against third parties. If freezing orders were to be obtained against potential judgment debtors of a company pending the making of a winding-up order, it should be a provisional liquidator rather than a petitioning creditor who sought and obtained them.

The applicant Customs applied for the continuation of freezing injunctions against the respondents. Customs alleged that the second respondent company (T) and another company (C) had been involved in a large-scale VAT missing trader and/or carousel fraud. The first respondent was the sole director and controller of C and the other respondents
were directors of T, one being also a shareholder. Customs had presented a petition for the winding up of C based on unpaid VAT of over £35 million. Customs had obtained freezing injunctions against the respondents on a without notice application on the basis that they had all been improperly implicated in the fraud with the consequence that C had substantial claims against them which would be likely to be pursued by a liquidator of C, and that the liquidator would have his own claims against them under statute if C was ordered to be wound up. Customs did not allege that it had any claims of its own against any of the respondents, and although Customs gave a cross-undertaking in damages it did not propose to commence any proceedings of its own against them. The respondents submitted that the freezing injunctions had been made without jurisdiction, or ought not to have been made as a matter of discretion, because Customs was pursuing no cause of action for a money judgment for the effective enforcement of which a freezing order would preserve a fund, and because the respondents were not alleged to hold or to have custody over assets belonging to C.

HELD: (1) The particular nature of the relief sought by means of the presentation of a creditors’ winding-up petition did not disable the petitioner from asserting that it was pursuing a cause of action for the purpose of conferring jurisdiction on the court to grant appropriate interim relief, whether by way of freezing order or otherwise, Pickering v Lynch (2002) 2 BCLC 634 and Ravenhart Service (Holdings) Ltd, Re (2004) EWHC 76 (Ch) , (2004) 2 BCLC 376 applied. An interim order preventing the dissipation of the company’s assets pending the hearing of the petition was within the court’s jurisdiction as a means of preserving the effectiveness of any order which might be made on the hearing of the petition, Mercantile (Europe) AG v Aiyela (1993) 3 WLR 1116 applied. (2) A freezing injunction could be made against persons in relation to whom the claimant asserted no cause of action and sought no money judgment, but in relation to whom there was an arguable case that assets held in their name or under their control were in truth beneficially owned by the defendant against whom the claim was made, TSB Private Bank International v Chabra 2 All ER 245 and C Inc Plc v L (2001) 2 All ER (Comm) 446 applied. The jurisdiction to grant freezing orders against third parties was not rigidly restricted by the Chabra requirement to show that, at the time when the order was sought, the third party was already holding or in control of assets beneficially owned by the defendant, Cardile v LED Builders Pty Ltd (1999) HCA 18 considered. The court had jurisdiction to make a freezing order against a third party as the potential debtor of a company against which the claimant had a cause of action since enforcement of a judgment against the company might lead to its liquidation and an action by the liquidator against the third party. There was no need to show a sufficient causal connection between the two claims, Cardile and C Inc considered. 

(3) As a matter of discretion the court would only continue the freezing orders until a liquidator had the opportunity to consider taking proceedings and himself apply for freezing orders. If freezing orders
were to be obtained against potential judgment debtors of the company pending the making of a winding-up order, it should be a provisional liquidator rather than a petitioning creditor who sought and obtained them.

Judgment accordingly.
Bankruptcy

Bankruptcy basics - serving bankruptcy statutory demands

Advises creditors on the requirements for the service of statutory demands on debtors, recommending that this be done personally or on a personal basis by representatives and giving alternatives if this cannot be done. Discusses the procedural requirements, including the provisions of the CPR, evidence needed for judicial approval and the process which should follow the serving of a demand.


Bankruptcy restrictions

The Enterprise Act 2002 introduced a new and more liberal regime for the discharge of bankrupts. With effect from 1 April 2004, a bankrupt is discharged at the end of the period of one year beginning with the date on which his bankruptcy commenced or earlier if the Official Receiver files with the court a notice stating that investigation of the bankrupt’s conduct and affairs is either unnecessary or has been concluded, in which case the bankrupt is discharged when the notice is filed. As a counter-balance to the new provisions governing discharge, the Enterprise Act 2002 introduced post-discharge restrictions in the form of bankruptcy restrictions orders (‘BROs’) and bankruptcy restrictions undertakings (‘BRUs’) where the conduct of the bankrupt justifies the making of such orders or the giving of such undertakings.

(A Mithani & J Bamford: [2006] 22 (4) IL&P, 123)

International insolvency

Land, security in land and the European Regulation on Insolvency Proceedings 2000

The author examines the treatment of land in the context of the European Insolvency Regulation, a recent and important addition to the range of European instruments dealing with resolution of conflict of laws problems, and looks at the issue of recognition of security involving land in cross-border proceedings.

(P. Omar: Conv, 7-8.06, 353) 06.38.044

Cross-border insolvency law in the UK: an embarrassment of riches

The following article critically evaluates the three systems currently in force for dealing with cross-border insolvencies in the UK. In reviewing s 426 of the Insolvency Act 1986, the European Regulation on Insolvency Proceedings 2000 and the UNCITRAL Model Law on Cross-Border Insolvency 1997, the article highlights areas of possible conflict and suggests
some resolutions between the three instruments.

(PJ Omar: [2006] 22(4) IL & P, 132) 06.36.038

COMI manifesto

The introduction of new regulation has gone some way to defining businesses’ centres of main interest, but there’s still some explaining to do. Shierson v Vlieland-Boddy [2005] EWCA Civ 974: Eurofood IFSC.

(J Pickering: Lawyer, 11.9.06, 36) 06.38.097

Pre-packs

Pre-packed administrations: bargains in the shadow of insolvency or shadowy bargains?

This article looks at the development of the pre-pack, identifies the issues raised by this device and considers how insolvency law might respond to the burgeoning popularity of such agreements. A particular concern will be whether the advent of the pre-pack calls for a rethinking of current approaches to the protection of those interests that are affected by corporate troubles.

(V Finch, JBL, 9.06, 568) 06.36.077

Property

Tenant insolvency – CVA – value of landlord’s claim

In the matter of Newlands (Seaford) Educational Trust Chittenden and others v Pepper and others [2006] EWHC 1511 (Ch); [2006] 27 EG 234 (CS) 26 June 2006. The company voluntary arrangement (CVA) was affected by the multiple retailer, PowerHouse, evidently in an effort to offload liability under some 31 underperforming outlets, in order to rescue and keep in business some 53 outlets. Landlords, many of them institutional, are so concerned by the use of a CVA that a major challenge to set it aside has been launched. This article reports on a recent case where similar types of issues arose for consideration.

(Comm Leases, 08.06, 1147) 06.35.063

Schemes of arrangement

Schemes of arrangement back on course

Outlines the reasoning behind the separation of future and accrued claims under schemes of arrangement as required by the Companies Court in Re British Aviation Insurance Co Ltd. Examines arguments for "incurred but not yet reported" claims and notified claims to be treated in one single meeting rather than separately, discussing the Companies Court ruling in Re Sovereign Marine & General Insurance Co Ltd, also referred to as the WFUM Pool decision.


Securitisations

Recharacterisation in "true sale" securitisations: the "substance over form" delusion

Discusses the uncertainties surrounding the UK courts’ approach to whether, in the event of the originator's insolvency, a transfer of receivables to a special purpose vehicle was a true sale or merely a secured
loan and the potential consequences of such a recharacterisation. Examines how recharacterisation has been influenced by the courts' inconsistent approach to the form and substance of transactions, and whether an excessive reliance on the parties' intentions may produce a dependence on form over substance.

Considers the obstacles to applying the strategy used to differentiate between fixed and floating charges to true sale recharacterisations and suggests a possible solution.


**Transactions at undervalue**

Price check

_Hill v Spread Trustee Company_ does much to clarify the oft-debated Section 423 of the Insolvency Act.

(C. Newman: Lawyer, 11.9.06, 42)

06.38.091

**US jurisdiction**

US bankruptcy court gains extraterritorial jurisdiction

Comments on the US Court of Appeals Fourth Circuit ruling in *French v Liebmann* on whether the US court had jurisdiction over offshore assets, in deciding whether the US bankruptcy trustee could recover real estate in the Bahamas which it was alleged the owner, who was resident in the US, had transferred to her children who were also US residents whilst she was insolvent and in breach of the provisions of the US Bankruptcy Code.

Chapter 15 database

The US have set up a website www.chapter15.com to create a database of decisions and related information.

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