C/M/S/ Cameron McKenna

The heavyweight

Comprehensive coverage of this month's banking and insolvency law

December 2006

Looking forward

Developments scheduled for the month ahead

Date	Item	Significance
31 December 2006	**European code of conduct for clearing and settlement**	**Transparency of prices and services section to be implemented**
1 January 2007	**The Companies (Registrar, Languages and Trading Disclosures) Regulations 2006**	**Coming into force**
1 January 2007	**The Companies Act 2006 (Commencement No. 1, Transitional Provisions and Savings) Order**	**Coming into force**
1 January 2007	**The Capital Requirements Regulations 2006**	**Coming into force**
1 January 2007	**The Child Trust Funds (Amendment No.3) Regulations 2006**	**Coming into force**
20 January 2007	**Companies Act 2006: provisions only relating to Transparency and Takeover Directives.**	**Those provisions only will come into force**
1 February 2007	**HM Treasury consultation on changes to building societies legislation**	**Consultation closes**
Spring	**Powerhouse case hearing**	**Landlords objection to cramming down of parental guarantees in CVA**
End 2007	**Transparency in bond and non-equity markets – EU consultation**	**Final report to European Council and Parliament expected.**

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Date	Item	Significance
1 December 2006	**Office holders' remuneration**	**An unusual case on the practical factors that will be considered when office holders' remuneration comes before a court.**
8 December 2006	**Importance of careful drafting in financing agreements**	**A case of interest to trade financiers highlights problems arising from a poorly drafted document.**
12 December 2006	**EC Regulation: COMI and Establishment**	**The High Court ruled that a company incorporated in E&W has neither its COMI nor its "establishment" in the jurisdiction. Hans Brochier.**
12 December 2006	**The Hedge Fund Industry: an increasingly litigious environment**	**Hedge funds have historically been relative strangers to the process of litigation but this article explains the changing climate.**
13 December 2006	**Syndications: Arranging banks duty to disclose**	**Banks involved in syndicated credit facilities will be reassured by this case that did not attribute liability to Arranger.**
15 December 2006	**The tracker: status of Public Bills before the UK Parliament**	**A monthly round-up of bills to alert organisations to horizon risk.**
21 December 2006	**Changes to planning obligations - how Section 106 Obligations will fit in with PGS** **Three articles**	**Focus on Government's three consultation papers published mid-December on refinements to the proposed Planning Gain Supplement and its relationship with Planning Obligations.**
22 December 2006	**Companies Act 2006: Takeovers and electronic communications – update**	**Timetable set for implementation of some provisions of CA 2006**

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Banking

CASES

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Citibank NA v MBI Assurance SA and another

[2006] All ER (D) 196 (Dec) Chancery Division Mann J 13 December 2006

Trust and trustee – Trust deed and deed of charge – Construction – Company issuing notes to fund debt acquisition – Notes guaranteed by first defendant and secured by deed of trust under which claimant acting as trustee – First defendant directing claimant to vote in favour of plan for assignment of debt and to exercise option to receive cash on assignment – Trustee seeking directions – Whether first defendant able to give directions to claimant in relation to exercise of option – Whether exercise of option amounting to disposal under deed of charge.

In 2000, the Eurotunnel debt was refinanced, and part of its junior debt (including a part described as Tier 3 debt) was acquired by a company named Fixed Link Finance BV (FLF). In order to fund that acquisition FLF issued a series of notes, which were due to be repaid in 2025. A certain series of note (the G series notes) were guaranteed by MBIA Assurance SA (MBIA). Those notes were secured by a trust deed, by virtue of which Citibank, as trustee, had the benefit of direct covenants from FLF, including a covenant to pay the notes when due. Clause 12.2 provided that 'all the Issuer's rights in respect of the Financing Agreements (including, without limitation, its rights to vote as a Lender (as defined in the Financing Agreements)) which have been assigned to the Trustees pursuant to the Deed of Charge shall, unless and until the Secured Obligations have been discharged in full, be exercised by the Trustees in accordance with Pt 1, Sch 4'. Citibank also held a charge over FLF's assets. By cl 19.4 (see para [9]) of the deed of charge, the issuer covenanted not to dispose of its assets without the prior written consent of the trustee and MBIA. On 2 August 2006, various Eurotunnel companies, including those liable for the Tier 3 debt, went into a French form of insolvency proceedings called 'safeguard proceedings'. A scheme, 'the Safeguard Plan', was subsequently proposed, whereby the holders of Tier 3 debt would assign the debt to a new company in consideration for a pro rata share of the nominal amount of the NRS. The plan further provided that during the period of 15 calendar days from the date of the court decision approving it, each holder of the Tier 3 debt would have an option to receive cash rather than the NRS. On 6 November, MBIA's solicitors wrote to Citibank, directing it to vote in favour of the Safeguard Plan, and to exercise the Tier 3 cash option. QVT Financial LP (QVT), a hedge fund who held another series of note (the C series), became aware of the fact that the plan might contain a proposal that Tier 3 debts would be replaced by

hybrid notes, and that MBIA would cause FLF to dispose of those notes. QVT alleged that cl 19.4 of the deed of charge required Citibank to consent to the disposal, and that such consent could not properly be given in the circumstances. Citibank brought proceedings, seeking a direction as to whether it had to comply with the direction to vote in favour of the plan. It subsequently became clear that QVT did not oppose the plan, but rather considered Citibank should not accept a direction to exercise the option, or give consent to what it alleged constituted a disposal within cl 19.4 of the deed of charge. Proceedings were amended accordingly. The plan was approved on 27 November 2006.

Issues arose as to, inter alia, the power of MBIA to give directions to Citibank in relation to the exercise of the option, and whether the exercise thereof would constitute a disposal for the purposes of cl 19.4 of the deed of charge such as to require Citibank's consent.

The court ruled:

(1) The mortgage entitled Citibank to give directions to FLF to execute the option. MBIA had the power to direct Citibank to exercise the option, or to direct it to require FLF to exercise it. Since there was no express or implied limitation confining such a direction to circumstances of enforcement (in the sense of enforcing primary payment obligations) or even default, the right could be exercised by Citibank if and when the Tier 3 option came into existence. On a natural construction of the provisions, if the right to exercise the option or compel its exercise was vested in Citibank, then Sch 4 meant that MBIA could require its exercise. The provisions were of reasonably wide effect. They were certainly wide enough to catch a right which was essentially a right in respect of consideration payable for a forced substitution of the debt. In the instant case the exercise of the option fell within the subject matter of cl 12.2.

(2) In the instant case the exercise of the option would not be a disposal within the meaning of cl 19.4 of the deed of charge. The option would not come into existence until the Safeguard Plan came into effect. At that point the Eurotunnel debt formerly vested in FLF would be assigned. In its place would be a new bundle of rights, rights to cash and to the hybrid notes, with a cash option for the latter. The option gave the right to take the consideration in an alternative form. There was no proposal that FLF should dispose of those rights in the sense of parting with them in favour of another. The proposal was that FLF should exercise one of the rights in a certain way so as to receive its consideration in form B (cash) when it would have otherwise received it in form A (notes). While the right to notes disappeared on the election to receive cash, there was not a disposal for the purposes of cl 19.4. The notes would never have been received, so it could not be that they had been disposed of. It was artificial or unduly formalistic to regard that as a disposal of the right to notes. It was more realistic to regard what would have happened as an exercise of rights, and no more. No property would pass from FLF; nothing would be destroyed; there would be no transferor or transferee. All those were possible badges of disposal.

None would occur. There would therefore be no disposal for the purposes of cl 19.4.

Opposition to Eurotunnel sauvegarde procedings

Elliott International LP and others v Law Debenture Trustees Ltd

[2006] All ER (D) 143 (Dec) [2006] EWHC 3063 (Ch) Chancery Division Warren J 23 November 2006

Trust and trustee – Trust deed – Construction – Claimants seeking declaration as to meaning and effect of condition of bond terms.

Each of the claimants held a proportion of sterling denominated bonds due in 2050. The bonds were issued by Eurotunnel Finance Ltd (the issuer) pursuant to a trust deed dated 15 May 2006 and a master deed dated 7 April 1998. The bonds formed part of a complex restructuring package agreed between the Eurotunnel Group of companies and their bank creditors. The defendant was the trustee under the trust deed on behalf of the holders of the bonds from time to time. The Paris Commercial Court issued a number of judgments opening safeguard proceedings, a form of court-sanctioned restructuring for solvent debtors, in favour of a number of companies in the Eurotunnel Group, including the issuer and a number of other companies registered in the UK. A challenge to a judgment of that type was known as a 'tierce opposition' under French law. The claimants commenced tierce opposition proceedings (the opposition proceedings) in respect of five of the seven English companies within the safeguard proceedings. They sought a declaration as to the proper meaning and effect of condition 14 of the bond terms, first that the trustee had no capacity under condition 14(a), even if requested to do so, to institute or to pursue the opposition proceedings in the Paris Commercial Court on behalf of the claimants in relation to the safeguard proceedings and secondly, that the claimants were not and had not at any material time been prevented or prohibited from instituting and pursuing the opposition proceedings by reason of condition 14(b).

HELD:

The opposition proceedings were not proceedings within 14(a). They were not proceedings to enforce the terms of the bonds. Even if they were to be regarded as part and parcel of the safeguard proceedings, the safeguard proceedings themselves were not proceedings to enforce the terms of the bonds; rather they were proceedings the purpose of which was to achieve or assist in achieving a restructuring of the issuer's debt. In commencing the opposition proceedings, a trustee would not be taking action to exercise its rights under the bonds. It might be that the trustee did have power to commence such proceedings but, in doing so, on the facts of the instant case, it would not be doing so to exercise its rights under the bonds. It followed that condition 14(a) did not empower the trustee to commence opposition proceedings and a fortiori that the trustee could not have been compelled to do so under that condition by the claimants. Further, there was nothing in condition 14(b) which prevented the claimants from instigating and pursuing the opposition proceedings.

"I'll see you alright …":mere words of comfort

Manches LLP v Freer

[2006] All ER (D) 428 (Nov) [2006] EWHC 991 (QB) Queen's Bench Division Judge Philip Price Qc Sitting As A Judge Of The High Court 30 November 2006

Guarantee – Director of company – Company retaining solicitors – Director telling solicitors words to effect of: 'you don't have to worry, I'll be paying your fees' – Company not paying fees – Whether director personally liable for fees.

At material times, the defendant was a director of GE Ltd and a shareholder of TT Inc (which was GE Ltd's parent company). The claimant solicitors undertook work for the companies. Letters of engagement were sent out, which were signed by the defendant. When signing, it was stated that the defendant said words the gist of which was: 'you don't have to worry, I'll be paying your fees.' The companies did not pay for all the work done. The claimants obtained a default judgment in respect of outstanding fees against TT Inc, but that company was believed to be insolvent. GE Ltd was in liquidation. The claimants issued proceedings seeking to recover the sums owed by GE Ltd from the defendant and asserted that he was personally liable as a director by virtue of a provision in the claimants' terms of business. No terms of business were ever signed by the defendant.

The central issue was whether by signing the engagement letter the defendant personally guaranteed payment of the claimant's fees and disbursements in the event that the companies failed to pay them.

The defendant denied liability. He submitted that there was no evidence that he had signed any document on his own behalf as distinct from on behalf of the companies, nor that there had been any intention to enter a separate contract of personal guarantee with the claimant.

HELD: In the circumstances of the case, the words used by the defendant had been nothing other than mere statements of comfort to the claimants reiterating his willingness to make available funds to the companies to enable them to pursue their purposes. The defendant had signed the letters of engagement on behalf of the companies only, and had not intended to bind himself legally to any guarantee of payment of sums owing by the companies to the claimants.

It followed that the claim would be dismissed.

Issues as to proper demand for repayment

Brampton Manor (Leisure) Ltd v McLean and others

[2006] All ER (D) 376 (Nov) [2006] EWHC 2983 (Ch) Chancery Division Evans-Lombe J 28 November 2006

A bank had been entitled to appoint receivers pursuant to a debenture even though the breach of the debenture that was pleaded had not been relied on at the time of the receivers' appointment.

The claimant company was formed in early 1998 for the purpose of acquiring a leisure centre business. W was chairman and controlling shareholder of the company. By letter dated 20 August 2002 the third defendant (the bank) demanded payment of the sum of £847,452.93 from the

company. The demand was made pursuant to a loan master agreement which governed the relationship between the bank as loan creditor and the company as debtor at the date of the demand. The company failed to pay the payments specified in a letter of 30 August by the required date and accordingly, on 6 September 2002 the bank appointed the first and second defendants as administrative receivers pursuant to the debenture granted by the company to the bank on 6 August 1998. The claimant contended that the appointment of the receivers was unlawful and sought an order for their removal, a discharge of the receivership and consequential relief. By a further amendment to its defence the bank relied, in the alternative, on the principle that a debenture holder might rely on any circumstance, existing at the time of the appointment of receivers, which would justify their appointment notwithstanding that it was not being expressly relied on by the debenture holder at the time the appointment was made.

The issue arose whether at the time of the demand on 20 August 2002 the claimant was truly in default.

It was accepted that on the face of the accounts there was no money, or insufficient money, held by the bank to the credit of the company, sufficient to pay the July and August instalments due under the term loan agreement. The company contended, however, that by reason of the conduct of the bank, extending back to September 1998, the commencement of the bank's banking relationship with the company, and continuing till the demand which resulted in unlawful deductions from the company's accounts by the bank, the bank brought about a situation whereby the company did not have sufficient credit in its accounts to make the instalment payments.

HELD: The claim would be dismissed.

By W's own admission, the company was, at the time of the demand on 20 August 2002, in breach of the provisions of the loan master agreement and had been party to events in default under the debenture which justified that demand, even if no express reliance was placed by the bank on those breaches and events, which justified making the demand and appointing the receivers.

Title of financier of purchased goods

Fairfax Gerrard Holdings Ltd and others v Capital Bank plc

[2006] All ER (D) 380 (Nov) Queen's Bench Division (Commercial Court) Judge Mackie Qc Sitting As A Judge Of The High Court 28 November 2006

Contract – Construction – Finance agreement – Claimant providing finance to purchaser of machinery – Purchaser selling machinery on – Defendant providing finance to subsequent purchaser – Whether claimant retaining title to machine.

The first claimant was in the business of trade finance; the second and third claimants were subsidiaries. The group typically provided finance by purchasing goods for a customer and passing title to him only when repaid. The clients paid fees and other charges for the service, which was attractive particularly to those without the financial resources or creditworthiness to borrow in other ways.

One customer, D Ltd, offered automatic foil stamping die cutting machines for sale under its brand name, purchasing from manufacturers in China. It had an existing customer, C Ltd, to whom it hoped to sell a machine known as a D1050SS, for some £175,000. D Ltd had previously used the claimants to finance purchases from its suppliers and proposed to do so again when purchasing the machine in question. C Ltd itself obtained finance from the defendant. In July 1999, the claimants entered into a finance agreement with D Ltd. According to the claimants, it was an express term of the agreement that the machine would be sold to D Ltd subject to a reservation of title clause, and D Ltd would sell it on to C Ltd, the debt thereby created being automatically assigned to the claimants. In October 2000, D Ltd went into creditors' voluntary liquidation and it was dissolved two years later. The dispute then arose as to the title to the D1050SS, and proceedings were begun by the claimants.

The claimants contended that, on the proper construction of the finance agreement, they had retained title to the machine.

HELD On its proper construction, the finance agreement, did not permit D Ltd to sell the machine in the ordinary course of business. The defendant had had notice of the rights of the claimants. The claimants' action would therefore succeed. On the facts, it would be entitled to judgment in the sum of £132,500.

No condition in loan agreement affecting repayment

Battlebridge Group Ltd v (1) Amala Equity Ltd (2) Joseph Kelly

[2006] EWHC 2982 (Comm) QBD (Comm) (David Steel J) 23/11/2006

The defendant could not rely on his contention that the payment of a loan was conditional on the satisfactory outcome of his checks into a company as he had made no mention of that condition in response to numerous demands for payment or in his witness statement.

The claimant investment company (B) claimed the balance of a loan agreed with the first defendant company (X) and its sole shareholder and director the second defendant (K). X agreed to lend a sum of money to B secured against 5,493,708 shares in a listed company. X was under an obligation not to deal with the shares. The loan was on a non-recourse basis. Subsequently the shares were forwarded to X and placed in a nominee account. Thereafter five million were transferred out and K sold 60,000. Several months later and despite frequent reminders no funds had been supplied by X. It was agreed at a meeting between B and K that the collateral would be reduced to five million shares with the balance to be returned to B. Over the following months B chased for the return of the shares and provision of the loan monies. It was not until four months later that 433,708 of the shares were re-registered with B and a further two months before K replied to the complaints. At a subsequent meeting K denied trading any of the shares, claimed

he had not been able to contact B as the FSA were investigating the loan and said that he had not forwarded the second part of the loan amount because B had suspended its stock for two weeks. In a subsequent letter K stated that the original stock price was inflated and offered a further loan of £1 million but on different terms. At trial K contended that the balance of the loan was conditional on the satisfactory outcome of his checks into the company.

HELD: (1) There was no difficulty in rejecting the existence of any such condition for the payment of the balance of the loan. Despite numerous demands by B at no stage did K ever respond to the effect that the balance was not due because the checks were incomplete or unsatisfactory. Indeed there was not even any mention of the condition in K's witness statement. In addition a variation to limit the drawdown made little commercial sense as although the loan sum was reduced by 40 per cent, the share capital was only to be reduced by 10 per cent. For those reasons it followed that B was entitled to payment of the balance of the loan. (2) It was now common ground that 493,708 shares should have been returned and it was accepted that there was no basis upon which K could have legitimately sold 60,000 of the shares. The striking lack of frankness in regard to the sale of the shares reflected seriously on K's honesty and it was clear that B was entitled to the value of the sold shares. (3) It was unclear whether the shares had been placed in a designated account but given the history of the matter the injunction sought by B was granted with the effect that K should continue to hold the shares in the designated account.

Judgment for claimant.

Disclosure of documents

Real Estates Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd and others

[2006] All ER (D) 237 (Dec) [2006] EWHC 3249 (Ch) Chancery Division David Richards J 15 December 2006

Disclosure and inspection of documents – Confidential documents – Documents obtained in confidence and for limited purpose – Whether documents should be disclosed – Whether inspection of documents prohibited by relevant statutory provisions – Whether court should exercise discretion against ordering inspection – Financial Services and Markets Act 2000, s 348 – Civil Procedure Rules, SI 1998/3132, r 31.12.

In June 2001, the claimant company was floated with a split capital structure. The first and second defendant companies were one of the leading fund managers of split capital investment companies, appointed by the claimant to provide investment management services. The third defendant company, which was appointed a sponsor to the flotation, was an investment bank which had considerable experience in the market for such companies (the splits market). It was the claimant's case that the defendants owed duties of care in tort and that the first and second defendants owed contractual duties as regards the advice provided in respect of the flotation, the financial model to be adopted by it and its investment objectives and policy, and that

they were in breach of those duties. The collapse of the splits market in 2001 led to investigations by the Financial Services Authority (FSA). A number of employees and former employees of the defendants were interviewed by the FSA in the course of the investigation, mostly under statutory powers, and transcripts of those interviews were supplied by the FSA to the first and second defendants. In 2003, the Jersey Financial Services Commission (JFSC) conducted its own review relating to split capital investment companies administered or marketed in Jersey. An unspecified number of employees and former employees of the first and second defendants were interviewed in the course of the JFSC's inquiry and the transcripts were supplied to the first and second defendants. The claimant sought inspection of documents which comprised largely of transcripts of the interviews conducted by the FSA and the JFSC with employees or former employees of the defendants. The defendants withheld inspection of those documents and objected to their inspection on the basis that such inspection was prohibited by s 348 of the Financial Services and Markets Act 2000, and that disclosure would constitute a criminal offence. The claimant challenged the defendants' claim to withhold inspection of those documents pursuant to CPR 31.19, SI 1998/3132, on the basis that those documents were relevant to the issues in the present proceedings and satisfied the criteria for standard disclosure in CPR 31.6.

The central issue which arose was: (i) whether s 348 of the Act prohibited inspection of the transcripts and other documents supplied by the FSA to the defendants even if those documents did no more than record information provided by employees or former employees of the defendants to the FSA, being information which came to their knowledge in the course of their employment, (ii) if it did not, then the further issue was, as in the instant case, where the secondary recipient was a company and the information obtained by the FSA was provided in interviews by present and former employees of the secondary recipient, what constituted the prior knowledge of the company.

The defendants accepted that, if s 348 did not prohibit the inspection of transcripts and other documents supplied by the FSA in their entirety, the documents could be redacted so as to excise information not previously known to them. However, they submitted that the cost and difficulty of doing so, particularly when set against the value of what would be left, would make that a disproportionate exercise, and that accordingly, the court should exercise its discretion under CPR 31.12 to refuse to order inspection.

HELD:

The right of a party to refuse inspection of a relevant document was that it would be disproportionate and the court's task under CPR 31.12 was to determine whether that was so.

Section 348 of the Act did not prohibit the disclosure by a secondary recipient of transcripts either of his own interviews with the FSA or of interviews by the FSA with present or former employees of the secondary recipient, insofar as the transcripts contained information already and independently known to the

secondary recipient. A company could only have knowledge through the knowledge of its officers, employees or other agents. If, as had been decided, an individual secondary recipient was not prohibited from disclosing a document supplied by the FSA and containing information already known to him, it should follow that the same applied to a corporate secondary recipient, applying the rules of attribution. In those circumstances, transcripts of interviews with present and former employees of the defendants were disclosable by those companies in those proceedings, except and to the extent that they contained information which was not previously known to them, applying for that purpose the ordinary rules of attribution. The exceptional material would therefore be either confidential information (as defined) put by the FSA to the interviewee or information known to the employee but not attributable to his employer. Having considered the relevant matters, the balance of likely value as against the problems associated with redaction favoured an order for inspection, rather than a refusal of inspection.

The claimant would be permitted inspection of the documents in issue, subject to redaction in accordance with the relevant principles.

Arbuthnott v Fagan [1996] 1 LRLR 143 and *Re Galileo Ltd [1997] All ER (D) 70* considered.

LEGISLATION

Legislative and Regulatory Reform Act 2006

Explanatory Notes

Explanatory notes to the Legislative and Regulatory Reform Act 2006 have been published at

http://www.opsi.gov.uk/acts/en2006/2006en51.htm

Investment Exchanges and Clearing Houses Act 2006

The Act was granted Royal Assent on 19 December 2006 and came into force a day later. The Act is intended to prevent UK recognised investment exchanges and clearing houses from introducing provisions that would impose a regulatory burden on issuers and their members. The Explanatory Notes are available at http://www.opsi.gov.uk/acts/en2006/2006en55.htm

Banking

Bank liability

Public access to court documents

The Civil Procedure (Amendment No.2) Rules 2006 No 3132

These rules amend rule 5.4C of the Civil Procedure Rules 1998 (S.I.1998/3132) to make provision about statements of case filed at court before 2nd October 2006.

The full text is available at http://www.opsi.gov.uk/si/si2006/20063132.htm

(Date in force, 18.12.06)

Consumer credit

The Consumer Credit (Enforcement, Default and Termination Notices) (Amendment) Regulations 2006 no 3094

These Regulations amend the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983. They provide that default notices served under section 87 of the Consumer Credit Act 1974 shall specify— (a) that where action is required to be taken by the debtor or hirer to remedy the breach or pay compensation, this action shall be taken within not more than 14 days after the service of the notice; and (b) where no such action is required to be taken, the date on or after which the creditor or owner intends to take action, must not be less than 14 days from the date of the notice.

The Regulations are available at

http://www.opsi.gov.uk/si/si2006/20063094.htm

(Date in force, 19.12.06)

Company

FSMA definition of "transferable securities" and "debt securities"

The Companies Act 2006 will amend the definition of "transferable securities" and "debt securities" in the Financial Services and Markets Act 2000 (FSMA).

Transferable securities will be defined with reference to the Markets in Financial Instruments Directive (MiFID) (2004/39/EC) rather than to the Investment Services Directive (93/22/EEC).

Debt securities will be defined with reference to the Transparency Directive (2004/109/EC), rather than as securities that are not "equity securities" under the Prospectus Directive (2003/71/EC).

Schedule 15, paragraph 10 of the Companies Act 2006.

Companies Act 2006: Changes to the disclosure of significant shareholders

This Notice outlines forthcoming changes to the way in which most AIM companies will need to disclose significant shareholdings. The changes are required as a result of the implementation of the EU Transparency Directive via the Financial Services Authority Disclosure Rules, which will be renamed the Disclosure and Transparency Rules. Currently AIM companies disclose relevant changes to significant shareholders under the provisions set out in Rule 17 of the AIM Rules for Companies which is broadly based on the current Companies Act 1985.

From 20 January 2007, the Companies Act provisions will be replaced and extended by a new Chapter 5 of the DTR. These provisions will replace those currently contained in Rule 17 for most AIM companies. This Notice provides information on the transitional provisions of the DTR that will affect AIM companies and advises that some consequential changes to the AIM Rules for Companies will be required, which will be the subject of a future AIM Notice.

The full text is available at http://www.londonstockexchange.com/NR/rdonlyres/37156CEB-E10C-4551-A2B0-E6BE3AB38047/0/AIMNotice25.pdf

(AIM25: London Stock Exchange, 30.11.06)

Fraud

Money laundering

Regulation on information on the payer accompanying transfers of funds: publication in Official Journal

On 8 December 2006, Regulation No 1781/2006 on information on the payer accompanying transfers of funds (Regulation) was published in the Official Journal.

The Regulation applies to electronic transfers of funds that are sent or received by a payment service provider (PSP), that is, a natural or legal person whose business includes the provision of transfer of funds services. The Regulation does not

apply to transfers of funds that represent a low risk of money laundering or terrorist financing (for example, provided that certain conditions are met, transfers using credit and debit cards). The purpose of the Regulation is to help prevent, investigate and detect money laundering and terrorist financing.

The Regulation obliges the PSP of the payer to ensure that electronic transfers of funds are accompanied by accurate and meaningful information about the payer (at most, the payer's name, address and account number). The Regulation also imposes obligations on the PSP of the payee, in particular, in relation to verifying that the required information has been sent (where such information is missing or incomplete, the PSP must either ask for the information or reject the transfer). Provisions regarding intermediary PSPs are also included. All PSPs are obliged to keep records of information on the payer for five years and to respond to requests for this information from competent authorities.

Regulation

Basel

The Capital Requirements Regulations 2006

On 11 December 2006, the Capital Requirements Regulations 2006 were published . The regulations implement the Capital Requirements Directive (a combination of the Banking Consolidation Directive (2006/28/EC) and the Capital Adequacy Directive (2006/49/EC), which introduce a new prudential framework from 1 January 2007, based on the international Basel II framework.

Implementation of the CRD requires amendment of existing legislation to: (1) allow pan-European groups to apply for permission to calculate their capital requirements using one of the advanced methods; (2) provide for cooperation between competent authorities; and (3) give the FSA new powers to recognise External Credit Assessment Agencies.

The regulations were laid before Parliament on 5 December 2006 and come into force on 1 January 2007.

ARTICLES

Banking

Bank liability

Terms implied in settlement agreement

In *Independiente Ltd v Music Trading Online (HK) Ltd*, the court looked at a settlement agreement that obliged the defendants to give certain undertakings to the court,. The question arose whether the settlement agreement should be construed as impliedly imposing on the defendants identical undertakings owed to the claimants. The court held the settlement agreement included implied terms.

The case highlights the need to spell out in any settlement agreement the scope and extent of contractual obligations. The willingness of the court to "correct" the written settlement agreement by implying terms in this case is noteworthy, but cannot be assumed in every case

PLC 7 December 2006

A question of substance: determining whether a duty of care exists

Examines the impact of the CA decision in *Riyad v Ahli*. The case may cause considerable concern to organisations in the financial sector facing potential liability to parties with which they do not have a direct contractual relationship. Considers *HM Commissioners of Customs & Excise v Barclays Bank* on when a party owes a non-contractual duty to another in cases of economic loss.

Ellie Tofts Bankers' Law Vol 1 No 3 page 25

Financial institutions playing different roles: the Parmalat case

The Parmalat scandal offers a good opportunity to analyse the issue of conflict of interests in the financial services industry, focusing on the role played by financial institutions as both creditors and bond placers. After briefly tracing Parmalat's history, the rules aimed at managing conflict of interests set forth by the scandal, a law on public savings has been approved. Conclusions are drawn on: the effectiveness of Chinese walls proposed by the law; the need to strengthen cooperation among supervisors and the introduction of a class action mechanism.

(AM Carozzi: ERLR, 12.06, 1535) 06.51.094

Company

Transparency Directive – understanding shareholdings

The Transparency Directive, which is being implemented in the UK on 20 January 2007, is intended to:

- enhance investor protection and market efficiency across member states by ensuring that companies traded on a regulated market produce a regular flow of financial and other information

that is accurate, comprehensive and timely;

- ensure that companies and the market know about major shareholdings in the companies and how and when they change; and
- provide the mechanisms through which this and other regulated information (including announcements of inside information) is to be disseminated and stored, and the persons who are legally responsible for ensuring that published financial information is not misleading.

Consumer credit

A change in nature

Recent changes to the consumer credit regulations will have a relatively small impact on the premium finance sector but as this article reports, providers are having to adapt their processes to ensure compliance with this new environment.

(J Bernstein: Post Mag, 23.11.06, 22) 06.49.006

Capital markets

Bonds

The changing role of the trustee in international bond issues

Outlines the operation of international trusts and capital markets and key developments concerning the role of trustees in international bond issues.

Reviews the scope of a bond trustee's traditional legal obligations and liabilities, and the possible changes arising from the Elektrim litigation, including the Chancery Division decision in Law Debenture Trust Corp Plc v Acciona SA and the House of Lords ruling in Concord Trust v Law Debenture Trust Corp Plc on a trustee's ability to seek an indemnity from bondholders as a result of an invalid notice of acceleration. Compares the position of bond trustees in the US under the Trust Indenture Act 1939.

Journal of Business Law J.B.L. (2007) January Pages 43-66 1/1/2007 Philip Rawlings (University College London)

Derivatives

CDOs under siege - Part II: IAS derecognition and BASEL II

This is the second part of a two-part series that addresses the issues of structuring traditional Collateralised Debt Obligations ("CDOs") in relation to compliance requirements under the International Accounting Standards ("IAS") and Basel II. In this analysis attention is drawn to some of the inconsistencies between the IAS and Basel II approaches. The article discusses the possible implications and risks that market practitioners should take into account in contemplating CDO structures.

(K Glukhovskoy & J Tanega: [2006] 21(12) JIBLR, 689) 06.50.001

Growing pains for CDS

Credit derivatives players are facing more operational challenges as they try to keep up with the fast growth in this market. Despite some progress, it is becoming increasingly difficult to standardise

processes. Could regulation make a difference?

(R Horsewood: ISR, 11.06, 43) 06.49.037

A practical look at Credit Default Swaps

Basic operations, general legal framework, key contract terms (reference entity, credit event, obligation, deliverable obligation, restructuring – limitations, US standard, successor provisions) and Settlement of CDS contract, with a one page flow diagram for a Plain Vanilla Credit Default Swap with Physical Settlement assuming Notional of $10m.

Barbara de Calonje and Paul Glasgow Bankers' Law Vol 1 No 3 page 32

Finance and Security

Aircraft finance

Have Cape will travel

After many years in development, the Cape Town Convention – a new regime for cross-border aviation finance – is now receiving support from many countries around the world. The author reports.

(A Hewitt: Legal Week, 16.11.06, 23) 06.49.001

Asset based lending

Facing the Basel II endgame

The impact of Basel II has been widely debated, with much focus falling on the potential dampening effect on ABS volumes across Europe. But also of crucial importance is how the new regime will affect the buy-side. Will the Accord have a fundamental impact on investment strategies, portfolio composition and spreads? Asks the author.

(A Mattinson: ISR, 11.06, 35) 06.48.019

Charges

The rightful ranking of liquidation expenses – a statutory perspective

This paper is concerned with the proper ranking of liquidation expenses vis-à-vis that of floating charge holder claims on the insolvent liquidation of a company.

(D Venton: [2006] 22(6) IL+P, 205) 06.50.086

Property finance

Finding a new home

The property derivatives market has long been flagged as a potential huge growth area with obvious links to the securitisation sector. It is only now, however, that the market finally seems to be reaching its tipping point. Liquidity and securitisation-friendly tools hold the key to unlocking its true potential.

(H. Wray: ISR, 12.06, 40) 06.50.108

Securitisation

Reaching critical mass

Reverse factoring is taking off in Europe, the US and in emerging market countries. It offers benefits or all parties involving, and is a boon for the securitisation market as a whole.

(D Bedell: ISR, 11.06, 53) 06.48.020

Fraud

Fraud

The Fraud Review: effect on businesses managing fraud risk

The attorney general, Lord Goldsmith, published the final report of the government's Fraud Review in July 2006. A consultation process followed and it is expected that further findings will be published late this year or early next year. What will the Review mean for businesses seeking to manage their fraud risk in the wake of the publicity generated by the WorldCom and Enron scandals and the anti-fraud initiative championed by the Financial Services Authority (FSA)? In this briefing, we analyse some of the Review's key recommendations and look at the implications for businesses seeking to manage fraud risk.

(L Delahunty: IHL, 12/1.07, 44) 06.52.001

(Carousel Fraud) Walking on thin ice

The recent 'carousel fraud' case has put the limits of freezing orders to the test, as the authors explain. This article discusses *Revenue and Customs Commissioners v Egleton* – extending the reach and impact – Pandora's box of further satellite litigation?

(A. Howell & D. Smith: NLJ, 8.12.06, 1865) 06.51.088

Money laundering

JMLSG publishes suggested framework for MLRO annual report

The Joint Money Laundering Steering Group (JMLSG) have published a suggested framework for the Money Laundering Reporting Officer (MLRO) annual report on anti-money laundering (AML) systems and controls. While Financial Services Authority (FSA) rules advise that an MLRO provide such a report to senior management, the format of the report is not specified (SYSC 3.2.6G(2)).

The JMLSG's suggested framework, which updates the version published in March 2005, is divided into the following parts:

- (1) Part A. This part covers those within the firm responsible for AML systems and controls (for example, the MLRO and the director or senior managers with overall responsibility for AML systems and controls), and the structure within which they operate.
- (2) Part B. This part discusses the operation of AML systems and controls in the areas covered by SYSC 3.2.6G, for example, staff training, provision of information to senior management and documentation of policies and risk assessments.
- (3) Part C. This part covers business issues including the business operations of the firm, the type and size of the firm's customer base and customer due diligence procedures.
- (4) Part D. This part discusses conclusions and recommendations for actions.

Annexed to the framework is a suggested outline for a report on the duties of the nominated officer. The JMLSG explains that while the framework is intended to be helpful to MLROs, it is not formal guidance.

4 December 2006

A bank's duty to disobey

Considers the extent of the duty on banks to go against customers' wishes to disclose confidential information where they hold a suspicion of money laundering, by reference to the Court of Appeal ruling in K Ltd v National Westminster Bank Plc and provisions of the Proceeds of Crime Act 2002. Considers whether the customer could be granted an injunction on the ground that the bank was breaching its contractual duties by disclosing confidential information and whether the bank had breached its duties under s.333 by informing the customer that it had made an authorised disclosure.

New Law Journal N.L.J. (2006) Vol.156 No.7251 Page 1820 1/12/2006 Peter de Verneuil Smith (2 Temple Gardens)

Extension of money laundering regulation to the movement of money – a banker's view

Addresses some recent developments on the regulation of movement of money. In particular, this article considers the implications of the new EU Payer Information Regulation which aims to ensure that basic information is immediately available to the authorities responsible for combating money laundering and terrorist financing.

Roger Jones, Head of Risk, LTSB Bankers' Law Vol 1 No 3 page 9

Regulation

Money laundering – see Fraud section

FSA

Revised memorandum of understanding on UK Financial Stability

Assesses the value and importance of the revised Memorandum of Understanding on Financial Stability entered into between the FSA, the Treasury and the Bank of England. The relevance and significance of Memoranda as a regulatory tool are noted and the structure and content of the revised Memorandum considered in further detail. Comments are made with regard to the value and effectiveness of the final result produced.

George Walker Bankers' Law Vol 1 No 3 page 19

TECHNICAL

Capital Markets

ISDA

2006 ISDA Definitions

ISDA is close to finalising the draft of the 2006 ISDA Definitions.

ICMA

Competition law guidelines for discussion on organizational and market related activities under the auspices of ICMA

http://www.icma-group.org/content/legal1/icma_competition_law.html

Finance and security

LMA

LMA Grey Market document changes to help manage risk

Revised Grey Market documents have been posted on the LMA website.

The principal change is to the definition of "close of primary syndication". The change was made to reflect what is actually happening in the market with all parties anxious to risk-manage their positions from the instant they are allocated.

The new definition now reads:" Close of primary syndication means immediately upon the underwriters [and sub-underwriters] being notified by us as to the allocation of commitments relating to the facilit[y/ies]."

Other changes relate to the rubric on the front page of each document.

Clearing and Settlement

Council adopts conclusions on the new European Code of Conduct

On 29 November 2006 the Council of the European Union published the conclusions it adopted with regard to clearing and settlement at its 2766th ECOFIN meeting held on 28 November 2006.

The Council welcomes the recently introduced industry Code of Conduct and calls for it to be implemented swiftly.

It asks the European Commission to:

- (1) report on the monitoring process of the implementation and functioning of the Code of Conduct by February 2007;
- (2) review issues related to the safety and soundness of the securities clearing and settlement infrastructure providers in Europe and progress removing legal and regulatory barriers by June 2007; and
- (3) produce a final assessment by February 2008.

The Commission also asks the Financial Services Committee to conduct parallel investigations on legal and regulatory barriers, safety and soundness, and to produce its own report for the Council by March 2008.

Home credit

Home credit inquiry

A Competition Commission report announcing that the Competition Commission will introduce measures, including requiring home credit companies to share data on existing customers' payment records and provide clearer information on loan costs and changing the settlement rebate, to enable greater competition from other lenders, thereby increasing competition in the market and improving customers' access to alternative forms of credit, is available at http://www.competition-commission.org.uk/rep_pub/reports/2006/517homecredit.htm

(Competition Commission, November 2006)

Insurance

Insurance contract law - issues paper 2: warranties

Copies of the joint Law Commission and Scottish Law Commission issues paper on insurance contract law in relation to warranties, sets out tentative proposals for law reform, with a full consultation expected in summer 2007. The paper explains the current nature of an insurance "warranty" and where warranties fit within a hierarchy of terms in insurance contracts; summarises of the English Law Commission 1980 report, setting out both its analysis of the problems and its recommendations for reform; considers whether warranties are still the problem they were in 1980; evaluates the current state of the law; looks at how other jurisdictions have dealt with warranties; sets out our provisional proposals, namely that basis of the contract clauses should be abolished, and that warranties should be set out in writing and made subject to a causal connection test; and considers the arguments for and against making standard terms in commercial insurance contracts subject to a test of fairness, along the lines of the Unfair Contract Terms Act 1977 s.3 and s.17.

Copies of the paper are available from http://www.lawcom.gov.uk/docs/Insurance_Contract_Law_Issues_Paper_2.pdf

(Law Commission, November 2006)

Regulation

MiFID

MiFID: use of reference data standard codes in transaction reporting

Copies of the Committee of European Securities Regulators' consultation on the use of reference data standard codes in transaction reporting in relation to the Markets in Financial Instruments Directive are available.

http://www.cesr-eu.org/data/document/06_648b.pdf

(CESR, December 2006)

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  (2) Part B. This part discusses the operation of AML systems and controls in the areas covered by SYSC 3.2.6G, for example, staff training, provision of information to senior management and documentation of policies and risk assessments.

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4 December 2006

NOTICES

Banking

Bank accounts

Personal Accounts: A New Way to Save

A White Paper has been issued by the Department for Work and Pensions . This is part of the Government's strategy to help people to help themselves by encouraging good savings habits for one's own pension provision. The Executive Summary weighs in at a hefty 40 pages; designed for the time-rich executive.

The main point of the exercise, and the bits that relate to (bank) accounts are:

- seven million people are undersaving for retirement. The Government is reforming the private pensions system to simplify pensions and overcome the obstacles to saving.
- all eligible employees will be automatically enrolled into either a personal account or an employer-sponsored scheme. Employees will contribute a minimum of 4 per cent, matched by a minimum 3 per cent employer contribution and around 1 per cent in the form of normal tax relief from the State. This will overcome the inertia and short-termism that characterise attitudes to saving;
- a new scheme of low cost personal accounts based on the approach outlined by the Pensions Commission. This approach will maximise coverage among our target group, minimising charges and delivery risk;
- a new national minimum employer contribution to improve incentives to save and increase pension participation;
- an innovative approach to delivering the scheme using a delivery authority, staffed by individuals with expertise in business and financial services;
- a governance scheme with operational independence, whose duty to consult members and act in their interests will insulate it from external pressures; and
- a set of policies to ensure that personal accounts will complement, rather than compete with, existing high quality pension provision, including no transfers in and out of personal accounts and a maximum annual contribution of at least £5,000.

Competition

The price of banking: an international comparison

Key point: UK banks are amongst the most transparent in relation to the disclosure of fees and charges

On 5 December 2006, the British Bankers' Association (BBA) published a report prepared by Oxera Consulting on retail banking. The report compares the price and cost of the main banking

products used by British consumers with those in ten other developed countries (that is, Australia, Canada, France, Finland, Germany, Ireland, Italy, the Netherlands, Sweden and the USA).

Key findings include the following:

- (1) For current accounts, personal loans, savings accounts and credit card users who pay off their monthly balances in full, the UK is one of the cheapest countries for a typical customer to use a typical service; and
- (2) UK banks are amongst the most transparent in relation to the disclosure of fees and charges, and offer one of the broadest ranges of services.

The full text is available at http://www.bba.org.uk/content/1/c4/79/87/Oxera_Report_November_2006.pdf

(BBA, December 2006)

DTI consults on further aspects of implementation of the Unfair Commercial Practices Directive

The Department of Trade and Industry have published a consultation paper seeking views of stakeholders on two issues not addressed in the DTI's original (December 2005) consultation on implementation of the Unfair Commercial Practices Directive (UCPD) (2005/29/EC).

The UCPD must be implemented by EU member states by 12 June 2007.

The issues consulted on in the present consultation are:

- (1) whether offences in the regulations implementing the UCPD and the amended Misleading and Comparative Advertising Directive (MCAD) should include a mental element (mens rea), should rely on the current general approach of strict liability offences/due diligence defences, or should contain a combination of the two.; and
- (2) whether the Office of Fair Trading should have the power to bring criminal prosecutions.

The consultation is open for an eight-week period closing 5 February 2007.

Finance and Security

Mortgages

Research sheds light on interest-only mortgages

Research published today by the CML concludes that there is no evidence for the widely-held assertion that housing affordability pressures are driving borrowers to take out interest-only mortgages without having a plan for repaying the amount borrowed.

(CML, 30.11.06)

Exclude MPPI from Competition Commission referral, says CML

The Council of Mortgage Lenders has today submitted its response to the Office of Fair Trading's consultation on its proposal to refer the payment

protection insurance market to the Competition Commission. The CML argues that mortgage payment protection insurance should be excluded from the referral.

(CML, 30.11.06)

Regulation

European

Review of commodity and exotic derivatives business:

Call for evidence

The European Commission have published a call for evidence on a review of the regulatory framework concerning commodity and exotic derivatives business.

The Commission's report will look at problems in the existing regulatory structure and examine the scope and nature of regulation in the commodity and exotic derivatives business.

The review may be extended to wholesale commodity trading.

Timetable:

- 30 April 2007 - consultation closes
- 1 May – September 2007 - regulatory and market review
- September 2007 - feedback statement
- June 2008 - draft report
- October 2008 - final report

EC's mandate: (1) Article 65(3) of Directive 2004/39/EC on markets in financial instruments (MiFID); (2) Article 40(2) of Commission Regulation 1287/2006 (MiFID implementing Regulation); and (3) Article 48 of Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions (recast CAD). Annex II sets out the relevant legal provisions.

Insolvency Cases

Distribution by administrators

Re Lune Metal Products Ltd (in administration)

[2006] All ER (D) 225 (Dec) [006] EWCA Civ 1720 Court Of Appeal, Civil Division Tuckey, Carnwarth And Neuberger LJJ 14 December 2006

Company – Administration order – Administrator – Administrators seeking to pay out to creditors without company voluntary arrangement or compulsory liquidation – Whether court having jurisdiction to sanction distribution – Insolvency Act 1986, ss 14(3), 18(3).

In this pre-Enterprise Act case, the court had no power under the Insolvency Act 1986 to sanction administrators paying out creditors on a free-standing application.

The parties were appointed as administrators of the company, with two purposes: (i) approving a company voluntary arrangement (CVA); and/or (ii) a more advantageous realisation of the company's assets than would be achieved on a winding up. The administration was governed by the Insolvency Act 1986, before its amendment by the Enterprise Act 2002. The administrators' proposals were approved at a meeting of the company. All outstanding matters had been resolved, and the administrators held a fund of £485,237 for distribution to the creditors of the company. The administrators' proposals, as approved, envisaged the company entering in to a CVA once the assets had been realised. The administrators concluded, however, that it would be better for the creditors if the administrators were to pay out to the creditors early, paying the preferential creditors in full and the unsecured creditors pari passu, namely, on the same basis as if the payments had been made in the course of a compulsory liquidation. The costs of the proposed course would be £40,000, whereas the cost involved if the company first went into liquidation or into a CVA would be £70,000. The administrators applied to the High Court for the proposed distribution to be sanctioned. The judge held, however, that he had no jurisdiction to sanction the distribution, on the basis that the 1986 Act, prior to its amendment by the 2002 Act, had given neither the administrators power to make such a distribution, nor the court power to sanction or order the making of such a distribution. He concluded that if he had had jurisdiction, he would have sanctioned the proposed distribution, on the basis that the creditors had either supported it or had not objected to it, and it would result in an enhanced payment, at least to the unsecured creditors. The administrators appealed. The appeal was unopposed.

The following issues fell to be determined: (i) whether the court had the jurisdiction to sanction the distribution to the creditors

under s 14(3) and s 18(3) of the 1986 Act on the basis of the original application; (ii) in the alternative, whether the administrators could amend their application to include an application for the discharge of the administration order under s 18 of the 1986 Act; and (iii) if so whether the court had the jurisdiction to sanction the distribution on the basis of the amended application.

The court ruled:

- (1) The judge had had no jurisdiction under s 14(3) of the 1986 Act, prior to its amendment by the 2002 Act, to make an order sanctioning the administrator to make payments to the creditors.

Section 14(3) of the 1986 Act envisaged the court giving the administrator 'directions' but they had to be 'in connection with the carrying out of his functions', which did not extend to paying out creditors. Although s 14(3) did extend to giving the court what might be characterised as an inherent jurisdiction over the actions of an administrator, which might be invoked in the same sort of circumstances as in relation to liquidators, it could properly and fairly be said to justify the court sanctioning a course of action which was wholly outside the ambit of an administrator's powers.

Re Powerstore (Trading) Ltd [1998] 1 All ER 121 followed. Re Mark One (Oxford Street) plc [1999] 1 All ER 608 reversed. Re The Designer Room Ltd [2004] 3 All ER 679 followed.

- (2) With regard to the court's power to make such 'order as it sees fit' under s 18(3) of the 1986 Act, that provision only came into play on the hearing of an application under that section, namely, an application to discharge, vary or add an additional purpose to, an administration order, pursuant to s 18(1). The variation contemplated could not extend to sanctioning an action by an administrator which was not contemplated or permitted by some other provision of the 1986 Act. The court could, however, under s 18(3), sanction administrators paying money directly to a class of creditors (and therefore to all creditors), at least if it was to facilitate a desirable exit route from the administration.

In the instant case, there was no question of a variation or additional purpose, and therefore the jurisdiction under s 18(3) could only be invoked if the administrators had been making an application for discharge, which they had not. It followed that the judge had been right to dismiss the application as it was before him. The administrators would, however, be given permission to vary their application to apply for a discharge on the basis that the payments to the creditors sought to be sanctioned should first be made. On the basis of the amended application, the appeal would be allowed. The payments to the creditors would leave the company an empty shell. A CVA would be pointless. To require the administrators to incur the cost (which would be at the expense of the unsecured creditors) of petitioning to wind up the company would appear unreasonable, and to be avoided if possible. The solution lay in s 652 of the Companies Act 1985, which entitled the registrar of companies to strike a company off if was 'not carrying on business or in operation'. That would provide the

appropriate exit route for the administration. The administrators should inform the registrar of the proposed course of action, asking him what, if any, assistance or costs they should provide him with in connection with it, and should provide him with any such assistance and costs. On that basis, the administration would be discharged, and the distribution sanctioned, under s 18(3).

Re UCT (UK) Ltd (in administration) [2001] 2 All ER 186 followed.

CVA and retention of title

Re Ultra Motorhomes International Ltd; Ratten and another v Ultra Vehicle Design Ltd and another

[2006] All ER (D) 227 (Dec) [2006] EWHC 3236 Chancery Division Patten J 14 December 2006

Insolvency – Voluntary arrangement – Variation – Company producing and selling motorhomes – Arrangement being varied so as to allow transfer of company's undertaking to subsidiary – Sale agreement between company and subsidiary purportedly excluding sale of any motor vehicles and providing for retention of title to assets until payment in full received – Subsidiary purportedly transferring vehicle to another company pursuant to security agreement governed by German law – Whether vehicle excluded from sale of assets to subsidiary – Whether vehicle subject to retention of title provisions contained in sale agreement so as to prevent title passing to subsidiary.

Ultra Motorhomes International Ltd (UMIL) produced and sold motorhomes. By a proposal dated 21 November 2001, it entered into a company voluntary arrangement (CVA) which was approved by its creditors. The proposal was drafted with input by W, the sole director of UMIL, and provided for UMIL to continue to trade in order to maximise realisations. UMIL was to pay the supervisors a sum within 30 days of the CVA's approval and a further sum on 28 December 2001 and at the end of each month for a further 36 months. UMIL failed to make the monthly contributions. The supervisor subsequently proposed variations to the CVA, which were approved by the creditors on 20 December 2002. It was agreed that the failure to make the payments would not be treated as an event of default, that UMIL would recommence payments with effect from January 2003, and that it would pay the arrears for September and December 2002 in a single lump sum by 11 December 2004. In light of W's contention that UMIL was failing to attract new business as a result of the CVA, it was authorised to transfer its business and undertaking to a wholly owned subsidiary, Ultra Vehicle Design Ltd (UVDL), on terms which would require UVDL to make the monthly payments and pay off the arrears. Clause 2.1 of the sale agreement provided for the sale to UVDL of various assets, including 'the Equipment', the 'Stock' and 'the Contracts'. Clause 2.2 excluded 'any motor vehicles' from the sale, and cl 5.1 provided that 'Property to any right title or interest in any of the Assets shall pass to the Purchaser only upon payment in full being made for the respective assets'. By a letter dated 21 March 2003, and signed by H, the manager of UMIL and UVDL's business, UVDL entered into a security agreement with Behlke Electronic GMBH (Behlke), which purported to transfer ownership of a vehicle (vehicle 48) to Behlke, as security for a prepayment which

Behlke had previously made to UMIL in respect of another vehicle (vehicle 47). The agreement was in German, and described itself as 'Sicherheitsubereignung des Fahrzeugs'. Only two further payments were made to the supervisors following the sale agreement and on 2 July 2003, UMIL and UVDL were placed into creditors voluntary liquidation. Vehicle 47 had not been completed by the time of liquidation but it was recovered from the liquidator and completed at Behlke's expense. Behlke contended that vehicle 48 had been effectively transferred to it and that it was entitled to sell it and retain from the proceeds a sum equal to the costs incurred as a result of UMIL's failure to complete vehicle 47. In April 2004, Behlke removed vehicle 48 from the jurisdiction. The supervisors brought proceedings, seeking possession of vehicle 48, an order for its delivery up, and the assessment of damages consequent upon its removal from the jurisdiction. It was held, as a preliminary issue, that the English courts had jurisdiction to determine the validity of the security agreement but that it was governed by German law.

The supervisors submitted that vehicle 48 fell within the reference to 'any motor vehicles' in cl 2.2 of the sale agreement and was therefore excluded from the sale of assets to UVDL. In the alternative, it was submitted that, if included in the sale, vehicle 48 was subject to the retention of title provisions contained in cl 5.1 and, accordingly, title never passed to UVDL.

The application would be allowed.

(1) In the instant case vehicle 48 did pass to UVDL as stock subject only to the retention of title clause. The provisions of cl 2 of the sale agreement had to be given a construction which facilitated rather than impeded the purpose of the revisions to the CVA. It was clear that the transfer of assets to UVDL was intended to allow the business formerly carried on by UMIL to continue in the hands of its new subsidiary which was to obtain the benefit of UMIL's existing contracts and the equipment, stock and goodwill of that business. It would be odd for the draftsman to have included the benefit of contracts for the manufacture and sale of the motor homes but to have excluded title to a similar motor home already completed and available for sale. The exclusion of motor vehicles was a standard type of provision designed to exclude from the sale vehicles supplied for the use of the vendor's own employees.

Re Brelec Installations Ltd [2000] All ER (D) 515 applied.

(2) The effect of cl 5.1 was that UDVL could not pass title to the purchaser of a vehicle prior to all instalments of consideration being paid unless it obtained a consent or release from UMIL, which of course remained subject to the supervisor under the CVA. The security agreement was not a usual type of contract and would not fall within the scope of a general authority to enter into contracts for the production and sale of vehicles. Nor would it have been within the scope of H's apparent authority based on his role in the management of the business. Therefore the security was only binding on UVDL if H had been given express authority by W to enter into it on the company's behalf. In the circumstances, such express consent had not been given.

Exit from administration – distributions

In The Matter Of Cromptons Leisure Machines Ltd (2006)

Ch D (Lewison J) 13/12/2006

The court had a power, both under the Insolvency Act 1986 s.18(3) and under its inherent jurisdiction, on the application for discharge of an administrator, to authorise the administrator to make a distribution to those creditors of the company who would be preferred creditors in the event of a winding up.

The applicant administrators (G) of a company applied for the discharge of the administration order and for the court's sanction to make a distribution to creditors who would be preferential creditors in the event of a winding up. The issue was whether, in the case of an administration governed by the Insolvency Act 1986 before the amendment by the Enterprise Act 2002, the court had the power to authorise G to make a distribution to certain creditors, in the light of conflicting first instance decisions.

HELD: The issue had been considered at first instance by eight judges, six of whom had answered that the court did have the requisite authority and two of whom had decided that the court did not have jurisdiction, *Re Powerstore (Trading) Ltd (1997) 1 WLR 1280, Re Mark One (Oxford Street) plc (1999) 1 WLR 1445, UCT (UK) Ltd v (1) James Dargan (2) Ralph Preece (2001) 1 WLR 436, Designer Room Ltd, Re (2004) EWHC 720 (Ch) , (2005) 1 WLR 1581, Beauvale Group Ltd (In Administration), Re (2006) BCC 912, Re Wolsey Theatre Company Ltd (2001) BCC 486, Re TXU UK Ltd (In Administration) (2002) EWHC 2784 (Ch) , (2003) 2 BCLC 341, and Spiralglobe Ltd (2006) Unreported*, considered. It was now appropriate for the law to be taken as settled at first instance without the need for argument, *Colchester Estates (Cardiff) v Carlton Industries plc (1984) 3 WLR 693* applied. The approach in *Spiralglobe* and in *Beauvale*, in which the earlier decisions were considered, had to be taken to be the law at first instance. If that was wrong, it had to be put right by the Court of Appeal. Therefore, the court had a power, both under s.18(3) of the Act and under its inherent jurisdiction, on the application for discharge of an administrator, to authorise the administrator to make a distribution to creditors of the company who would be preferred creditors in the event of a winding up. There would be more money for creditors if the distribution was made than if the company was wound up and the distribution made in the course of a winding up. The creditors supported the application and the Insolvency Service did not oppose it.

Application granted.

How funds held on trust should be distributed in administration

Re Sendo International Ltd

[2006] All ER (D) 338 (Nov) [2006] EWHC 2935 (Ch) Chancery Division (Companies Court) Blackburne J 24 November 2006

The terms of two trust deeds, which were executed to allow an insolvent company to continue trading and provided that the net funds should be distributed pro rata to creditors listed in a schedule in proportion to the amounts shown against their names, were apt to fix the identity of those entitled to a share and the amount of their shares.

The company and the other companies in the group were involved in the manufacture and distribution of mobile phones. The applicants were appointed joint administrators of the company when it was placed in administration. They applied for directions concerning the distribution of funds held on the terms of two separate trusts. They wished to distribute the balances available, together, in the case of the first trust deed, with the additional $US1m in accordance with a draft protocol, which provided that, after allowing for reasonable costs, expenses and disbursements, the net funds held on the trusts of the first trust deed should be distributed pro rata to the persons listed on a schedule (the creditors trust account schedule) in proportion to the amounts shown against the names of those persons in the final column of that schedule. The same was the position in the case of the funds held subject to the trusts of the second trust deed. The broad position adopted by the applicants was that the terms of the two trust deeds were clear and that they should be free to distribute the funds to the creditors listed on the two schedules pari passu in accordance with the amounts for which they were listed on those schedules.

The question to be determined was how the size was to be fixed of each affected creditor's share in the monies standing to the credit of the relevant trust account.

It was submitted on behalf of a creditor who was a major supplier of the company (HDL) that the size had to be determined by an objective determination, if necessary by court proceedings or some other arbitral mechanism, of the amount of the liabilities incurred during the period covered by the relevant trust deed. The contents of the schedule were not, looked at in isolation, determinative of the beneficial position.

Held: On the true construction of the trust deeds the two trust funds should be distributed in accordance with the draft protocol. The two trust deeds were apt to fix the identity of those entitled to share, and the amounts of their shares, purely by reference to the creditors' trust account schedule.

"Phoenix" rule holds up insolvent MBOs

(1) Eric Walter Churchill (2) Peter John Churchill v First Independent Factors & Finance Ltd

[2006] EWCA Civ 1623 CA (Civ Div) (Ward LJ, Jonathan Parker LJ, Moore-Bick LJ) 30/11/2006

The purpose of the rule in the Insolvency Rules 1986 r.4.228 was to alert creditors of a company in liquidation to the fact that a person who had been involved in managing that company was also to be involved in managing the successor company. To ensure that that purpose was achieved, notice under the rule had to be given to the creditors before that person started to involve himself in managing the successor company. This case has devastating implications for management buyouts of insolvent companies. The practice is likely to be put on hold until the Rule is changed, according to our information in February 2007.

The appellant company directors (C) appealed against a decision upholding the grant of summary judgment to the respondent factoring company (F) on its claim for sums due and owing by a company of which C were directors. C had

been directors of a company (X) when it went into insolvent liquidation. At the time it went into liquidation they were also directors of another company with a name so similar to X as to suggest an association with X. By a sale agreement X had sold its goodwill to the new company. C denied liability for the sums owed. They accepted that the name of the new company was a "prohibited name" within the meaning of the Insolvency Act 1986 s.216 but argued that by virtue of a notice given by the new company under the Insolvency Rules 1986 r.4.228 the relevant provisions of s.216 and s.217 had been disapplied, thus relieving them from liability for the debts of the new company. It was F's case that notice had not been given by the new company to creditors of X, and that on the true construction of r.4.228 notice under the rule could not be given retrospectively, namely in respect of a person who was already a director of the successor company. C contended that r.4.228 did not require a director of an insolvent company to be named prospectively in order to avoid personal liability. C further argued that the word "may" in r.4.228(3) imported a degree of discretion.

HELD: F's construction of r.4.228 was the correct one. The expression "with a view to his being a director of the successor company" in r.4.228(3) was plainly prospective. The word "so" in the expression "a person who [was] so named" in r.4.228(4) could only refer to a person who was named in the notice "with a view to his being a director of the successor company". The word "may" in r.4.228(3) did not introduce any element of discretion. It was merely permissive, and meant that a person who would otherwise be in contravention of s.216 could except himself from the provisions of the section by means of the notice procedure prescribed by r.4.228. If he chose to avail himself of that procedure then in order for the notice to be effective it had to name him. If r.4.228 had been intended to have retrospective effect some express provision to that effect would be expected. No such provision existed and r.4.229 strongly suggested that such a construction was not intended. The purpose of the rule was to alert creditors of the company in liquidation to the fact that a person who was involved in managing that company was also to be involved in managing the successor company. To ensure that that purpose was achieved, notice had to be given to the creditors before that person started to involve himself in managing the successor company. On the true construction of r.4.228 any notice given by the new company following completion of its acquisition of X's goodwill would not have been effective to relieve C from liability for contravening s.216 by acting as directors of the new company prior to the giving of the notice.

Appeal dismissed.

Litigation over pre-liquidation claims should not be pursued at expense of post-liquidation creditors

Christopher Whitehouse v (1) David Frederick Wilson (Liquidator Of Vol-Mec Ltd) (2) Andrew Munro

[2005] EWCA Civ 1688 CA (Civ Div) (Chadwick LJ, Wilson LJ, Lindsay J) 7/12/2006

The public interest in the recovery for the benefit of a company's pre-liquidation creditors of funds or commercial opportunities said to have been misappropriated or misdirected by the actions of its majority shareholder and director did not lead to the conclusion that litigation to achieve that end should be pursued at the expense and risk of the post-liquidation creditors whose interests would be best served by a compromise of the company's claims.

The appellant (W) appealed against the court's sanction of the decision of the first respondent liquidator (L) to compromise the claims of an insolvent company (V) against the second respondent (M). M owned 73.75 per cent of the shares in V in which W had acquired a 25 per cent holding under a subscription agreement. M wished to buy W's shares and in that context W was sent the accounts for past years. W took the view that those accounts disclosed certain breaches by M of the subscription agreement. The relationship between M and W broke down, V ceased to trade and its business was transferred to a new company. M put V into members' voluntary winding-up and the liquidator commissioned a report by accountants into the remuneration and benefits in kind drawn by M from V and whether M had diverted any business from V. The accountants identified possible misfeasance claims against M. V then went into creditors' voluntary winding-up and the new liquidator (L) invited offers from M and W for the assignment of V's claims. M offered an immediate cash payment of £160,000. A company controlled by W offered a smaller immediate payment but possible further payments. L was minded to accept M's offer and the court gave its sanction under the Insolvency Act 1986 s.165(2)(b) as an exercise of L's power to compromise V's claims. W submitted that (1) the judge had erred in concluding that M's offer rather than W's offer was in V's best commercial interests; (2) the public interest in the pursuit of claims against an allegedly misfeasant director precluded sanction of the compromise.

HELD: (1) V was in an insolvent winding-up and its interests were those of its creditors. The whole of the cash offer made by M would be applied in paying L's fees and post-liquidation expenses. Therefore that offer did not serve the interests of the general creditors at all. However it did serve the interests of the post-liquidation creditors better than W's company's offer. The judge and L were correct to hold the view that M's offer was to be preferred on grounds of certainty and finality, because the deferred element of the other offer appeared to be subject to uncertainty and conditionality. The offer from W's company would produce no benefit for pre-liquidation creditors unless and until the litigation costs of pursuing M had been met and the post-liquidation expense creditors had been paid in full. Whatever the strength of the claim against M, there was no material on which L or the judge could conclude that a judgment could be enforced against M in an amount sufficient to meet those requirements. Even if W was the only pre-liquidation creditor, which was disputed, and was prepared to take the risk that pursuit of M would produce no benefit for him, he was not entitled to do that at the risk and expense of the post-liquidation creditors, which was the effect of his company's offer. (2) The public interest in the recovery for the benefit of V's pre-liquidation creditors of funds or commercial

opportunities said to have been misappropriated or misdirected by the actions of M did not lead to the conclusion that litigation to achieve that end should be pursued at the expense and risk of the post-liquidation creditors whose interests would be best served by a compromise with M.

Appeal dismissed.

Administration: how received funds should be distributed

Re Farepak Food and Gifts Ltd

[2006] All ER (D) 265 (Dec) Chancery Division Mann J 18 December 2006

The administrators of an insolvent company had not made out a sufficient case for the distribution to the company's former customers of certain funds held by them. A deed of trust executed by the administrators was treated as rectified to cover the relevant bank account and moneys it was intended to cover; however, the deed apparently gave a preference to those customers who had already paid sums to the company through its agents, which was an obstacle at the practical level to any sums being paid out under the deed.

FFG Ltd, the company, operated a Christmas savings scheme under which customers could spread their Christmas savings over a year. Small contributions could be made month by month so that enough had accumulated by the beginning of November to buy a shopping voucher, or a hamper, or other goods. It operated through a system of 'agents' who were typically work colleagues, friends or members of the same family as the customers. The agents collected the moneys and forwarded them to the company. There were approximately 26,000 agents, most of whom had no more than six or seven customers. On 11 October 2006, the directors decided to cease trading. The company went into administration on 13 October 2006. It was heavily insolvent and any dividends would be but a few pound in the pence. It did not, and would not, fulfil its Christmas 2006 orders, and the moneys that the customers paid had largely gone. In the three days leading up to the administration, the directors sought to ring fence the moneys received from customers in that period, so that it could be returned to customers if necessary. A deed of trust was executed, although there was apparently a mistake as to the account identified in that deed and questions about arose as to its scope. There was also an argument that the moneys received in that period were subject to a constructive trust in favour of their payers. There was a little short of £1m in respect of which the payers of those moneys might be said to have retained an interest by one or both of those routes. Of that sum, about £390,000 was said to be customers' moneys which had been received by the administrators post-administration. On 8 December 2006, the company's administrators issued an application, seeking directions, inter alia: (i) that sums of moneys credited to the company's accounts on or after 11 October were held on trust for the agents, (ii) as to whether certain moneys paid to a building society were similarly so held, (iii) as to whether moneys received prior to 11 October were held on trust for the agents who paid the moneys, and (v) directions for payment out in the event of trusts being established. On 12 December 2006, a joinder of representatives was ordered to enable the

various standpoints to be argued. It was further ordered that arguments should be advanced in support of a trust in favour of customers whose contributions were paid into the company's current account on or after 11 October, and in favour of customers whose moneys were paid after close of business on 13 October. Revenue and Customs were joined as the first respondent and 'the customers' were joined as the second respondent. The matter was expedited because of the proximity of Christmas.

The customers argued that:(i) there was a resulting trust, asserting that the company's directors would have known since January 2006, or at least some date in the year much earlier than October, that the business would fail, (ii) a constructive trust arising out of the unconscionability of retaining customer moneys after the decision to cease trading and the attempts to stop receipt of customer moneys, (iii) the express declaration of trust, or (iv) an implied declaration arising out of the related facts. Revenue and Customs took the view that the customers' claims should fail on the basis that the evidence and/or the law was not sufficiently clearly in their favour.

The court would only authorise a distribution if, balancing the strong need for a distribution if possible, against the need to have as full a picture as possible, the case for a distribution (both legal and factual) had been made out.

HELD:

On the basis that the available material did not sufficiently justify distribution of the moneys in the manner argued for by the administrators, it was inappropriate to make any of the directions sought. On the available material, it seemed apparent that the agents were agents of the company, and not agents of the customer (or at least not in any material respect). The agents' terms and conditions specified that they were agents of the company and the trade association provisions indicated the same thing. Although the finding that the moneys were taken by the agents as agents for the company did not militate against the existence of a resulting trust of the type argued for by the customers, however, there was no suggestion that the agent was expected to keep the moneys separate from other moneys (or indeed his own), and it was indeed known that it had been mixed with the moneys of others and paid over to the company with the moneys of others. Crucially, there was no suggestion that the moneys ought to have been put on one side by the company pending the transmutation from credited moneys to goods or vouchers. On analysis, the relationship between the customers and the company was a contractual relationship. In those circumstances, the resulting trust argument failed. It could not be determined that all the relevant moneys fell within the ambit of a constructive trust. Applying established authority, the underlying principles should be applied by reference to the time at which the moneys should be taken to have been paid to and received by the company, and that was not necessarily the same date as the date the credit appeared in the current account. Accordingly, an application of the result of those principles did not justify the distribution of all the moneys. Payment and receipt of the moneys were effectively simultaneous, which created factual and

legal problems with the result that the overall position was of sufficient uncertainty that they could not be decided on the basis of the available material. On the evidence, the deed had been executed as a result of a mistake which was capable of being rectified to bring it in line with the intention of the company. The appropriate form of rectification would be to substitute the name and number of the current account for the account identified in the deed.

Barclays Bank v Quistclose Investments Ltd [1968] 1 All ER 613, Re Butlin's Settlement Trust [1976] 2 All ER 483, Neste Oy v Barclays Bank [1983] 2 Lloyds Rep 658, Westdeutsche Landsbank v Islington LBC [1996] AC 669 and Twinsectra Ltd v Yardley [2002] 2 All ER 377 considered.

LEGISLATION

Bank insolvency

The Banks (Former Authorised Institutions) (Insolvency) Order 2006 No 3107

This Order makes provision for the modified application of Part II of, and Schedule B1 to, the Insolvency Act 1986 (c.45) to any company within the meaning of section 735(1) of the Companies Act 1985 (c.6) that— (a) has a liability in respect of a deposit which it accepted in accordance with the Banking Act 1979 (c.37) or 1987 (c.22), but (b) does not have permission under Part IV of the Financial Services and Markets Act 2000 (c.8) to accept deposits. The Schedule to the Order sets out modifications of Schedule B1 in its application to such companies. Broadly speaking these confer rights on the Financial Services Authority to participate in administration proceedings that are commenced as a result of the application of this Order. The Order is made as a consequence of the amendments made to Part II of the Insolvency Act 1986 by the Enterprise Act 2002 (c.40) and revokes the Banks (Administration Proceedings) Order 1989 (S.I.1989/1276) subject to savings (see article 2).

The full text is available at http://www.opsi.gov.uk/si/si2006/20063107.htm

(Date in force, 15.12.06)

Articles

Administration

Administrators and landlords - a raw deal?

Considers how administrators differ from administrative receivers and asks why the moratorium on legal action against a company in administration under the Insolvency Act 1986 Sch.B1 para.43 is unfair to landlords. Highlights the problems for landlords with debts accruing during administration and reflects on whether there are any options open for the landlord. Calls for a fair deal for landlords.

Landlord & Tenant Review L. & T. Review (2006) Vol.10 No.6 Page 161 1/11/2006-1/12/2006 Andrew Hindle

Re E-Squared Ltd; Re Sussex Pharmaceutical Ltd [2006]

EWHC 532 (CH); [2006] 3 ALL E.R. 779

Administrators of *Sussex Pharmaceuticals Ltd* were appointed out of court and their appointment took effect on January 31, 2005. At the initial creditors meeting, the administrators' proposals were approved. The proposals included a realisation of the assets of the company and the adoption of the procedure under para.83 of Sch. B1 to the Insolvency Act 1986 should sufficient funds be realised for distribution to be made to the unsecured creditors.

(Insol Int, 10.06, 140) 06.48.023

Company Voluntary Arrangement

Adverse outcome

Highlights the risks which landlords face when a tenant company or guarantor proposes to enter into a company voluntary arrangement (CVA). Explains the mechanics of a CVA, identifies two specific problems encountered by landlords and considers how CVAs can be challenged. Looks at the steps landlords can take to protect themselves.

Estates Gazette E.G. (2006) No.0647 Pages 172-174 25/11/2006 Neil Whitaker

Cross-border (non-US)

The matter of Hans Brochier Holdings Limited (in administration) (unreported)

Mr Justice Warren, 15 August 2006

The introduction of the EC Regulation on Insolvency Proceedings in 2000 (the 'EC Regulation') marked the commencement of a judicial hierarchy that distinguished 'main' insolvency proceedings from 'secondary' or 'territorial' insolvency proceedings. Under the EC Regulation, main proceedings can only be opened where the debtor's centre of main interests ('COMI') is located, whereas territorial and secondary proceedings can, upon condition, be opened in any EC jurisdiction where the debtor has an establishment. Territorial proceedings are ancillary proceedings instituted before main proceedings have been opened, and secondary proceedings are those instituted

subsequent to main proceedings. In this case, the High Court considered the requirements for the opening of main and territorial proceedings under the EC Regulation.

(R. Rose of CMS Cameron McKenna [2006] 22(6) L&P, 225) 06.50.091

A review of territorial proceedings within the European insolvency regulation

The article looks at opening of territorial proceeding, types of territorial proceedings, scope of territorial proceedings, substantive regime of territorial proceedings and balance and propositions.

(AE Menendez: [2006] 22(6) IL+P, 212)

International Insolvencies: bringing harmony to discord?

Considers recent insolvency developments applying to financial institutions as an international level. The article examines the extent to which these changes might reduce the scope for conflict between competing jurisdictions. In the second part, he considers the BCCI No 10 case and In re HIH Casualty, and analyses how these cases which illustrated complex problems that can arise, might be decided differently in the future.

Peter Bloxham Bankers' Law Vol 1 No 3 page 14

Migration: Europe's new forum shopping

The transformation of giant German auto parts company Schefenacker into a UK company in order to take advantage of more user-friendly English laws has sparked a huge amount of interest in Europe. There's even a new name for it.

(Global Turnaround: 12.06, 4) 06.51.097

No UNCITRAL for Australia until 2008

Insolvency law reform seldom happens quickly. Proposals for reform tend to have gestation periods that would make elephants jealous, the recently announced Chinese proposals being an excellent example. Here two leading experts on Australian insolvency law comment on their Government's latest proposals as unveiled on 13 November.

(G. Sutherland & D Cowling: Global Turnaround: 12.06, 10) 06.51.099

Distressed debt

Clever ways to do the dumbest things

Distressed debt used to be a secondary-market play. Today, it's a primary-market business. Distressed or stressed companies don't avoid default by restructuring old debts. They put on new ones supplied by myriad new forced buyers of credit. The product's already distressed when it goes on the shelf.

(P. Lee: Euromoney, 12.06, 69) 06.50.107

Human rights

Human rights quoted in vain - bankrupt versus trustee

Re Anthony John Charles Holtham v John Kelmanson (2006) Ch D (Bankruptcy Ct) (Evans-Lombe J) 24/10/2006

The frequency with which the courts hear the words "it's a breach of my human rights" is quite astonishing. They are

normally uttered by litigants in person on the wrong end of a court order. The assumption seems to be that, like a magic spell, once those words are said everything will be put right. What those who complain do not fully realise is that, even if an action were a breach of the European Convention on Human Rights, their remedy there might be limited, if one were granted at all.

District Judge Stephen Gerlis 9/11/2006
Lawtel ref Reference: BSD 16/11/2006
Document No. AB0000316

Restructuring

How credit derivatives threaten restructurings

Many things have happened to international restructuring over the last few years; the move from relationship banking to a capital markets structure dominated by hedge funds and private equity houses is the most obvious.

(Global Turnaround: 12.06, 6) 06.51.098

Bond advisers launch reform group

A group representing the high yield bond markets have launched a reform working group aimed at improving the legal system for European restructurings. In particular, they want a better hearing for bondholders in big debt-for-equity swaps.

(Global Turnaround: 12.06, 3) 06.51.096

Arrangements and reconstructions: recent developments in UK company law

When one talks about restructuring distressed companies, the Insolvency Act 1986, Sch.B1 company administration procedure tends to hog the limelight. However, there are other mechanisms in UK law that have played (and continue to fulfil) a constructive role in the corporate turnaround arena. This editorial evaluates current developments with regard to these alternative mechanisms.

(D Milman: Company Law Newsletter, 27.11.06, 1) 06.51.050

Security

Transactions at an undervalue – a new departure?

The Court of Appeal's recent decision in *Hill v Spread Trustee Company Ltd & Anor [2006] EWCA Civ 542* held that, in some circumstances, the granting of security in respect of existing indebtedness may constitute a transaction at an undervalue. This decision casts doubt on the generally accepted view that the decision of *Re MC Bacon [1990] BCLC 324* is authority for the proposition that the creation of a charge by a chargor in respect of its liabilities cannot constitute a transaction at an undervalue under s238 of the Insolvency Act ('1986 Act'). This article summarises the relevant law and comments on the effect f the decision in Hill.

(J Levy & A Bowe: [2006] 22(6) IL+P, 222) 06.50.090

United States

Navigating the common law approach to cross-border insolvency

The article looks at judicial assistance in cross-border insolvency under common

law recognition and implementation of a US Chapter II plan, recognition and enforcement of foreign judgments in personam and in rem, characterisation of bankruptcy judgments, universalism.

(L Chan Ho: [2006] 22(6) IL+P, 217) 06.50.089

Deepening insolvency and the UK wrongful trading statute – comparative discussion

Wrongful trading in the UK; "deepening insolvency" in the US; shadow directors and good faith attempts. Tentative suggestions as to the relationship between wrongful trading in the UK and deepening insolvency in the US.

W A Brandt and C Vance Insolvency Intelligence vol 19 no 10 Nov/Dec page p 156

Amendments to Bankruptcy Code expand trade creditors

Enacted in April of 2005 and applicable to cases filed on or after October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA" or the "Reform Act") amended the Bankruptcy Code in some important ways. Many of these changes have tilted the paying field in favour of creditors. Included among the more "creditor friendly" revisions are new s.503(b)(9) and amendments to s.546(c). This article discusses how these two amendments improve the lot of sellers of goods in bankruptcy and highlights some areas of potential confusion spawned by the new statutory language.

(N.T. Zink: Insol Int. 10.06, 137) 06.48.024

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