C/M/S/ Cameron McKenna

# The heavyweight

## Comprehensive coverage of this month's banking and insolvency law

June 2008

# Looking forward

## Developments scheduled for the month ahead

| Date | Item | Significance |
|---|---|---|
| June and September 2008 | **Financial Stability Forum - bank solvency** | Interim and more detailed reports expected. |
| 3 July 2008 | **Bank charges case** | OFT required to argue whether bank borrowing charges are unfair and how much compensation customers should receive. |
| 1 August 2008 | **Consultation paper on CESR's/CEBS' technical advice to the European Commission on the review of commodities business** | Paper gives an overview of the commodity derivatives markets. |
| September 2008 | **UNIDROIT Convention on Substantive Rules regarding Intermediated Securities.** | Convention is due to be adopted. |
| 30 September 2008 | **Green Paper on effective enforcement of judgments in the EU** | Comments sought on transparency of debtors' assets |
| Anticipated date in force, 1 October 2008 | **Legislative Reform (Consumer Credit) Draft Order 2008** | New exemption from regulation under the 1974 Act for certain consumer credit agreements. |

# Table of Contents

# Banking

# Cases

## IB4AI LLC v Auriel Capital (Cayman) Ltd

*[2008] All ER (D) 288 (Jun) Chancery Division Judge Waksman Qc Sitting As A Judge Of The High Court 23 June 2008*

Contract – Construction – Hedge fund – Marketing agreement – Agreement entitling defendant to terminate if claimant failing to attract certain fee level – Claimant bringing action for wrongful termination – Whether 'total base fees' including rebates of fees paid to customers by way of discount

The proceedings concerned an investment fund incorporated in the Cayman Islands in June 2004. Shares were first offered to investors by an offering memorandum of August 2004. The fund was listed on the Irish stock exchange. It was a 'feeder fund' in the sense that substantially all its assets (together with another feeder) were invested in a master fund. by a management agreement of July 2004, the defendant was appointed as manager and investment manager of the fund. The offering memorandum for the shares set out the fees. The fund was to pay the defendant a monthly management fee equal to 2% annualised of net asset value and an incentive fee dependent on the performance of shares in the fund. The offering memorandum also indicated that the defendant could, at its sole discretion, rebate fees to shareholders or pay a portion of such fees to a third party. In July 2005, the defendant entered into a marketing agreement with the claimant, under which the latter was appointed as marketing agent in respect of promotion of the shares. Clause 7.2 of the marketing agreement entitled the defendant to terminate the agreement on 31 January if, on 1 November 2006, the claimant had not had 'Tagged Investors ... whose total base fees have exceeded $500,000 plus the greater of zero and $10,000,000 times the total net performance over the trailing fifteen months'. In the event, the defendant terminated the agreement on the basis that the claimant had failed to reach the required total base fees under cl 7.2. The claimant issued proceedings for wrongful termination. A preliminary issue was heard concerning the definition of 'total base fees', and in particular the characterisation of the amount of fees attributable to an investment of June 2006 by Alpha Transport Platform Inc on behalf of a pension plan, one of the tagged investors, which was introduced to the fund by the claimant. The standard management fee for investors in the fund, payable by the fund to the defendant under the management agreement, was 2%. As a potentially large investor, however, the pension plan negotiated a discount of 0.5% to the management fee. That discount was effected by a letter agreement under which the investment manager for the fund was obliged to make a quarterly rebate payment to Alpha

amounting to 0.5% of the management fee otherwise payable.

The claimant accepted that it would not have reached the target for total base fees if the fees from the pension plan was calculated at 1.5% rather than 2%; in other words, if 'total base fees' did not include rebates. The defendant argued, inter alia, that 'fees' ordinarily meant a sum actually received, and a sum at most notionally received but in substance returned by way of discount, could not be regarded as a 'fee'. The claimant relied upon the custom and usage in the hedge fund industry, based on expert evidence before the court.

The court ruled:

On its true construction, the phrase 'total base fees' had to be calculated exclusive of rebates. The target which the claimant had to reach was artificial if it did not refer to the actual amount recovered. There was nothing in the expert evidence inconsistent with that construction.

The defendant would succeed on the preliminary issue.

## Moore Stephens (A Firm) V Stone & Rolls Ltd (In Liquidation)

*[2008] EWCA Civ 644 CA (Civ Div) (Mummery LJ, Keene LJ, Rimer LJ) 18/6/2008*

The principle that a company would not have attributed to it knowledge of a fraud when that fraud was being practised on the company itself only applied where the company was the intended victim or target of the fraud and not where harm to the company merely resulted from the discovery of the fraud.

The appellant accountants (M) appealed against a decision ((2007) EWHC 1826 (Comm), (2008) Bus LR 304 ) refusing to strike out the claim against them. The respondent company (R) had commenced proceedings against M claiming that M negligently failed in the course of various audits to detect the dishonest behaviour of the individual (S) who was at the relevant time the sole directing mind and will of R. The nature of S's dishonesty was to procure R to engage in a letter of credit fraud on banks which enabled substantial sums of money to be channelled through R and applied elsewhere for the benefit of S and others also party to the fraud. The frauds gave rise to liabilities by R to the banks, in particular to a Czech bank. That bank sued R and S in deceit and was awarded substantial damages against both. R could not pay and went into liquidation. Its claim against M, brought by its liquidators, was for just under US$174 million. M denied negligence and applied to strike out the claim or for summary judgment contending that R was seeking an indemnity against liabilities it had incurred by its own fraud and that such a claim was barred by the principle of public policy expressed in the maxim ex turpi causa non oritur actio. The judge declined to strike out the claim. R submitted that (1) the ex turpi causa maxim did not prevent it from suing for recovery in respect of its own losses caused by the individual who was its directing mind and will in relation to the frauds because R was itself a victim of the frauds and should not have any knowledge of them attributed to it; (2) the ex turpi causa maxim did not provide a

defence to M when the detection of dishonesty in the operation of R's affairs was the very thing that M, as auditors, was retained to do.

HELD: (1) If, in order to advance a claim, it was necessary for the claimant to plead or rely on illegality, the claim was automatically barred, however good it might otherwise be, and the court had no discretion in the matter, Tinsley v Milligan (1994) 1 AC 340 HL applied. In the instant case, R's claim relied upon, was based substantially on, arose out of and was inextricably linked with the fraud that was perpetrated on the banks. That fraud was actually perpetrated by S, who was R's sole directing mind and will. (2) A company would not have attributed to it knowledge of a fraud when that fraud was being practised on the company itself, Hampshire Land Co (No2), Re (1896) 2 Ch 743 Ch D and JC Houghton & Co v Nothard Lowe & Wills Ltd (1928) AC 1 HL applied. The Hampshire Land principle would ordinarily only apply in circumstances in which the agent intended to harm the company or it was the target of the agent's acts, McNicholas Construction Co Ltd v Customs and Excise Commissioners (2000) STC 553 QBD and Morris v Bank of India (2005) EWCA Civ 693, (2005) BCC 739 applied. It was not enough to engage the principle that an agent's acts might result in harm to the company, Arab Bank Plc v Zurich Insurance Co (1999) 1 Lloyd's Rep 262 QBD (Comm) doubted. In the circumstances the instant case was not one in which the Hampshire Land principle had any application. S as the sole directing mind and will of R procured R to enter into fraudulent transactions with banks. It was R that dealt with the banks and, as between R and the banks, the principles of attribution required S's dishonesty to be imputed to R, which should therefore itself be liable for the frauds. R was neither the target nor the victim of its agent's dishonesty. It was itself the fraudster, and it made no difference that its frauds were likely, when and if found out, to result in the incurring of liabilities by R. (3) There was no support in the authorities for the proposition that if the very thing from which the defendant owed a duty to save the claimant harmless was, or included, the commission of a criminal offence, the public policy defence based on the ex turpi causa principle would be overridden so as to enable the bringing of the claim that relied on the claimant's illegality, Reeves v Commissioner of Police of the Metropolis (1999) QB 169 CA (Civ Div) and Clunis v Camden and Islington HA (1998) QB 978 CA (Civ Div) considered. (4) R's claim relied upon its own illegality. It therefore had to fail by application of the ex turpi causa principle, which was not trumped by the "very thing" argument.

Appeal allowed

## Bell v Long and others

*[2008] All ER (D) 179 (Jun) [2008] EWHC 1273 (Ch) Chancery Division, Manchester District Registry Patten J 16 June 2008*

Consistent with the settled principle that the interest of a mortgagee in an early sale and the desire of a mortgagor for a longer period of marketing and as a result a potentially larger return had been resolved in favour of the mortgagee, there had to be a degree of latitude given to mortgagees and receivers alike not only as to the timing of any sale but also as to the method of sale to be employed. Once the method of sale was chosen, the property had to be properly marketed in whatever way was appropriate for that method of sale. The mortgagee could have regard to its own interests in deciding how to sell and, if it had made a genuine decision albeit one which had resolved any doubts in its own favour, no breach of duty will have occurred.

The claimant was a director and majority shareholder in D Ltd (the company). The company owned four freehold properties which had been converted into offices and let to solicitors, accountants and other providers of professional services. Subsequently, the first an second defendants, who were partners in the third defendant, were appointed as the administrative receivers of the company (the receivers) by virtue of a floating charge over its assets. It was accepted that repayment of the sums due under the charge could only be made through the sale of some or all of the properties. The receivers instructed the fourth defendant selling agents to advise them on the marketing and disposal of the properties. On 17 February 2000, the fourth defendant provided the receivers with provisional valuations (see [27]) and marketing advice (the first report). The fourth defendant recommended that all four properties be placed on the open market for sale; that sale boards be erected indicating that they were investment properties; and that sales particulars for each property should be sent to local and regional property agents and to all active secondary investment purchasers. The formal marketing of the properties did not commence until the end of March. On 30 March, the sales particulars were completed and sent out by post over the course of the next few days. A number of offers in relation to individual properties were received before the particulars of sale were sent out, but were rejected as being too low. On 21 March, the receivers received an offer of £600,000 for the entire portfolio. On 23 March, a bid for all four properties was received from PCPL Ltd, the eventual purchaser. On 7 April 2000, the fourth defendant provided the receivers with an update outlining the progress that the marketing had made (the second report). The second report stated that there had been little interest shown in relation to certain of the individual properties and suggested that there lay a strong advantage in securing an early sale of the entire portfolio, and recommended the acceptance of an offer of £730,000 made by the purchaser. In mid April, the receivers and the bank, on the advice of the fourth defendant, decided to press ahead with a portfolio sale of all four properties. While each of the four properties remained on the market, the fourth defendant concentrated its efforts on securing a portfolio sale and gave only secondary consideration to the possibility of individual sales. Following two further

rounds of bargaining, the four properties were sold to the purchaser for a combined purchase price of £775,000. Subsequently, the claimant issued the instant proceedings whereby he alleged, inter alia, that the receivers, in disposing of the properties, had failed to fulfil their duty to obtain the best price then reasonably obtainable for the properties in the open market.

He submitted, inter alia, that the sale price was significantly lower than the market value of the four properties at the time of the sale and that, had they been sold for their true market value at the time, only three of the four properties would have needed to be disposed of to repay the indebtedness and to meet the costs of the receivership.

The claim would be dismissed.

Consistent with the settled principle that the interest of a mortgagee in an early sale and the desire of a mortgagor for a longer period of marketing and as a result a potentially larger return had been resolved in favour of the mortgagee, there had to be a degree of latitude given to mortgagees and receivers alike not only as to the timing of any sale but also as to the method of sale to be employed. Once the method of sale was chosen, the property had to be properly marketed in whatever way was appropriate for that method of sale. The mortgagee could have regard to its own interests in deciding how to sell and, if it had made a genuine decision albeit one which had resolved any doubts in its own favour, no breach of duty would have occurred.

On the evidence, the receivers had properly relied upon advice properly given by the fourth defendant as to the method of sale to be adopted. In those circumstances, there had been no breach of duty by the receivers.

Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] 2 All ER 633 applied.

## Associated British Ports v Ferryways NV and another

*[2008] All ER (D) 165 (Jun) [2008] EWHC 1265 (Comm) Queen's Bench Division, Commercial Court Field J 13 June 2008*

Contract – Construction – Ferry service agreement – Guarantee – Claimant entering into ferry service agreement with first defendant – Second defendant providing guarantee for first defendant's obligations – Claimant alleging repudiatory breach of ferry service agreement – Whether first and second defendants liable for alleged breach.

This case concerned a question of interpretation of a contract, as to whether certain equipment used in the ferry business fell within the definition of an operational contract made between the claimant and the first defendant. More interestingly from the perspective of guarantee law, it concerned a question of construction as to whether the second defendant had entered into a guarantee.

Under the terms of the letter agreement, the second defendant, a sister company of the first defendant, assumed 'full responsibility for ensuring' that the first defendant fulfilled its obligations under the agreement. Subsequently, a dispute arose between the claimant and the first defendant and a claim was brought against the first defendant based on breach of the operational contract and

against the second defendant as guarantor.

A number of issues fell to be determined, including: (i) whether certain equipment fell within the scope of the operational contract; (ii) whether the obligations of the second defendant were those of a guarantor; and (iii) if so, whether those obligations had been discharged by a time to pay agreement.

The claim against the first defendant would be allowed. The claim against the second defendant would be dismissed.

(1) The operational contract had to be construed against the factual background. Against that background, the equipment fell outside the definition in the contract. The first defendant had acted in breach of the operational contract.

(2) It was settled law that the hallmark of a guarantee was an assumption of a secondary liability to answer for a debtor who remained primarily liable to a creditor. Whether the liability assumed was of that character or involved the assumption of a primary liability was a matter of construction which fell to be determined having regard to the substance and not the form of the provisions in issue.

In this case, the second defendant's obligations were defined with reference to the duties, commitments and liabilities of the first defendant and would only become concrete and of practical significance on such duties, commitments and liabilities accruing and the first defendant being in default. The substance of the obligations was to see that the first defendant performed its obligations under the second agreement and accordingly fell properly to be characterised as giving rise to a secondary, rather than a primary, liability.

*Moschi v Lep Air Services Ltd* [1972] 2 All ER 393 applied; *Pitts v Jones* [2008] 1 All ER 941 considered.

(3) In executing the time to pay agreement, which was expressed to be in accordance with the second agreement and which contained the terms it did, the parties had entered into a binding contract varying the second agreement and giving the first defendant time to pay. In those circumstances, the guarantees contained in the letter agreement were discharged by the time to pay agreement and, accordingly, the second defendant was not liable under the letter agreement for any of the sums due from the first defendant to the claimant under the second agreement.

*Polak v Everett* [1874-80] All ER Rep 991 applied.

## JP Morgan Chase Bank and others v Springwell Navigation Corp

*[2008] All ER (D) 167 (Jun) [2008] EWHC 1186 (Comm) Queen's Bench Division, Commercial Court Gloster J 27 May 2008*

Bank – Duty of care – Advice – Investment bank – Defendant shipping firm investing profits with claimant investment bank – Defendant incurring substantial losses in relation to GKO bonds – Whether bank liable in breach of contract, negligence, breach of fiduciary duty, negligent mis-statement and/or misrepresentation

The claimant was a well-known investment bank. By this case, it sought a court declaration of no liability against the defendants claims that it had been negligent in matters of investment advice. The claimant denied that it had ever given advice on investments, but had simply carried out orders to buy and sell investments. The defendant also claimed the claimant was liable for misstatement for having misled the defendant as to the characteristics of Russian bonds or instruments referred to as GKO-linked notes and other Russian investments

The defendant was at all material times the investment vehicle of the Polemis family, who owned and operated a large Greek shipping fleet. The family used the defendant as a means of investing spare liquidity from their shipping companies. During the 1990s the defendant invested very heavily in emerging markets, acquiring, through the claimant, a portfolio of debt instruments with a face value of over $US 700m. In particular, during 1997 and 1998, it built up substantial investments in Russian bonds or instruments referred to as 'GKO-linked notes'. Due to the Russian financial crisis in 1998 the value of those investments was marked down heavily as were the defendant's other Russian and Indonesian investments. The defendant claimed damages or equitable compensation for breach of contract, negligence, breach of fiduciary duty, negligent misstatement and/or misrepresentation under s 2 of the Misrepresentation Act 1967 in respect of the loss of the value of the investment portfolio acquired through its dealings with the claimant. In essence, it alleged that the portfolio of emerging markets investments, which it held as at August 1998, was one which no reasonable advisor could have advised it to have held. Had the claimant advised the defendant in accordance with its duties, then in August 1998 it would have had a well-diversified portfolio in low risk investments. The Russian and Asian financial crises would have had no, or no substantial, effect on the value of its holdings and they would not have caused any or any substantial loss to the defendant. Even if the claimant owed no responsibility to give general investment advice, it was nonetheless liable for misstatement for having misled the defendant as to the characteristics of the GKO-linked notes and other Russian investments.

Prior to these proceedings, the defendant sought to recover:

- (i) damages for loss in the value of its investments;
- (ii) an account of what it contended were excessive profits made by the claimant in its dealings with the defendant;

- (iii) 'shipping losses', namely the profits it would have made from shipping investments had the portfolio maintained its value;
- (iv) certain claims in respect of the claimant's alleged conduct after the Russian default, because, inter alia, options available to it were not exercised;
- (v) reimbursement of custody fees allegedly wrongly charged by the claimant after April 2000; and
- (vi) interest on all sums. It was accepted by the defendant that if the shipping losses claim succeeded, then allowance would have to be made in the calculation of interest on the investment claims to reflect the fact that the defendant's money would have been used to finance the purchase of the relevant vessels.

The claimant issued proceedings seeking declarations of non-liability. The defendant's claims were made by way of counterclaim. The claimant denied that it had ever given advice on investments, but had simply carried out orders to buy and sell investments. It also alleged that, if it had given advice, then it had done so competently and without negligence.

The court ruled:

On the facts, there was nothing to suggest that the defendant had been led to believe that it had been offered a full, or general, investment advisory service, or a wealth management service simply on condition that it had changed from investing in time deposits. There had arisen no contractual obligation or common law duty of care to advise the defendant either in the wide terms pleaded as to appropriate investments and the structure of its portfolio or otherwise. No free standing obligation to advise arose by virtue of the claimant's role as a private bank, its actual conduct over the relevant period, or the circumstances with which it was faced. The defendant was contractually precluded from bringing an action in misrepresentation. There was no evidence to support the claim for allegedly excessive profits.

The pre-default claims of the defendant's counterclaim failed and would be dismissed.

The post-default claims would be the subject of a separate judgment.

# Legislation

If you are generally interested in new legislation, ask Ruth for "The Tracker", a monthly update on the progress of bills going through Parliament.

Ruth.Pedley@cms-cmck.com

## Building Societies

### The Building Societies Act 1986 (Accounts, Audit and EEA State Amendments) Order 2008 No 1519

This Order amends the Building Societies Act 1986 to implement, in relation to building societies: (a) Parts of Directive 2006/43/EC of the European Parliament and of the Council on statutory audits of annual accounts (amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC) (O.J. L 157, 9.6.2006, p.87), and (b) Parts of Directive 2006/46/EC of the European Parliament and of the Council amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions (O.J. L 224, 16.8.2006, p.7). The Order also makes an amendment to the definition of "EEA State" in section 97 of the 1986 Act. The existing definition of "EEA State" excludes Bulgaria and Romania, which became Community member States on 1st January 2007. The new definition refers to the definition of "EEA State" in the Interpretation Act 1978 (c.30), which was inserted into that Act by the Legislative and Regulatory Reform Act 2006 (c.51). It therefore includes all Community member States.

http://www.opsi.gov.uk/si/si2008/pdf/uksi_20081519_en.pdf

Date in force: (29.6.08)

## Consumer

### Legislative Reform (Consumer Credit) Draft Order 2008

This Order amends the Consumer Credit Act 1974. Article 3 inserts a new section 16C into the 1974 Act. This creates a new exemption from regulation under the 1974 Act for certain consumer credit agreements. To qualify sums due under the agreement must be secured by a land mortgage and less than 40% of the land must be used or intended to be used as or in connection with a dwelling by the debtor or a person connected with the debtor. Where the debtors are trustees less than 40% of the land must be used by the beneficiary of the trust or a person connected with that beneficiary.

http://www.berr.gov.uk/files/file46556.pdf

Date in force: (Anticipated date in force, 1.10.08)

## Contract

### The Financial Services and Markets Act 2000 (Amendments to Part 7) Regulations 2008 No 1468

These Regulations amend Part 7 of the Financial Services and Markets Act 2000 which deals with schemes for the transfer of insurance and banking business. Section 112 of the Act is amended by the insertion of new subsections (2A) to (2C) and a consequential amendment of subsection (9).

Subsections (2A) and (2B) make clear for the avoidance of doubt that the power of the court to make an order under section 112 is to be taken as always having included the power to transfer, for example, contracts which include provisions prohibiting their transfer or contracts in relation to which there is a query as to their transferability in the absence of consent of a counterparty or contracts where there is a contravention, liability or interference with a right or interest which arises as a result of the transfer. New section 112A is inserted. The new section makes clear, again for the avoidance of doubt, that the specified entitlements arising as a result of something done or likely to be done by or under Part 7 of the Act will only be enforceable after the order under section 112(1) has been made and only insofar as the court makes provision to that effect in that order. These circumstances might be relevant, for example, in relation to the transfer of reinsurance contracts, if such transfer were sanctioned by the court, which are connected to insurance contracts being transferred under an insurance business transfer scheme. Section 112A(1) could be relevant, for example, where a counterparty of a bank or insurer has a right to terminate an agreement with the bank or insurer which is exercisable as a result of the bank or insurer stating its intention to pursue a banking or insurance business transfer scheme.

http://www.opsi.gov.uk/si/si2008/pdf/uksi_20081468_en.pdf

Date in force: (30.6.08)

### Rome I adopted by EU Council

The EU Council had adopted the Rome I Regulation on the law applicable to contractual obligations. Rome I converts the Rome Convention on the Law Applicable to Contractual Obligations into a community regulation, modernising the rules where appropriate.

The Regulation will come into force on the twentieth day following publication in the Official Journal and its substantive provisions will come into force 18 months later.

In May 2006, the UK exercised its option to opt out of the negotiations on Rome I. The Government are consulting views on whether now, with an improved text, whether the UK should opt in. Responses are due to the consultation by 25 June 2008.

http://www.justice.gov.uk/publications/cp0508.htm

## Data Protection

### The Data Protection Act 1998 (Commencement No. 2) Order 2008 No 1592

This is the second Commencement Order made under the Data Protection Act 1998. Article 2 of this Order provides for the partial commencement of section 56 of

the Data Protection Act 1998 (c. 29) ("DPA") on the 7th of July 2008. Section 56 prohibits a person, A, from requiring an individual, B, or a third party, C, to provide A with information obtained by means of a subject access request under section 7 of the DPA. The prohibition applies in circumstances specified in section 56, for example where B is seeking employment with A. However, Article 2 commences section 56 only in relation to information held by the Secretary of State or by the Independent Barring Board pursuant to their respective functions under the Safeguarding Vulnerable Groups Act 2006 (c. 47) or the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 (S.I. 2007/1351 (N.I. 11) (the Independent Barring Board is established under section 1 of the Safeguarding Vulnerable Groups Act).

http://www.opsi.gov.uk/si/si2008/pdf/uksi_20081592_en.pdf

Date made: (19.6.08)

# Housing

## Housing and Regeneration Bill

A Bill to establish the Homes and Communities Agency and make provision about it; to abolish the Urban Regeneration Agency and the Commission for the New Towns and make provision in connection with their abolition; to regulate social housing; to enable the abolition of the Housing Corporation; to make provision about sustainability certificates, landlord and tenant matters, building regulations and mobile homes; to make further provision about housing; and for connected purposes.

http://www.publications.parliament.uk/pa/ld200708/ldbills/067/2008067.pdf

# Insurance

## The Financial Services and Markets Act 2000 (Amendment of section 323) Regulations 2008 No 1469

These Regulations amend section 323 of the Financial Services and Markets Act 2000. Section 323 enables the application by order of Part 7 of the Act, which provides for insurance and banking transfer schemes, in relation to the insurance business of underwriting members and former underwriting members of the Society of Lloyd's. Section 323 of the Act as it stands prior to this amendment uses the existing definition of former underwriting member set out in section 324 of the Act. That definition does not apply to former underwriting members who ceased to be underwriting members before 24th December 1996. This amendment enables an order under section 323 to apply to all insurance business whenever written in the Lloyd's Market.

The Regulations are made using the power in section 2(2) of the European Communities Act 1972. This matter arises out of and relates to the European Community obligation on Member States to authorise insurance undertakings, in particular, to transfer all or part of their portfolio of contracts to an accepting office within the Community under Article 12(2) of Council Directive 1992/49/EEC

(known as "the third non-life insurance directive") and Article 14 of European Parliament and Council Directive 2002/83/EC (known as "the consolidated life insurance directive").

http://www.opsi.gov.uk/si/si2008/pdf/uksi_20081469_en.pdf

Date in force: (30.6.08)

# Articles

## Banking

### How fair are bank charges?

The authors (rather prematurely?) assess the recent decision in Office of Fair Trading v Abbey National and others [2008] EWHC 875 (Comm), All ER (D) 349 (Apr)

(J Jarvis and R Hanke: BJIBFL, 06.08, 282) 08.26.062

## Company

### The statutory contract under s33 of the Companies Act 2006: the legal consequences for Banks - Part 1

This article considers the limitation period of claims arising between members of a company (sometimes banks) and a company under s14 Companies Act 1985 and s33 Companies Act 2006.

(C Ryan and G Scanlan: BJIBFL, 06.08, 304) 08.26.052

## Cross-border

### Cross-border mergers: a new procedure for companies in the EEA

In this article the authors consider the new procedure for effecting cross-border mergers under the Companies (Cross-Border Mergers) Regulations 2007, its benefits and some practical considerations.

(A Rippon and K Gould: BJIBFL, 06.08, 295) 08.26.056

## Directors

### Dealing with directors' conflicts of interest under the Companies Act 2006

The new statutory rules relating to conflicts of interest under the Companies Act 2006 are due to come into force on 1 October 2008. In this article the author considers the scope and content of those statutory duties and identifies the ways in which companies and their directors may be able to deal with situations involving conflicts of interest.

(B Griffiths: BJIBFL, 06.08, 292) 08.26.057

## Environment

### The Climate Change Bill

In the Climate Change Bill the Government introduces the world's first legally binding targets for the reduction of greenhouse gas emissions. Is the Bill as significant an environmental measure as it is claimed to be? Are its objectives demonstrably achievable, and/or enforceable? To answer these and other questions about the emerging legislation this article will explore the context and meaning of some of the more important provisions.

(H Townsend: JPL, 2008 (4), 450) 08.26.072

## Execution

### Execution of deeds including leases by companies-changes

### to the law effective from 6 April 2008

Until now the rules on the execution of contracts and deeds by companies was governed by s36 Companies Act 1985. Those provisions were repealed by s44 Companies Act 2006. While much of the Companies Act 2006 will not come into force until 1 October 2009, s44 came into effect on 6 April 2008.

(Comm Leases, 05.08, 1334) 08.25.001

### More changes for bank lenders? April's company law changes

More provisions of the Companies Act 2006 came into force on the 6th of April. This article considers those provisions that may have a direct impact on bank lending documents and practices. The most significant change is in relation to the execution of documents by companies. The April changes are less extensive than those that took place in October 2007 or those to be brought into effect later in the Act's implementation timetable.

(B Cain et al: FRI, 05.08, 16) 08.25.065

## Financial assistance

### Financial assistance for the acquisition of shares in private companies: finally laying the undead to rest

How do you kill something that is already dead? This is a familiar predicament for vampire slayers but a relatively novel one for legislators. It arises not in some fictional gothic horror but in the context of the Companies Act 2006 which abolishes, at long last many would say, the ban on private companies giving financial assistance for the acquisition of their own shares. But it seems to have taken a bullet, a dagger and a stake through the heart to finish it off.

(D Ereira: BJIBFL, 06.08, 289) 08.26.059

# Hedge funds

## Hedge fund regulation in selected European Jurisdictions

The purpose of this article is to examine contemporary European hedge fund regulation in some of the leading EU hedge fund jurisdictions, with a view to highlighting the difficulties inherent in overcoming existing differences, on the on hand, and identifying the features that a harmonised regulatory framework would need to incorporate if its practical implementation is to stand a realistic chance of success, on the other.

(P Athanassiou: EBLR, 6.08, 447) 08.26.001

## Hedge accounting: a rule based amendment to a judgment-based standard

The recent proposal to amend IAS 39 in respect of a complex area of hedge accounting has diverged from the basic assumption of a principle-based standard, to more rule-based. While the proposals give welcome guidance in respect of allowed hedge accounting strategies, they raise the question as to whether detailed rules may create a further need for even more guidance in the future.

(R Labuschagne and T W Lee: BJIBFL, 06.08, 297) 08.26.055

# Lending

## Loan buy-backs: the analysis, the options and the future

The purchase by a borrower of a loan made to it generally results in that loan ceasing to exist. This raises significant legal issues on current market standard documentation. For example, will the purchase be re-characterised as a prepayment in the documentation? Does the borrower fall within the category of those to whom an assignment or transfer can be made? For the future, the loan market must decide whether or on what terms it wishes borrowers to be able to purchase their own debt but, for existing transactions, there may be structures that can achieve the same commercial effect as a purchase by the borrower but circumvent these legal issues.

(S James, J Johnson and M Sweeting: BJIBFL, 06.08, 279) 08.26.063

# Pensions

## Changes in the Employer Debt Regulations

There have recently been significant changes to the legislation which applies when an employer ceases to participate in a multi-employer final-salary pension scheme (ie a scheme which has more than one participating employer).

(P Read: BJIBFL, 06.08, 307) 08.26.051

# Risk

## Rogue trading: a challenge to systems and controls

This article looks at the history of rogue traders, the requirements put in place by regulators and the measures firms should

consider when reviewing systems and controls.

(D Howie and C Brennan: BJIBFL, 06.08, 299) 08.26.054

## Securitisations

### Credit crunch: does anyone owe a duty of care to investors?

This article looks at the core of the credit crunch, a core that is well known to those in the capital markets: securitisations.

(T Howe& N Yeo: IHL, 5.08, 31) 08.23.093

## Security

### Slavenburg solved?

The authors review the draft overseas Companies Regulations 2008. Of most interest to transactional lawyers will be Pt 7 Company Charges, which aims to do away with the need for Slavenburg filings.

(D Turing and J S Excell: BJIBFL, 06.08, 291) 08.26.058

# Technical

## Accounting

### Directors' report: potential impact of Climate Change Bill

A new clause, 80, has been included in the Climate Change Bill which would have an impact on all companies other than those that are subject to the small companies regime for accounts and reports. Clause 80(4) requires all companies whose directors' report must contain a business review under section 417(1) of the Companies Act 2006 (all companies other than those subject to the small companies' regime) to include a report on their greenhouse gas emissions in the business review.

## Credit rating

### Role of credit rating agencies - ESME's report to the European Commission

The European Securities Markets Experts Group (ESME) has published this report to the European Commission on the role of credit rating agencies (CRAs) following a request for advice from the Commission in November 2007.

ESME concludes that although CRAs do not undermine the overall integrity and value of corporate ratings, their performance in the area of structured finance has been unsatisfactory. ESME does not think that regulation is the answer however, and recommends an enhanced self-regulatory model, as detailed in the Report. ESME also concludes that existing CRAs should facilitate the reduction in the barriers to entry and allow for the establishment of more CRAs to encourage competition.

Part 1 of the Report sets out ESME's response to general questions addressing the role of CRAs in the financial markets and the current regulation of CRAs. The Report also outlines the US regulatory experience following the enactment in September 2007 of a CRA reform act, and the role played by CRAs in the recent market turmoil.

Part 2 includes ESME's response to specific questions set out in the Commission's mandate.

ESME's conclusions and recommendations to address deficiencies in the area of structured finance are set out in Part 3 of the Report and cover six broad areas: analytics/policy; governance; communication and transparency; performance measurement; culture; and external regulation oversight. ESME recognises that some of the recommendations have already been implemented by some CRAs that have worked to improve their credit rating processes.

http://ec.europa.eu/internal_market/securities/docs/esme/report_040608_en.pdf

(ESME, June 2008)

## Financial Stability

Consultation papers on Liquidity Risk Management have been issued by CEBS

(deadline for response is 1st August) and the Basel Committee on Banking Supervision (BCBS) (deadline for response is 29th July).

The BBA will prepare a joint response with LIBA and ISDA.

## Committee of European Banking Supervisors

CEBS has published its findings on issues relating to the valuation of complex and illiquid financial instruments. The report puts forward a set of issues that should be addressed by institutions and accounting and auditing standard setters in order to improve the reliability of the values ascribed to these instruments. CEBS has prepared this in response to a request set out in the October 2007 roadmap of the ECOFIN on the financial market situation.

The analysis focuses on the following valuation related aspects:

- · challenges for the valuation of complex financial instruments or instruments for which no active markets exist;
- · transparency on valuation practices and methodologies as well as related uncertainty; and
- · auditing of fair value estimates.

The major findings can be summarised as follows:

- 1. On valuation challenges:
  - - accounting standard setters should consider the need for further guidance on measuring fair values when there is little market activity in the instruments concerned (or other instruments relevant to pricing).

Institutions should:

- * enhance their practices and governance surrounding the use of modelling techniques;
- * ensure that all appropriate risk factors are considered when determining a fair value; and
- * improve risk management practices to ensure adequate risk assessment of transactions and appropriate management of exposures;
- - institutions and standard setters should consider wider valuation-related issues, including:
- * classification issues;
- * importance of timely impairment and possible changes to impairment rules for assets available for sale;
- * treatment of Day one profits and related reserves; and
- * impact and management of the own credit risk.

2. On transparency aspects:

- - institutions should enhance their disclosures on fair values and on valuation techniques; and
- - accounting standard setters should review the disclosure requirements to enhance the information to be disclosed on fair values and valuation techniques.

3. On auditing aspects:

- -auditing standard setters should pursue their efforts to enhance the guidance for the audit of fair value estimates.

CEBS recommends that institutions and standard setters address the issues included in the report.

(ISDA 18 June 2008)

### Memorandum of understanding on cooperation between the financial supervisory authorities, central banks and finance ministries of the European Union on cross-border financial stability

The FSA published this published a memorandum of understanding (MoU) on cooperation between EU financial supervisory authorities, central banks and finance ministries (Parties) in respect of cross-border financial stability. The MoU is dated 1 June 2008 and it extends and updates a 2005 MoU.

Under the MoU, the Parties recognise that financial stability is a common concern for member states and the EU and agree that it must be safeguarded, taking into account the wider international context. Accordingly, the MoU is designed to facilitate cooperation at EU level to ensure timely and effective management and resolution of cross-border systemic financial crises, in order to limit their economic impact. Cooperation in these circumstances will take place on the basis of the existing institutional and legal framework for financial stability in member states and applicable EU legislation, respecting the roles and division of responsibilities among the Parties.

The MoU does not create any legal commitment on the part of any of the Parties to intervene in favour of anyone affected by a financial crisis. The objective of the MoU's common principles for cross-border financial crisis management is to protect cross-border stability of the financial system, not to prevent bank failures. The MoU makes clear that, in a crisis situation, primacy will always be given to private sector solutions, building (as far as possible) on the financial situation of a banking group as a whole.

Annex 1 to the MoU sets out common practical guidelines for crisis management, setting out the respective roles of the Parties and the procedures to be followed in the event of a cross-border systemic financial crisis. Annex 2 to the MoU sets out a systemic assessment framework template.

The list of signatories to the MoU includes FSA, the Pensions Regulator, the Bank of England and HM Treasury.

(FSA, June 2008)

http://www.fsa.gov.uk/pubs/mou/cross_border.pdf

## LIBOR

### Understanding the construction and operation of BBA LIBOR - strengthening for the future

The British Bankers' Association has invited comments on a report outlining changes to the governance of the London Interbank Offered Rate (LIBOR), used to set rates for financial products.

The BBA announced that LIBOR is to be strengthened forthwith by:

- 1) Requiring any discrepancies in rates contributed to the LIBOR process by banks to be reviewed by the Foreign Exchange and Money Markets Committee (FEMMC) and, if necessary, justified by the relevant contributing bank. FEMMC is an independent committee which oversees the LIBOR setting mechanism.
- 2) Expanding the membership of FEMMC.
- 3) The BBA commencing discussions with major banks with a view to increasing the number of contributing banks to the LIBOR rate-setting panels.

The BBA also announced that it is seeking views on whether:

- 1) In addition to the existing 11 am fix of US Dollar LIBOR, there is demand for another fix for US Dollar LIBOR later in the day after the US market has opened.
- 2) Whether there is demand for the creation of an additional US Dollar index that seeks to capture European US Dollar trading..

(BBA, June 2008)

http://www.bba.org.uk/content/1/c6/01/38/99/BBA_LIBOR_strengthening_paper.pdf

# LMA

## LMA endorses EHYA market practice recommendations for issuers of non-investment grade debt securities

The Loan Market Association (LMA) and the European High Yield Association (EHYA) have issued a press release in which the LMA endorsed the market practice recommendations for issuers of non-investment grade debt securities (NIGDS) of the EHYA (the Recommendations).

Under the Recommendations an issuer of NIGDS which are to be listed or otherwise publicly traded should:

- 1) Make publicly available key material debt facility documents and key intercreditor documents, including amendments and waivers.
- 2) Disclose in the offering memorandum key terms of its material debt facilities including payment terms, financial covenants and security and intercreditor arrangements.
- 3) Disclose, on an ongoing basis, material amendments and waivers of the terms of its debt facilities and details of new or refinanced material debt facilities. It should also disclose defaults that result in acceleration of its debt.

Issuers must already comply with the listing and disclosure rules of the exchange on which their NIGDS are listed, but greater disclosure of information about an issuer's capital structure will enhance the ability of investors to assess NIGDS, which by their nature carry a greater credit risk

than investment grade debt securities. See Practice note, Prospectus Directive and debt securities for more on the existing rules in the UK.

http://www.ehya.com/docs/PressRelease/LMA-EHYA-Press-Release.pdf

16 June 2008

# ISDA

## US Crude Oil and Refined Petroleum Products Annex

ISDA have published a ISDA US Crude Oil and Refined Petroleum Products Annex. It can be obtained from their website.

## Property derivatives

Tax treatment of property derivatives US Revenue Ruling 2008-31:

There has been concern for some time about US withholding taxes be applied to payments made to a non-US resident under a property derivative referencing US real estate.

This concern stemmed from regulations implementing the Foreign Investment in Real Property Tax Act ("FIRPTA"), which are written in a way that suggests such property derivatives might constitute "US Real Property Interests" subject to FIRPTA. The Revenue Ruling indicates that FIRPTA will not apply to property derivatives written in swap form where the underlying index references data from a geographically and numerically broad range of United States real estate.

ISDA Tax Committee 19 June 2008

# Payment Services

## HMT publishes summary of responses to consultation on Payment Services Directive implementation

HM Treasury has published a summary of responses to its consultation on UK implementation of the Payment Services Directive (2007/64/EC) which was launched in December 2007.

In addition to providing an overview of consultation responses, the Summary outlines the Government's conclusions on its approach to PSD implementation. These conclusions remain subject to further detailed analysis until November 2008 when the European PSD transposition process will have run its course.

Respondents to HMT's consultation were broadly supportive of the Government's proposed policy approach to PSD implementation. However, some changes to this approach are to be made as a result of transposition discussions at European level and in order to take into account the consultation responses. The changes, and an explanation for them, are detailed in the Summary.

HMT will publish a further consultation document in summer 2008 on the draft regulations which will enact the PSD in the UK on 1 November 2009. The Government intends to lay these regulations before Parliament by the end of 2008.

FSA intends to consult on PSD-related changes to the FSA Handbook in summer 2008 and, in October 2009, will consult on its approach to PSD fees. In early 2009 FSA will publish an Approach Document, outlining how it plans to address matters

such as authorisation and supervision under the PSD.

PLC 17 June 2008

# Notices

## Dormant accounts

### Scottish Consultation on the Distribution of Funds from Dormant Bank and Building Society Accounts

The Scottish Government is seeking comments on setting priorities for the distribution of assets for investment in the third sector under the proposals contained in the Dormant Bank and Building Society Accounts Bill 2007.

http://www.scotland.gov.uk/Publications/2008/06/ACCOUNTS

(Scottish Government, June 2008)

## Employment

### Plans to ban age discrimination – Equality Bill

Harriet Harman, Minister for Women and Equality, has announced new measures which will be in the Equality Bill, which will streamline and strengthen discrimination legislation, including banning age discrimination, to make Britain a fairer place. Despite considerable progress, inequality and discrimination still exist: Women are paid on average 12.6% less per hour than men; disabled people are two and a half times more likely to be out of work, and ethnic minorities a fifth less likely to find work; and two thirds of over-fifties feel that they are turned down for a job because they are too old.

http://nds.coi.gov.uk/Content/Detail.asp?ReleaseID=372032&NewsAreaID=2

(Cabinet Office, 26/06/2008)

## Financial Ombudsman Service

"ombudsman news", Issue 70 now available:

- mortgage complaints;
- pension-related complaints;
- changes to the dispute resolution rules

http://www.financial-ombudsman.org.uk/publications/ombudsman-news/70/70.htm

## OFT

### OFT publishes new reports as part of homebuilding market study

The OFT has published two new reports that it commissioned as part of its market study into the UK homebuilding industry.

http://www.oft.gov.uk/news/press/2008/79-08

### Scotland: OFT on property management services

The OFT has launched a market study into property management services for

common and shared residential property in Scotland.

Residents in tenements and other collective residential properties in Scotland use property managers, known as factors, to manage common and shared property - for example roofs, staircases, entrances and gardens. The study will consider issues such as how much choice and information is available to homeowners, how property managers are selected, the quality and costs of the services provided, how homeowners can effectively manage services and whether homeowners have access to redress when things go wrong.

http://www.oft.gov.uk/news/press/2008/74-08

# Regulation

## Principles for Sound Liquidity Risk Management and Supervision

The Basel Committee on Banking Supervision has issued for public comment enhanced global Principles for Sound Liquidity Risk Management and Supervision.

http://www.bis.org/press/p080617.htm

(BIS, 17/06/2008)

# Test case

## Bank charges test case

The OFT has published a webpage giving links which includes some of the test case court documents and its policy for publication of test case documents on the website.

http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/current/personal/personal-test-case/personal-documents

# Insolvency

# Cases

## Re Paycheck Services 3 Ltd and other companies

Revenue and Customs Commissioners v Holland and another

*[2008] All ER (D) 319 (Jun)Chancery Division Mark Cawson Qc (Sitting As A Deputy Judge Of The High Court) 24 June 2008*

The Revenue successfully pursued a director personally for dividend payments that the Revenue alleged should not have been made. The companies were incorrectly set up as a tax efficient structure; when the companies became insolvent because a large tax payment was due that was not provided for, the Revenue went for the (honest) director .

*You may like also to see the article at (A Riem: ICR, 06.08, 152) that reviews 2007 case law in England and Wales with regard to attempts by creditors to pursue directors of companies as well as the companies themselves and the reaction of courts to this continuing trend.*

The respondents were directors of PS Ltd, which they operated as their trading company. They each held 50% of the issued share capital. PS Ltd itself held 100% of the issued share capital of P (DS) Ltd (PD) and P (SS) Ltd (PS). All those companies were together known as the 'composite companies'. PD and PS were incorporated to act as sole corporate director and company secretary respectively of each of the composite companies, and the respondents were each appointed as directors of PD and PS. The issued share capital in the composite companies comprised one voting 'A' share, and approximately 50 non-voting shares, each of a separate class. The A share was held by PST Ltd (PST), a company of which the respondents were each directors and in which they each held 50% of the issued share capital. There was only an advantage in being a non-voting shareholder/employee of the composite companies so long as the relevant composite company paid lower rate corporation tax for which there was threshold under s 13 of the Income and Corporation Taxes Act 1988, limited to profits of £300,000 pa in respect of an 'associated company'. Section 13(4) of the 1988 Act provided that for the purposes of that section, a company was to be treated as an 'associated company' of another at a given time if at that time one of the two had control of the other or both were under the control of the same person or persons. Section 416 of the 1988 Act provided that a person would be taken to have control of a company if he possessed the greater part of that company's voting power. Section 417(3) of the 1988 Act provided that 'associate' meant, inter alia, the trustee or trustees of any settlement in relation to which the participator was a settlor. It was accepted that as a matter of the strict application of ss 13 and 416 of

the 1988 Act, that the composite companies were associated through the fact that PST controlled each of them, and because the collective turnover exceeded the £300,000 threshold, they were each liable for corporation tax. However, the respondents relied on Extra Statutory Concession C9 (ESC C9) for maintaining that the composite companies should not be treated as 'associated'. ESC C9 provided that the Revenue should not treat one company as being associated with another because they were controlled by the same trustee by virtue of the rights and/or powers held in trust by that trustee, provided that there was no past or present connection between the companies other than those rights and/or powers. In April 2001, the Revenue wrote to the respondents, expressing the view that the composite companies might not be entitled to rely on ESC C9. The respondents acted on professional advice, but none of those advisors suggested that the composite companies should stop paying dividends. On 9 August 2004, the respondents received advice from counsel to the effect that the composite companies were liable to pay corporation tax on the basis that ESC C9 did not apply to them. On 18 August 2004, the respondents had a consultation with leading counsel, who confirmed the advice received on 9 August 2004. The Revenue took the view that by continuing to pay dividends after April 2001, each composite company had been left with insufficient reserves with which to meet any further liability for the higher rate of corporation tax that the Revenue had determined had to be paid. It was the Revenue's case that even after receiving counsels' advice in August 2004, the respondents had caused the composite companies to continue to trade and pay dividends while knowing that such companies were rendered insolvent with no reasonable prospect of avoiding insolvent liquidation, with the effect that the respondents had failed to act in the best interests of the composite companies and were in breach of their duties to those companies. The Revenue commenced proceedings against the respondents, seeking to make the respondents liable for payment of the corporation tax in question.

The issues for determination were: (i) whether the respondents were de facto directors of the composite companies, (ii) if either or both the respondents were de facto directors, whether by causing the composite companies to pay dividends they had acted in breach of their duties as de facto directors, and (iii) if either or both the respondents had acted in breach of duties owed to the composite companies, whether they ought to be relieved from liability pursuant to s 727 of the Companies Act 1985, which relieved the company officer from liability where he had acted honestly and reasonably.

The court ruled:

(1) Having regard to settled law and on the evidence, the first respondent was a de facto director of the composite companies. However, the evidence had not established that the second respondent had been a de facto director of any of the composite companies.

Hydrodam (Corby) Ltd, Re [1994] BCC 161, Secretary of State for Trade and Industry v Hollier [2006] All ER (D) 232 (Jul) and Mea Corpn Ltd, Re; Secretary of State

for Trade and Industry v Aviss [2007] 1 BCLC 618 applied.

(2) Pursuant to ss 270(3) and (4) of the 1985 Act, any distribution should be limited to profits available for distribution as determined 'by reference to' accounts that 'enabled a reasonable judgment to be made' as to amounts of the items referred to in s 270(2). The references to 'reasonable judgment' and 'reasonably necessary' pointed against an intention to render a dividend unlawful if it was only with hindsight that any provision ought to have been made for a particular liability. What the relevant provisions required was the making of a reasonable judgment based on facts as reasonably perceived, or that would have been ascertained by reasonable enquiry.

Until the consultation with leading counsel on 18 August 2004, it had not been necessary to make provision for the potential liability for corporation tax. Consequently, payment of the dividends had not been unlawful and the first respondent had not been in breach of his duties as de facto director of the composite companies in continuing to cause them to pay dividends, having reasonable grounds for doing so. However, after receipt of that advice on 18 August 2004, the first respondent could have had no reasonably held belief that the Revenue's claims to corporation tax would, ultimately, be defeated. Accordingly, from that date onwards, any interim accounts ought to have made provision for corporation tax. In those circumstances, any dividend paid after that date had been unlawful and the first respondent was liable in respect of the payment of those dividends.

Loquitar Ltd, Re; IRC v Richmond [2003] All ER (D) 123 (May) considered.

(3) Although it was not in dispute that s 727 of the 1985 Act was capable of applying in the case of payment of an unlawful dividend, in addition to showing that he acted honestly, the onus was fairly and squarely on the officer to satisfy the court that he had acted reasonably in authorising and procuring payment of the dividend on the basis of the interim accounts, which was a matter to be tested objectively. Further, if the officer got over those hurdles, it was necessary for him to demonstrate that, having regard to 'all the circumstances of the case' he ought fairly to be excused. The expression 'all the circumstances of the case' primarily meant the circumstance in which the breach took place.

The second respondent had not sufficiently participated in the decision to pay dividends and to continue to pay those dividends to render her liable, and even if she had been prima facie liable, it would be proper to grant her relief pursuant to s 727 of the 1985 Act. In respect of the first respondent, in the period up to 19 August 2004, he was at no stage liable in respect of the payment of dividends, or if he was, he ought to be relieved from liability pursuant to s 727 of the 1985 Act. However, the continued payment of dividends after 19 August 2004 had rendered him liable in circumstances in which it would not be a proper exercise of the power under s 727 to relieve him from liability.

The claims against the second respondent would be dismissed.

Loquitar Ltd, Re; IRC v Richmond [2003] All ER (D) 123 (May) considered; Target Holdings Ltd v Redferns (a firm) [1995] 3 All ER 785 distinguished.

## Ruttle Plant Ltd v Secretary of State for the Environment, Food and Rural Affairs

*[2008] All ER (D) 270 (Jun) [2008] EWHC 238 (TCC) Queen's Bench Division, Technology And Construction Court Ramsey J 30 April 2008*

Although a liquidator was entitled to sell a bare cause of action, divesting himself of all control, he could not do the same by way of an assignment of the "fruits of the action". The court also commented that where there was a sale of the fruits of a cause of action, and where an assignee funded the action or provided other funds to the liquidator, it was difficult to see that the element of funding in itself necessarily rendered the exercise of the otherwise valid statutory sale objectionable. In the instant case, whilst the assignment of the fruits of an action was, in itself, a valid exercise of the power of sale, the assignment of the liquidator's right to prosecute and to carry on the proceedings was not. Without that statutory authorisation, the transaction was objectionable as being champertous.

The effect of an earlier judgment ([2007] All ER (D) 73 (Dec)), was that the substantive proceedings would be struck out and that summary judgment would be entered against the claimant because, on the true construction of a deed of assignment, the proceedings ought to have been carried on in the name of FAL, a company in liquidation. The deed assigned the fruits of the cause of action and provided that '... hereafter the Assignee shall be enabled to prosecute the Action and all proceedings consequent thereon in as full a manner as the Company or the Liquidator could have done and free from all control [or] any interference by the Liquidator'. Thereafter, the claimant sought to add FAL as a claimant, and the liquidator of FAL also applied, albeit late, for FAL to be joined as a claimant.

Issues arose, inter alia, as to whether the deed of assignment was objectionable on other grounds in the light of the liquidators' powers under the Insolvency Act 1986 and the meaning given to the phrase the 'property of the company' in para 6 of Sch 4 to that Act.

The defendant contended, inter alia, that the liquidator could not surrender his fiduciary power to control proceedings that had been commenced in the name of FAL. The claimant replied that the courts recognised the power of a liquidator to permit a party to whom the fruits of an action were assigned to conduct litigation, and that there was commercial sense in permitting a liquidator to allow a third party to conduct the litigation.

The court ruled:

(1) Although a liquidator was entitled to sell a bare cause of action, divesting himself of all control, he could not do the same by way of an assignment of the fruits of the action.

There was a difference between the two. When a bare cause of action was assigned as part of a sale of the property of a company, the liquidator was exercising the power of sale granted to him, and an intrinsic part of that sale was the right to commence or continue those proceedings. In the same way, a sale of property would include, as an intrinsic part of the sale, any

cause of action, together with a similar right to commence or to continue proceedings. However, by assigning the right to commence and to continue proceedings, the liquidator would be assigning a discretionary power, which, being part of the statutory powers of a liquidator, was personal to the liquidator, just as his appointment was. Just as a statutory claim was not the 'property of the company' for the purposes of para 6 of Sch 4 to the 1986 Act, so the liquidator's power to prosecute and carry on proceedings was not such property, because the power of the liquidator only arose after liquidation.

In those circumstances, whilst the assignment of the fruits of the action in itself was a valid exercise of the power of sale, the assignment of the liquidator's right to prosecute and carry on the proceedings was not. Without that statutory authorisation, the transaction was objectionable as being champertous.

Sankey Furniture Ltd, Re, ex p Harding [1995] 2 BCLC 594 applied; Dicta of Lightman J in Grovewood Holdings plc v James Capel & Co Ltd [1994] 4 All ER 417 at 425 adopted; Oasis Merchandising Services, Re [1995] 2 BCLC 493 and Re Oasis Merchandising Services, Ward v Aitkin [1997] 1 All ER 1009 considered.

(2) The court should be slow to exercise its discretion to permit a party in the claimant's position to add a party. To permit the claimant to add a party and then for the claimant's proceedings to be struck out would not be an appropriate exercise of discretion. In relation to the liquidator's application, although late applications should generally be discouraged, there was merit in the application and, subject to costs, no additional prejudice had been shown to have caused by the delay. In all the circumstances, it would be desirable to join FAL, and doing so would be consistent with the overriding objective to deal with cases justly.

Accordingly, FAL would be joined as a party and the claimant's proceedings would be struck out.

*Per curiam:* Where there is a sale of the fruits of the cause of action there will necessarily be a price to be paid. An assignee who funds the action or provides other funds to the liquidator will generally be paying a sum which in inherent in the concept of sale. In some circumstances, the court might find the means of funding or payment objectionable on public policy grounds, but it is difficult to see that the element of funding in itself necessarily renders the exercise of the otherwise valid statutory sale objectionable.

# Articles

## Bankruptcy

### Haines v Hill: Where does this decision leave a trustee in bankruptcy?

The decision of the Court of Appeal in Haines v Hill represents yet further disappointing outcome for trustees in bankruptcy in their battle to claw back assets previously transferred to a bankrupt's divorce spouse pursuant to an ancillary relief order of the divorce court.

(J Briggs: Insol Int, 06.08, 90) 08.26.064

## COMI

### The centre of main interests: But where is it? I know not how to find it

This article provides an interpretation of Article 3 of Council Regulation 1346/2000, which serves creditor-protection as well as debtor's interests, especially when considering the concept of corporate rescue.

(A Daehnert: ICR, 06.08, 167) 08.25.080

## Directors

### Recent cases involving directors' liability

This article reviews recent 2007 case law in England and Wales with regard to attempts by creditors to pursue directors of companies as well as the companies themselves and the reaction of courts to this continuing trend.

(A Riem: ICR, 06.08, 152) 08.25.081

## Financial stability

### A better foundation? Reforming bank insolvency law post Northern Rock

In the wake of the Northern Rock collapse, the government has proposed sweeping changes to the UK insolvency regime as it applies to deposit-taking financial institutions. Although changes pertaining to the protection of despositors are perhaps necessary to restore and promote confidence in the banking system, the proposed reforms to the insolvency law and too radical. The current system of administration is adequate to deal with a large bank insolvency without sweeping changes.

(M Farrell: BJIBFL, 06.08, 284) 08.26.061

## Set-off

### Administration set-off: a commentary on the paper of the FMLC Working Group (Issue 108)

This article outlines the findings of a Working Group set up by the Financial Markets Law Committee (FMLC) to explore the uncertainty surrounding the application of set-off in administration proceedings.

(S Bewick, P Hertz, J Marshall and R Tett:
BJIBFL, 06.08, 287) 08.26.060

# Technical

## Insolvency reform

### European High Yield Association responds to Insolvency Service on Insolvency Law Reform

In a letter to the Insolvency Service on 13 June 2008, the European High Yield Association (EHYA) has clarified its proposals to introduce formal legal proceedings governing the restructuring of large companies. The letter follows on from the proposals submitted by EHYA to the Treasury in April 2007 and February 2008.

http://www.ehya.com/ads/PressRelease/Letter_to_Treasury_22_02_2008.pdf

http://www.ehya.com/docs/PressRelease/EHYA_Responds_To_Insolvency_Service_on_Reform_Laws.pdf

Editor: Ruth Pedley, Professional Support Lawyer, Banking and Corporate Recovery Teams, CMS Cameron McKenna LLP.

Please contact Ruth for further information or feedback on this bulletin: Ruth.Pedley@cms-cmck.com

020 7367 2098

C/M/S/ Cameron McKenna

# Law-Now™

**CMS Cameron McKenna's free on-line information service**

To register for Law-Now on-line go to our home page **www.law-now.com**

CMS Cameron McKenna LLP
Mitre House
160 Aldersgate Street
London EC1A 4DD

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000