C/M/S/ Cameron McKenna

The heavyweight

Comprehensive coverage of this month's banking and insolvency law

January 2008

Looking forward

Developments scheduled for the months ahead

Date	Item	Significance
January 2008	**Bank charges case hearing underway**	To establish the application of the Unfair Terms in Consumer Contracts Regulations 1999 and of the doctrine on penalties.
28 January 2008	**SEPA (Single European Payments Area)**	Goes live.
14 February 2008	**Regulation of modified credit agreements**	Consultation closes
14 February 2008	**Leased plant and machinery: mismatched chains of leases and leases granted at a premium**	Comments to be received by HMRC by this date
31 March 2008	**FSA discussion paper on definition of capital**	Discussion Paper on the potential for changing FSA's capital resources requirements for banks, building societies and investment firms closes for comment
6 April 2008	**Commencement of s 1282 Companies Act 2006**	Floating charge holders will rank after payment of liquidation expenses. Reversal of the Leyland Daf case.
6 April 2008	**Consumer Credit Act 2006**	The financial limit of £25,000 will be abolished

Table of Contents

Banking

Cases

Penalty clause in hire purchase

(1) County Leasing Ltd (2) County Leasing Asset Management Ltd V Richard John East

[2007] EWHC 2907 (QB) QBD (Judge Richard Seymour QC) 21/12/2007

A clause in a car hire purchase agreement that required the repayment of sums borrowed plus interest for the entire period of a long-term loan on demand was a penalty clause and unenforceable. The fact that the amount demanded was excessive did not stop the lender from entitlement to repayment of the sum properly owing where the borrower had not offered to repay any sum

Legislation

REITs regulations amended

Two sets of Real Estate Investment Trusts regulations have been amended to reflect changes made in 2007 to the REITs balance of business conditions and to the rules relating to joint ventures carried on by REITs.

Articles

Basel

An analysis of the Basel II framework on credit derivatives treatment of the trading book for risk mitigation purposes and its relationship to the banking book

Basel II has been designed to ensure the capital adequacy of internationally active banks. A framework has been designed to measure capital adequacy and the minimum standard to be adopted by national regulatory authorities. The two objectives are soundness and stability of international banking system, and consistency among international active banks. This briefing attempts to focus on Basel II's recommendation on accounting rules and risk mitigation between banking book and trading book by employing credit derivatives to achieve the capital regulatory requirement.

(M.W.H. Hsiao: Co Law, 1.08, 26) 08.03.047

Distressed debt

Assigning distressed debt, declarations of trust and the Vanderpitte Procedure

Barbados Trust Company Limited v Bank of Zambia [2007] 1 Lloyd's Rep 495 (CA)

Those trading in debt on the secondary market will be familiar with covenants against or restrictive of assignment. In general terms, these

covenants serve the dual function of protecting the syndicate banks against assignments to third parties who might not be able to provide their share of funds and of protecting borrowers from having 'foisted' on them as a lender non-established or non-authorised or otherwise 'undesirable' institutions. The Court of Appeal decision in Barbados Trust Company Limited v Bank of Zambia, set within the distressed debt arena, serves as a cautionary note to all would be assignors/assignees that for thereto be an effective assignment, great care must be taken to ensure that restrictive covenants are complied with or, if compliance is impossible, that waivers are obtained from the borrower. More crucially, however, the decision suggests that a covenant restrictive of assignment may, in certain circumstances, be circumvented by the use of a declaration of trust and the adoption of the procedure sanctioned in Vanderpitte v Preferred Accident Insurance Corporation of New York [1933] AC 70 (PC) by which the beneficiary of a trust may sue the obligor directly (joining the trustee as defendant) when the trustee refuses to sue ('the Vanderpitte Procedure').

(B. Leahy: ICR, 12.07, 341) 08.04.006

Finance

Protecting title in stock finance

This article considers how dealers selling large machines may be given credit to buy stock for their showrooms, the available security and its risks.

(M. Nield: BJIBFL, 12.07, 638) 08.02.010

Islamic finance

The Shari'a Supervisory Board: a potential problem in Islamic finance?

This article discusses one amidst the many distinct features of contemporary Islamic finance, namely the practice where each financial institution which offers Islamic financial products and services has its own Shari'a Supervisory Board. This article highlights the resulting problems as well as the potential problems that arise out of the said practice. The problems highlighted are the diverging opinions of the various Shari'a Supervisory Boards, the shortage of Shari's scholars, and the payments of exorbitant consultation fees; while the potential problems discussed relate to conflict of interest, conflict of duty, breach of confidentiality, and insider dealing.

(H.S.F. Abd Jabbar: Co Law, 1.08, 29) 08.03.055

Islamic finance in the UK consumer Sector

With the expansion of Shariah compliant financing structures in the commercial sector UK institutions have been looking at opportunities in the consumer sector. Institutions must ensure not only compliance with Shariah law but with the complex consumer protection regime of the United Kingdom when offering these types of financial products. This article examines the issues faced in this area.

(J Patient; JIBLR, 12.07.9) 08.02.017

Litigation

What's the limit?

The author reviews the law on limitation and finds that judges continue to struggle to apply the law in a clear and consistent manner.

(D. Ohrenstein: BJIBFL: 12.07, 642) 08.02.011

Trading claims

This article considers, from an English law perspective, whether if distressed debt is bought in the secondary debt market, the buyer can litigate against the arranger of the original syndicated loan under which the debt was

created, for failing to provide adequate financial information about the borrower. The Goldman Sachs case.

(A. Chakrabarti & D. Pygott: BJIBFL, 12.07, 645) 08.02.012

Property derivatives

Property derivatives: the next steps

This article introduces the concept of property derivatives and highlights some points about the 2007 International Swaps and Derivatives Association, Inc ('ISDA') Property Index Derivatives Definitions. It will also mention the extent to which property derivatives could be applied in the general context of structured deals.

(A. Damianova: BJIBFL, 12.07, 647) 08.02.013

Regulation

Giving advice under the COBS/MiFID regime and principles-based regulation

With MiFID barely a couple of months old, we thought that we would benefit from a tour of the Directives and of advising customers. The authors takes us on an excursion that perhaps lacks a little magic and mystery about it but is no less necessary for all that.

(A. Samuel: CM, 12/1.07,13) 08.04.015

Financial promotions after MiFID: the new Conduct of Business rules

Among all the MiFID-related revisions FSA has made to COBS, are some changes to the: rules on financial promotions. Some, but not all, are MiFID-driven. Some, but again, not all, have a significant impact on how authorised firms manage promotional campaigns. The authors look at the changes and how they affect firms promoting specific investments.

(E. Radmore & D Gilmore: CM, 12.1.07,9) 08.04.016

Conflicts in investment banking: the challenges ahead II

This article revisits the perennial topic of management of conflicts of interest in the context of a multi-disciplinary investment firm which was the subject of an article in (2005) 5 JIBFL 205. This article also takes a look at the evolving regulatory landscape with regards to the identification and management of conflicts of interest in light of the implementation of the EU MiFID.

(E. Katz: BJIBFL, 12.07, 633) 8.02.009

Conflicts of interest and inducements under MiFID

Conflicts of interest and the payment of inducements are inevitable in the financial services industry. The rules designed to protect clients have recently changed with the introduction of the Markets in Financial Instruments Directive (MiFID). Greater attention must now be paid to identifying, recording and managing conflicts of interest, while firms must ensure that payments in the nature of inducements fall within one of three "safe harbours" designated by MiFID. However, applying these rules can raise difficult issues.

(G. Busby: JIBLR, 12.07, 1) 08.02.016

Retention of title

CKE Engineering Ltd (in administration) v Coseley Galvanising Ltd [2007] LTL 3/10/2007

In starting his judgment in the above case, HHJ Norris QC noted that 'The one thing that is clear in this case is that it is extremely difficult to make money by galvanising metal fabrications. The rest is factual and legal uncertainty.' The case required the court to revisit the legal uncertainty

of the effectiveness of reservation of title clauses in circumstances where the goods supplied under the ROT clause were said to have lost their original identity such that it was impossible to trace into them.

(T Robinson: ICR, 12.07, 345) 08.04.018

Sub-prime

Sub-prime loans, inter-bank markets and financial support

This article reviews the background to the credit crisis and the associated difficulties that arose in the inter-bank markets over the summer and with the subsequent support made available to Northern Rock by the Bank of England and the Treasury in September 2007.

(G. Walker: Co Law, 1.08, 22) 08.03.054

Technical

Basel

CEBS: Report on Regulatory Implementation of Pillar 3

CEBS has published the findings of a survey it has carried out with regard to regulatory implementation of disclosures by credit institutions as set out in chapter 5 of Directive 2006/48/CE which transposes the Basel Pillar 3 requirements into EU legislation. It provides an overview of the situation in the EU. The findings and the discussions within CEBS and with the industry reveal that the implementation of the Pillar 3 provisions does not give rise to major concerns. This is mainly related to the fact that supervisory authorities are largely refraining from taking prescriptive approaches. A limited number of areas have been identified that merit further attention. The follow up work that CEBS proposes to carry out relates in particular to the application of the disclosure requirements to (significant) subsidiaries and to devising a possible solution where limited disclosure is being provided with a subsidiary's (individual) financial statements. Connected to this discussion is the relationship between Pillar 3 and accounting disclosures where CEBS will await the outcome of efforts undertaken by the industry before deciding on the need for any measures in this area. The findings of the note have been discussed with industry representatives during a workshop on Pillar 3 issues held on 7 December 2007. It appeared that industry participants largely shared CEBS's findings and conclusions, and welcomed the proposed way forward. A summary of the discussions at the workshop can be accessed via the second link below.

http://www.c-ebs.org/press/documents/FinalReportonregulatoryimplementationofPillar3.pdf

http://www.c-ebs.org/press/documents/SummaryofPillar3ws_Dec2007_000.pdf

Notices

ASB provides additional narrative reporting guidance for UK companies

The Accounting Standards Board remindis UK quoted companies of the need to follow the business review reporting requirements in section 417 of the Companies Act 2006 for years beginning on or after 1 October 2007.

www.frc.org.uk/asb/press/pub1480.html

(ASB, 10/01/2008)

4ps publish model change protocol for accommodation PFI projects

On 9 January 2008, 4ps published a model change protocol for accommodation private finance initiative (PFI) projects (the Protocol). The Protocol has been approved by PartnershipsUK (PUK) and is fully compliant with SoPC 4 requirements. The Protocol can be down loaded from the 4ps website.

Fitch Ratings introduce structured finance currency swap ratings

On 10 January 2008, the rating agency Fitch Ratings announced that it is introducing public ratings of currency swap obligations of special purpose vehicles in global structured finance transactions with immediate effect. According to Fitch Ratings, interest in such ratings has grown since the implementation of Basel II.

Companies House 2006

GC100 publishes guidance on directors' conflicts of interest

On 18 January 2008 the GC100 published a guidance paper on directors' conflicts of interest and the Companies Act 2006. From 1 October 2008 a director will have a statutory duty under section 175 of the 2006 Act to avoid a situation in which he has, or can have, a conflict of interest or possible conflict of interest with the company's interests. There will be no breach of this duty if the relevant matter has been authorised by the directors. For a public company the directors can only authorise the matter if permitted to do so by the company's articles of association.

The GC100 has concluded that most companies will want to amend their articles of association to include a general power for directors to authorise conflicts. The paper sets out a summary of the 2006 Act provisions on conflicts, an explanation of changes companies might make to their articles to reflect the new conflicts provisions and guidance for directors on exercising the power to authorise conflicts including suggested procedures for authorising conflict situations and reviewing authorisations.

Government response to consultation on the registrar's rules

On 18 January 2008, Companies House published on its website the Government's response to the July 2007 consultation paper on the power given to the registrar of companies under the Companies Act 2006 to make rules. The consultation invited comments on questions concerning such matters as authentication of paper and electronic documents; layout of forms; transitional arrangements and delivery of documents.

Insolvency

Cases

Protective awards not provable

Robert DAY (Liquidator of Compound Sections Ltd) v (1) Ronald Benjamin HAINE (As a representative of the former employees of Compound Sections Ltd entitled to the benefit of Protective Awards made by the Employment Tribunals on 31st August 2006) (2) The Secretary Of State For Business Enterprise And Regulatory Reform

[2007] EWHC 2691 (Ch) Ch D (Companies Ct) (Sir Donald Rattee) 19/10/2007

Protective awards granted to a number of employees after a company had gone into liquidation were not provable debts of the company as they had been made after the date of liquidation.This case will leapfrog appeal to the House of Lords. Application for permission to appeal is due to be heard in mid February.

Legislation

Liquidation expenses

The Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007

Commencement of section 1282 Companies Act 2006 on 6 April 2008. This is the section that reverses the House of Lords decision in re Leyland Daf, and puts the priority of liquidation expenses ahead of floating charge holders.

http://www.opsi.gov.uk/si/si2007/uksi_20073495_en_1

The Insolvency Practitioners and Insolvency Services Account (Fees) (Amendment) Order 2008 No 3

This Order amends the Insolvency Practitioners and Insolvency Services Account (Fees) Order 2003 (S.I.2003/3363) by increasing the fee to be paid in relation to the recognition of professional bodies.

Section 415A, under which this Order and the principal Order are made, was inserted into the Insolvency Act 1986 (c.45) by section 270 of the Enterprise Act 2002 (c.40). Article 3 of this Order substitutes a new paragraph (2) for paragraphs (2), (2A) and (2B) of article 2 of the principal Order and makes provision for increases in the fees to be paid by bodies recognised pursuant to section 391 of the Insolvency Act 1986, in respect of the maintenance of their recognition under that section from £200 per member to £207 per member. The provisions of article 2(2B) of the principal Order required payment to be made on or before 1st April 2008 by reference to the multiplicand which then applied, that is to say £200, before it was amended by this Order. Article 4 provides that no further payment is required where a body has, prior to this Order coming into force, already made a payment under the principal Order by reference to its membership at 1st January 2008. The fees

are designed to recover the costs associated with the recognition of professional bodies.

www.opsi.gov.uk/si/si2008/pdf/uksi_20080003_en.pdf

Explanatory memo at http://www.opsi.gov.uk/si/si2008/em/uksiem_20080003_en.pdf

Articles

Leyland Daf reversal and proposed new SI

This article sets out some details of the proposed reversal of the House of Lords decision in the Leyland Daf case and the proposed rules to be introduced by a new statutory instrument. The reversal of the House of Lords decision will be achieved by a new s 176ZA inserted into the Insolvency Act 1986 ('IA 1986') by s 1282 of the Companies Act 2006 ('CA 2006'). It will come into force for liquidations starting (ie winding up order made or resolution passed) on or after 6 April 2008 and in order for it to be effective there will have to be some new rules which are proposed to be introduced by a statutory instrument coming into effect on the same date.

(P Fidler of CMS Cameron McKenna: IL&P, 12.07, 181) 08.04.002

TIX, IVAs and the principles of competition law

The importance of distinguishing pro-competitive from anti-competitive behaviour. How to apply competition law to agreements between financial institutions. The circumstances in which an unlawful abuse of market power arises. How to obtain a remedy for a breach of the Competition Act 1998.

(J. Skilbeck: IL&P, 12.07, 184) 08.04.003

The taxation of administrations and liquidations of limited liability partnerships

The limited liability partnership (LLP) has been with us for some seven years now. At March 31, 2006 there were 17,499 LLPs registered in Great Britain following the registration of 6,570 new LLPs in 2005/2006. In the same period, 990 registrations were closed. Although not all closed registrations will be the result of financial failure, given the number of closed registrations, it is becoming increasingly likely that an insolvency practitioner (IP) will become involved in either advising the members of an LLP which is in financial difficulties of the best route to dissolution or having to act as administrator or liquidator of an LLP. One of the aspects with which the IP will have to deal is taxation. The law in this area is both obscure and complex and a mistake could expose the IP to personal liability. This article first compares LLPs to a traditional partnership and to a company; it then sets out how the members of an LLP are taxed and how this is affected by either administration or liquidation. Finally, it seeks to offer some guidance to IPs when dealing with LLPs and their members including the perhaps seemingly irrational conclusion that as far as the members are concerned liquidation is a preferable option to administration.

(F Ridgway: Insol Int, 01.09, 1) 08.03.073

Keeping secrets in Chapter 11: overcoming the presumption of full disclosure in bankruptcy cases

This article examines narrowly defined exceptions to the general policy mandating open inspection of documents and other information submitted to the court in connection with a US bankruptcy case. The author concludes that, although US bankruptcy laws establish a mechanism to shield

trade secrets and confidential commercial information from disclosure, courts cast a critical eye on requests to prevent public inspection of certain kinds of information claimed to be 'confidential' and 'commercial'.

(M. G. Douglas: BJIBFL, 12.07, 654) 08.02.015

No rubber-stamping by US court

This article examines the recent rejection by a New York bankruptcy judge of Chapter 15 protection for two Bear Stearns hedge funds registered in the Cayman Islands and discusses the implications for offshore hedge funds. At the time of writing this article, the decision is under appeal.

(R. Tett and K. Thom: BJIBFL, 12.07, 652) 08.02.014

Personal liability of an insolvency practitioner for employee claims – Part 2: Discrimination

Part 1 of this article dealt with various types of employment claims that might impose personal liability on an insolvency practitioner. This part of the article deals exclusively with discrimination claims.

(D. Pollard: Insol Int, 01.08, 7) 08.03.074

Distributions to creditors and shareholders in the Collins & Aikman Administration: Unique Solutions to Unique Issues

The administrations of the majority of the companies comprising Collins & Aikman Europe have recently ended. In a trend that became its hallmark, unique issues were being addressed by the administrators through to the end. This article analyses how the administrators navigated issues relating to making distributions to creditors and shareholders given the complexity of the administrations and the existence in certain cases of surplus funds following creditor distributions.

(L Norley: ICR, 12.07, 292) 08.04.019

More litigation in the next downturn in Europe? - Part one

As the credit crunch intensifies and, as a result, the European debt market continues to see less liquidity, litigation may play an increased role in the next downturn. This two part article explores the potential for investors to resort to litigation to protect or improve their positions. Part One examines some of the insolvency/restructuring cases that have come before the English Courts in recent years. Based in part on those cases, Part Two, which will appear in Volume 5, Issue 1 of International Corporate Rescue, will address which other litigation angles may be considered by whom in the next downturn.

(P.J.M. Declercq: ICR, 12.07, 296) 08.04.020

Changing COMI prior to insolvency is fair game!]

Investors and lenders have increasingly taken into account domestic and cross-border insolvency laws and their judicial implementation in their investment decision making process. Since trade and capital flows are multi-jurisdictional, in 1997, the UNCITRAL Model Law on Cross-Border Insolvency was created as a means to establish the underlying principals of international insolvency. The UNCITRAL Model Law attempted to resolve the issues surrounding recognition of foreign main or non-main proceedings, treatment of foreign creditors, territorial limitations of jurisdictions, and enforcement of foreign judgments. In the United States, key elements of the UNCITRAL Model Law were adopted through the addition of chapter 15 of the Bankruptcy Code included in the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005.

(A. Marshall & C. Pardiwala: ICR, 12.07, 318) 08.04.021

The end game in insolvency for hedge funds: special case or no favoured treatment? - Part one]

Whether talking about international Military security, mergers and acquisitions, or even the down side of marriage (divorce), the issue of preparing for the end game is essential. Without thorough consideration of the negative implications of, for example; the use of leverage in hedge fund management, those parties involved such as fund managers, investors, prime brokers, banking supervisors or securities regulators may not be prepared for significant credit events and, even worse, potential liquidation.

(J M Guira: ICR, 12.07, 323) 08.04.022

Technical

Guidance for Insolvency Practitioners on the Money Laundering Regulations 2007

On 7 January 2008, the Insolvency Service published guidance for Insolvency Practitioners on the Money Laundering Regulations 2007 (the 2007 Regulations).

The Guidance updates previous guidance issued by the Insolvency Service to reflect the changes resulting from the 2007 Regulations, which replaced the Money Laundering Regulations 2003. It also focuses on Part 7 of the Proceeds of Crime Act 2002 (as amended) and sections 18 and 21A of the Terrorism Act 2000 (as amended).

The Guidance is advisory only and failure to comply with it does not mean the IP has breached the 2007 Regulations.

The main obligations imposed on IPs by the 2007 Regulations are to:

1) establish procedures to identify customers and verify their identities;

2) carry out ongoing monitoring of business relationships;

3) appoint a money laundering reporting officer;

4) establish internal systems, procedures, policies and controls to forestall and prevent money laundering; and

5) provide relevant individuals with training on money laundering.

FMLC on Administration, Set-off and Expenses

"Legal assessment of rule 2.85 of the Insolvency Rules 1986 and its interplay with other insolvency provisions in respect of post-administration liabilities owed to counterparties"

FMLC has now published its report on the above. FMLC considers that the application of the new administration set-off rule and its interplay with other insolvency provisions relating to the payment of post-administration liabilities owed to counterparties by a company in administration (including the concept of an administration expense) could give rise to potential legal uncertainties, as discussed in this paper. Some of these are merely drafting concerns that could be clarified through an amendment to the Rules, case law or guidance, but others are more substantial and would require more significant changes to the legislation. FMLC considers that these uncertainties may discourage counterparties from dealing with a company in administration, thus harming attempts to rescue the company through administration. Although these uncertainties are of general application, they could affect the financial markets if the insolvent company entered into

swap or other derivative transaction (either prior to or following the administration) or was itself in the financial sector. At the end of this paper, a number of proposals are set out which would, in the FMLC's opinion, help to resolve some of these uncertainties

Issue 108 - Administration - Set-off and Expenses - November 2007 Report

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

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

020 7367 2098

C/M/S/ Cameron McKenna

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

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