C/M/S/ Cameron McKenna

The heavyweight

Comprehensive coverage of this month's banking and insolvency law

January 2007

Looking forward

Developments scheduled for the month ahead

Date	Item	Significance
Various to 2008	**Companies Act 2006**	**The Act will be implemented at different (as yet unpublished) times between April 2007 and October 2008.**
20 February 2007	**Dormant Bank Accounts**	**Treasury ask for response to consultation paper.**
From April 2007	**Consumer Credit Act 2006**	**"Unfair relationships" test will be introduced, to allow consumers to challenge unfair treatment by lenders.**
May 2007	**EU mortgage credit harmonisation**	**EU action to make the market for mortgages more efficient and competitive. Mortgage Funding Expert Group, formed to identify barriers to cross-border mortgage activity and propose solutions, will publish findings.**
I July 2007	**UCP 600**	**Revised rules on documentary credits are expected to be written into most letters of credit.**
1 November 2007	**Markets in Financial Instruments Directive**	**MiFID will be implemented on this date.**

C/M/S/ Cameron McKenna

Law Now

Articles on our free information website this month

Date	Item	Significance
2 January 2007	**Guarantees: the risks of unclear documents and "Entire Agreement" clauses**	**The court decided an assurance by a director that he would pay the fees the company owed was not a guarantee of those fees, despite a letter signed at the same time that included a term that the directors would be liable if the company failed to pay.**
8 January 2007	**Companies' details on websites and in electronic communications**	**From 1 January 2007, the statutory requirement for companies to state particulars on stationery has been extended to websites and electronic communications.**
12 January 2007	**Financial Collateral Arrangements - European Commission report**	**The Directive on financial collateral arrangements might be extended to include credit claims as eligible collateral.**
23 January 2007	**Court does not validate payments made from frozen bank account**	**Reminds banks of need to spot winding-up petitions against their customers.**
30 January 2007	**Secured creditor can intervene in charged property before enforcement**	**The first time the Court of Appeal has analysed the rights of parties to a securitisation. And a reminder of how extensive a secured creditor's rights are in charged property, even before the right to enforce arises.**

Table of Contents

Banking

CASES

Banking

Bank liability

Defence of illegality refused in PC case against bank

Morrell and another v Workers Savings & Loan Bank

[2007] UKPC 3 Privy Council Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Millett, Lord Walker of Gestingthorpe and Lord Mance 18 January 2007

A bank was found to have acted legitimately in honouring orally authorised disbursements from a customer who, when he had opened his account, believed that he had specified that only transactions documented in writing should be honoured. Even if contractual documentation purported to preclude a bank from being indemnified for acting upon a customer's oral instructions, it did not preclude the customer from giving or the bank from accepting and acting upon oral instructions from that customer, and there would be little conceptual difficulty about treating subsequent oral instructions as being a consensual variation to the written contract.

The claimants were active customers of the defendant bank (the bank) during a two-year period beginning in February 1992 and ending in May 1994. After that time, the bank refused to honour further cheques and the claimants' four accounts became inoperative. The claimants commenced proceedings against the bank, seeking an account and declarations to the effect, inter alia, that:(i) the bank had wrongly debited their accounts in all instances where the bank was unable to supply documentary proof or authorisation for such debits, (ii) an overdraft and overdraft and penalty interest debited by the bank to their Jamaican dollar account were not owed, and (iii) a mortgage over certain property did not cover any overdraft (as the bank was contending), but was only given to the bank as security for a loan which was never granted and was thus unenforceable. The bank counterclaimed for an overdraft. The trial judge dismissed the claimants' claim and the counterclaim succeeded. During the hearing of the claimants' appeal to the Court of Appeal of Jamaica against that decision, the claimants sought to raise, for the first time, the entirely new point that the purpose of the accounts which they had opened and operated had been, to the bank's knowledge and with its consent, illegal foreign exchange trading on their part. Consequently, they argued that the bank's counterclaim should fail and (presumably therefore) accepted that their own claim should likewise be dismissed. The Court of Appeal upheld the trial judge's decision, a majority of the appeal judges taking the view that the

defence of illegality should not be allowed to be raised. The claimants appealed.

The issue arose as to whether the majority of the Court of Appeal had been right to hold that the question of illegality, not having been raised at trial, had not been open for consideration on its merits on appeal.

HELD The appeal would be dismissed.

Where a contract was ex facie illegal, the court would not enforce it, whether the illegality was pleaded or not. Where the contract was not ex facie illegal, evidence of surrounding circumstances tending to show that it had an illegal object should not be admitted unless the circumstances were pleaded.

Having considered all the points made in the claimants' case, there was no basis on which the Board could or should upset the findings of the courts below. With regard to the issue of illegality, neither the banking contract nor the mortgage between the claimants and the bank had been ex facie illegal. What was now said was that the first claimant had been carrying on business as an unlicensed foreign exchange dealer, contrary to the exchange control legislation then in force, that his business as such had been knowingly aided and abetted by the bank, again, contrary to such legislation and that the mortgage had been given to secure. In the circumstances, the determination of such an issue involved questions of fact which would have required a trial to determine.

The Court of Appeal had been right to refuse to allow the question of illegality to be raised for the first time on appeal.

Litigation

World Wide Freezing Order granted for foreign judgment

Banco Nacional de Comercia Exterior SNC v Empresa de Telecommunicationes de Cuba SA

[2007] All ER (D) 182 (Jan) [2007] EWHC 19 (Comm) Queen's Bench Division (Commercial Court) David Steel J 24 January 2007

Practice – Pre-trial or post-judgment relief – Freezing order – Worldwide freezing order – Whether jurisdiction to grant order in relation to registered foreign judgment.

In February 2000, the applicant entered into an agreement entitled 'escrow agreement', governed by Italian law and subject to the exclusive jurisdiction of courts in Turin. Under the escrow agreement, the respondent and another entity guaranteed the restitution of financing provided to Banco National de Cuba by the applicant under a credit facility arising under a loan agreement of November 1994. In May 2001, the respondent entered into two agreements for the supply by a company Gran Kaiman Teleco SA (GKT) of telephone equipment and plant. Both agreements provided for payments to be made by the respondent to another company, GDE. A related finance agreement was concluded between GDE and the respondent, providing for the provision of funds for the plant and equipment to be repayable on extended credit terms secured by bills of exchange. GKT was also a party to the agreement on the basis that it would be liable for 'non-compliance with any

obligations contracted by this company' under the agreement. In April 2002, the government of Cuba issued a decree proclaiming that the facilities and guarantees provided by the respondent as collateral for Banco National de Cuba with the applicant would be null and void. The respondent duly indicated that it could not comply with the escrow agreement. Proceedings ensued. An arbitration was conducted in Paris in accordance with the arbitration clause in the loan agreements. It was resolved in favour of the applicant, but shortly before the instant hearing the decision was annulled on the ground that the seat of the arbitration should have been in Spain. In the interim, proceedings had begun in Turin. Judgment was given in November 2005 in favour of the applicant. Significant damages were awarded to the applicant. The Italian judgment was registered in England pursuant to Council Regulation (EC) 44/2001 in September 2006. A domestic freezing order was made at the same time, the basis of which was the need to preserve assets of the respondent situated in England in the form of money due from 'UK Roaming Partners' of the respondent. Those partners were other telecommunications companies who had agreed with the respondent to allow other individuals to connect to the respondent's network. The regular payments of those partners prior to the decree were made into the escrow accounts under the escrow agreement. Thereafter the payments were no longer paid to those accounts. The domestic freezing order specifically referred to the 'debt or debts due or to become due' from several United Kingdom mobile telephone companies. In October 2006, a worldwide freezing order was also made, and the applicant obtained a variation of the domestic order. The applicant applied seeking the continuation of the orders together with various amendments. The respondent accepted continuing the domestic order (without amendment) but opposed the continuation of the worldwide order.

The respondent submitted that the court had no jurisdiction under Regulation 44/2001, that it was not open to the court to make an order other than in respect of assets situated in England or outside the territory of member states of the EU, and that on the facts the applicant had not established a real risk of dissipation.

HELD:

Article 47 of Regulation 44/2001 provided an unrestricted and discrete code for the granting of provisional or protective measures in the context of enforcement. There was no basis for restricting the measures to the freezing of domestic assets and/or for limiting the disclosure to domestic assets. The relief was aimed not at the assets, but rather the respondent. It carried none of the comity implications of being tantamount to interference with the jurisdiction of a foreign court as were involved in anti-suit injunctions. To the contrary, it was intended to aid enforcement of the foreign judgment. On the facts, the applicant had made out a risk of dissipation and, in all the circumstances, the injunction would be continued.

Finance & Security

Charges

Charge-holder can intervene in charged property before security enforceable

(1) Citibank Na (2) MBIA Assurance Sa v QVT Financial LP

[2007] EWCA Civ 11 CA (Civ Div) (Sir Anthony Clarke MR, Arden LJ, Dyson LJ) 22/1/2007

In this Eurotunnel restructuring case, although a holder of security would not normally be expected to take steps in relation to a charged property before the security became enforceable, unless it could show that the sufficiency of the security was threatened, there was nothing to prevent the parties from agreeing that the holder should have rights to intervene before the security became enforceable.

The appellant noteholder (Q) appealed against a decision ((2006) EWHC 3215 (Ch)) determining the proper interpretation of a trust deed and deed of charge in relation to the proposed exercise of an option arising under the restructuring of the Eurotunnel debt. The first respondent (C) was the trustee of a trust constituted by a trust deed and deed of charge between C, the second respondent (M) and a special purpose vehicle (F). The subject-matter of the trust was predominantly Eurotunnel tier 3 junior debt owned by F. That debt had been used to secure seven tranches of notes issued by F. M was the "note controlling party" under the trust deed while it remained guarantor of some of those notes. A proposed restructuring of the Eurotunnel group approved by the French court provided for the assignment of the tier 3 debt by F to a Eurotunnel company in consideration of the issue of certain notes redeemable as shares in Eurotunnel plus cash, with an option to receive cash instead of the notes. M directed C to exercise the tier 3 cash option. Q took the view that it would be contrary to C's position as trustee to exercise or consent to the exercise of the cash option. C sought directions from the court, which held that M had power pursuant to the trust deed and deed of charge to direct or instruct C to exercise the option and that the exercise of the option did not require C's consent under the negative pledges contained in the deed of charge and conditions attached to the notes. Q submitted that (1) C had no power to exercise the tier 3 cash option and therefore could not be instructed to do so by M; (2) the exercise of the option by F required C's consent under clause 19.4 of the deed of charge or condition 4 of the notes and M had no right to direct the giving of that consent; alternatively that C's right to exercise the option was not within the rights which M could direct C to exercise because it was not within clause 12.2 of the trust deed.

HELD: (1) The judge was right that C had power to cause the exercise by F of the tier 3 cash option. That was a question of interpretation of the trust deed and deed of charge. In the normal way the holder of

security would not be expected to take steps in relation to the charged property before the security became enforceable, unless it could show that the sufficiency of the security was threatened, but there was nothing which prevented the parties from agreeing that the holder should have rights to intervene before the security became enforceable, Nelson v Hannam (1943) 1 Ch 59 applied. Clause 8.1 of the deed of charge imposed on F the duty to do all such other acts or things or execute any other document as might in the opinion of C or M be necessary or desirable to enforce any rights under the "participation documents", and the restructuring plan was such a document replacing or supplementing the credit agreement. Therefore C had power to cause the exercise by F of the tier 3 cash option. It made no difference that the effect of the exercise of the option was to turn property into cash. (2) C was bound to give a direction to F if so required by M on two bases. The first was if M formed the opinion that it was necessary or advisable that F should exercise the option for the purposes of clause 8.1.3 of the deed of charge. The second was that clause 12.2 of the trust deed had to be interpreted according to its tenor and there was nothing on the face of it to limit it, where security had not become enforceable, to a case where the trustee was seeking to invoke F's right to exercise the tier 3 cash option in order to preserve the sufficiency of the security. Having regard to the rights conferred by clause 8.1 of the deed of charge, no such limitation could be implied. Moreover, the negative pledge clauses did not on their true interpretation apply where the action taken by F was being taken at the direction of C and, so long as it was the note controlling party, M. The negative pledge clauses made no sense if the consent of those parties had already been given because the purpose of the clauses was to prevent transactions without their consent. In any event exercising the tier 3 cash option would not be a disposal for the purposes of the negative pledge clauses.

Appeal dismissed.

LEGISLATION

Reform of appeals through House of Lords

Consultation: draft Supreme Court rules on appeals

The Constitutional Reform Act 2005 provides for the appellate jurisdiction of the House of Lords to be abolished and a new Supreme Court of the United Kingdom to be established.

The new Court is due to begin work in October 2009. The government has published a consultation on the draft Supreme Court rules.

Abolition of Wigs

This downward trend of reform for reform's sake is also reflected in the fact that judges in civil courts are to stop wearing wigs from 1 October 2007, ending more than 300 years of legal tradition. This applies in the High Court and the Court of Appeal, and follows a review set up by the Lord Chief Justice, Lord Phillips. Standards are however being upheld in the criminal courts.

Banking

Banking system

Regulation (EC) No 4/2007 of the European Central Bank of 14 December 2006 amending Regulation (EC) No 2423/2001 ECB/2001/13) concerning the consolidated balance sheet of the monetary financial institutions sector

The regulations are available at

http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:L:2007:002:SOM:EN:HTML

(OJ 2007, L 2/3)

Fraud

Fraud Act 2006

The Fraud Act 2006 is now in force, as of 15 January 2007.

See Articles Fraud Act 2006: implications for technology-related fraud

ARTICLES

Banking

Consumer

Terrorism, tax and bank secrecy

The right to personal privacy is enshrined both in international conventions and in domestic legal systems. The right embraces many different types of personal information and extends to an individual's financial and banking arrangements. Yet the right is not absolute and must be qualified in the interests of law enforcement and other objectives. Two recent episodes have highlighted the tensions that may arise between the basic rule and the application of the various exceptions.

(C. Proctor: JIBFL, 12.06, 477) 07.02.011

E-issues

The international judicial recognition of electronic signatures – has your agreement been signed?

The purpose of this article is to undertake a comparative analysis of the judicial decisions emerging from various common law jurisdictions in the area of electronic signatures. The article explores the willingness of courts to adapt to technological change by either applying legislation designed to facilitate electronic transactions or construing common law principles in a manner favourable to new technology. In particular, this article examines the types of electronic signatures that have obtained judicial recognition and the purposes for which electronic signatures have been held to be legally effective in a contractual context.

(S. Christensen, S. Mason & K O'Shea: [2006] 11(5) Comms L, 150) 07.01.011

Capital markets

Bonds

ICMA Regulatory Policy Newsletter

Issue No. 4: January 2007

Investor Protection in the International Bond Markets

In the international bond markets, certain assumptions about investor protection are shared between issuers, investors and underwriters: high standards of disclosure are essential to the functioning of the market; bond documentation should be clear and unambiguous; and the market itself is best placed to take any necessary action. The market does need to address a number of questions: the equalisation of information that issuers make available to their bondholders and bank lenders; conforming bond documentation across different currency sectors; and change of control clauses. ICMA has taken a number of initiatives to help.

Guidance on Denominations of €50,000 and Integral Multiples of €1,000

ICMA and ICMSA have published a set of guidance notes on the treatment of debt securities with a denomination which is the sum of €50,000 and an integral multiple of another lesser amount, usually €1,000.

Implementation of the Transparency Directive

The Transparency Directive is due to be implemented in January 2007. Implementation across the EEA is expected to be staggered and uneven, and there are disagreements about interpretation of some of its provisions. This is likely to cause difficulties to firms involved in cross-border activities. ICMA is working to ensure that the Directive is implemented across the EEA as soon as possible with the minimum of national divergences.

MiFID Implementation

ICMA has continued to be heavily involved in the work of MiFID Connect in the UK, and is holding a series of seminars on MiFID implementation for ICMA members in other countries. Key implementation issues which are not yet settled include best execution and transaction reporting.

Bond Market Transparency

In its Feedback statement, the European Commission said that it expects to engage in constructive dialogue with all stakeholders over the coming months to determine whether self-regulatory measures can provide a viable low-cost means of addressing the issues raised. The Commission has also asked CESR and ESME for technical advice by the end of June 2007 on cash bonds.

Clearing and Settlement

ICMA has emphasised that efficient monitoring and enforcement is key to the success of the Code of conduct for clearing and settlement, and has argued for the inclusion of users in the process. User involvement is also important in the governance of the proposed TARGET2 Securities project.

Derivatives

Keep on building

The European ABS market's rapid expansion has long been underpinned by strong and growing RMBS issuance. However, with Basel II about to take effect and concerns about a decline in performance, there was a feeling that 2006 may see RMBS issuance levelling out. In fact, new market entrants have driven massive growth, but is it sustainable?

(A. Mattinson: ISR, 1.07, 32) 07.03.024

Liquidity rising

The European CMBS market is expected, for the first time, to top €20bn more than the most conservative volume calculation for the previous year. German and pan-European deals have fuelled much of this growth, accompanied by an increasing sophistication in structuring techniques. But, as the author explains, aggressive property valuations may mean trouble for the sector in years to come.

(C. Smith: ISR, 1.07, 37) 07.03.025

On the fast traxx

Many players do not want to discuss the concerns surrounding the massive growth

in credit derivatives or the increasing leverage within the sector, when further standardisation and product development lead to the opportunities seen in this market today. But how much larger can CDS markets get – the corporate segment is already said to be 10 times the size of the underlying bond market – before something derails?

(R. Horsewood: ISR, 1.07, 51) 07.03.026

Finance and Security

Asset based lending

Risky business? Assessing the lender's real environmental risk and how to avoid it

This article examines some of the key areas of environmental risk and discusses steps lenders can take to limit their exposure to liability, including complying with the revised Equator Principles in project finance.

(M. Townsend, J. Pavry and C. Warren: JIBFL, 12.06, 488) 07.02.013

Loans

Taking security in secured syndicated cross-border transactions

This article looks at three key issues which an English lawyer needs to think about when taking security for a syndicate of lenders in a European cross-border transaction:

- how to create security for a syndicate;
- the impact on the security that any trading of the loans will have; and
- the impact on the security of a change of security agent.

(C. Gibbons: JIBFL, 12.06, 511) 07.02.009

Interim loan agreements: a guide for commitment-phobes

When lenders commit to funding a leveraged acquisition, they are often asked to sign an interim loan agreement along with the commitment letter and term sheet. This article explores why interim loan agreements have developed, what terms they typically contain and some points of which lenders and sponsors should be aware.

(D. Campbell: JIBFL, 12.06, 481) 07.02.012

Project finance

Nothing left to negotiate: current financing terms for LNG projects

This article looks at the terms upon which LNG plants are currently being financed. These terms have now become more or less standard – on a generalised level – and constitute a significant departure from the terms that would normally prevail in the project finance market. The article looks in particular at the terms upon which sponsors of LNG projects are prepared to guarantee the bank debt during the construction period.

(G Vinter: IELTR, 11/12.06, 278) 07.02.043

Securitisation

A tax on securitization

Among its many effects on banks' regulatory capital, Basel II might prove to

be an additional capital tax on securitization.

(M. Nicolaides: IFLR, 12.06, 18) 07.02.003

Fraud

Fraud Act 2006: implications for technology-related fraud

An increase in sophistication in technological fraud led to concerns that eight offences of deception under the Theft Acts 1968-96, and the common law offence of conspiracy to defraud, were no longer fit for purpose. The author explains how The Fraud Act, which received Royal Assent on 8 November, includes provisions to tackle technological fraud, while retaining conspiracy to defraud in order to catch offences that have yet to develop.

(S Thomas: E-Commerce Law & Policy, 11.06, 6) 07.04.026

Money laundering

Financial data-sharing between public and private sectors

Reports on Home Office proposals for increased data sharing within the public sector and between the public and private sectors in order to combat fraud, published in the July 2006 provisional paper, New Powers against Organised and Financial Crime, and considers the response of the British Banking Association (BBA) to the paper. Notes the Home Office view that the Data Protection Act 1998 is too often seen as an obstacle and its suggestion that public sector bodies should consider membership of the Credit Industry Fraud Avoidance Scheme. Outlines the BBA's proposed conditions for data sharing and its concerns over confidentiality and public awareness.

Electronic Business Law E.B.L. (2007) Vol.8 No.12 Pages 10-11 1/1/2007 Dominic Hodgkinson

TECHNICAL

Banking

Clearing systems

Law Commission's project on intermediated securities during the course of this year.

The project will continue to focus on the latest draft of the UNIDROIT Convention on Intermediated Securities in order to provide a final advice to the Treasury.

You are encouraged to send your comments on the Law Commission's Interim Advice to the Treasury http://www.lawcom.gov.uk/investment_securities.htm

Capital markets

Derivatives

ISDA possible new projects in 2007

Proposals for documentation projects in 2007:

(a) Templates for commodity index confirmations plus additional provisions re Market Disruption Events, Disruption Fallbacks and Index Adjustments for index transactions

(b) Documentation for swaps and options on commodity baskets

(c) Templates for physical crude oil transactions (possibly in co-operation with LEAP)

(d) Language to calculate weather exposure for the purposes of collateralizing weather derivatives transactions under an ISDA CSA (according to the so-called Burn Methodology, as developed by WRMA)

(e) A User's Guide for weather transactions (as developed by WRMA)

(f) Amendments to the ISDA Energy Bridge to provide for cross-collateralization

(g) Additional transaction types to be covered by ISDA standard confirms:

(i) Fixed/floating swap: caps, floors, extendibles and cancellable extendibles

(ii) Basis swaps: rounding, conversion of units, FX conversion of CRP

(iii) Spreads: calls, puts, cracks

(h) Additional provisions re Calculation Agent

ISDA: Revised Dispute Resolution Language Working Group

ISDA report: "As agreed at the January 9 Dispute Resolution Language Working Group meeting, product specific working groups will be established to consider approval of standard dispute resolution language for each of equities, credit derivatives, interest rates and commodities product areas. These product specific working groups are designed to elicit views on whether there are specific product concerns that would arise in the

development of generic language such as that attached.

"Trader input is particularly encouraged as in some firms, the head of credit or equity trading, for example, is responsible for the decision on whether to include dispute resolution provisions in transaction documentation. It is anticipated that only one or two meetings of those sub-working groups will be held, particularly given that some institutions' representatives cover all products and it is not efficient to require attendance at multiple meetings. In addition, having trader input at the limited number of meetings these sub-working groups will engage in will ensure that the group has an indication of the level of support for this initiative and is aware of any obstacles with regard to the project."

ISDA new draft documents

Standard Terms Supplement for Recovery Lock Transactions

Contingent Credit Default Swap Confirmation

ISDA have circulated drafts of these documents around its members for comment.

Fri 12/01/2007 19:09 ISDA Legal Department [sminns@isda.org]

Finance and Security

Security

Report from the commission to the council and the European parliament evaluation report on the financial collateral arrangements directive (2002/47/EC)

The Financial Collateral Arrangements Directive 2002/47/EC (hereafter only "FCD" or "the Directive") creates a uniform EU legal framework for the (cross-border) use of financial collateral and thus abolishes most of the formal requirements traditionally imposed on collateral arrangements. Financial collateral are assets provided by a borrower to a lender to minimise the risk of financial loss to the lender in the event of the borrower defaulting on its financial obligations to the lender. Collateral is increasingly used in all types of transactions, including capital markets, bank treasury and funding, payment and clearing systems and general bank lending. The collateral provided is most often in the form of cash or securities. This report assesses FCD's implementation, its impact, and whether the Directive needs amendment.

The report is available at:

http://www.ec.europa.eu/internal_market/financial-markets/collateral/index_en.htm – directive

(European Commission, COM (2006)833 final, 20.12.06)

Fraud

Money laundering

Third Money Laundering Directive

Law Society raises concerns over definition of beneficial owner

The Law Society have published the letter it has sent to HM Treasury outlining significant concerns regarding the definition of beneficial owner introduced by the provisions of the Third Money Laundering Directive (2005/60/EC).

The Third Money Laundering Directive defines a beneficial owner as the natural person who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted. The threshold for ownership or control is 25%. The Law Society and the Society for Trust and Estate Practitioners believe that this will cause practical difficulties in a trust context, and urge HM Treasury to review of the drafting of the definition of beneficial owner set out in the regulations it is preparing for implementation of the directive, in order to provide greater clarity with respect to when and how the definition is satisfied in the English law trusts framework for the purposes of conducting customer due diligence.

12 January 2007

NOTICES

Banking system

Dormant bank accounts

Treasury enquiry into unclaimed assets within the financial system

The Treasury Select Committee has decided to undertake an inquiry into Unclaimed assets within the financial system. The Committee is particularly interested in receiving written evidence on:

- The definition, identification and collection of unclaimed assets;
- The distribution and use of unclaimed assets; and
- The possible relevance of schemes in other countries for putting unclaimed assets to productive use.

The Treasury are asking for written evidence by 20 February 2007.

Cross-border euro payments now significantly cheaper

EU rules on how banks should charge for cross-border euro payments have brought about significant savings for consumers, without leading to an increase in charges for domestic transfers, according to a European Commission report. A EUR 100 cross-border transfer, which would have cost on average EUR 24 before the rules were introduced, now costs on average EUR 2.50. The rules have also provided banks with an incentive to develop and invest more in an EU-wide payments infrastructure, which in the longer term should help to reduce costs for all consumers.

(CEC, 11.01.07)

Payment system

General principles for international remittance services

The Committee on Payment and Settlement Systems and the World Bank issued a report today entitled General principles for international remittance services. The CPSS-World Bank report provides an analysis of the payment system aspects of remittances, on the basis of which it sets out general principles designed to assist countries that are seeking to improve the market for remittance services. The report contains five general principles, covering: transparency and consumer protection; payment system infrastructure; the legal and regulatory framework; market structure and competition; and governance and risk management. The report also highlights the roles of both public authorities and remittance service providers in implementing the general principles.

(BIS, 23.01.07)

Capital markets

Derivatives

ISDA Netting and Collateral Opinion Update

New Netting Opinions

ISDA has commissioned netting opinions from the following two jurisdictions:

- (i) **Israel** counsel, Meitar Liquornik Geva & Leshem Brandwein, Law Offices; and
- (ii) **Anguilla** counsel, Harney Westwood & Riegels who also act as our British Virgin Island counsel.

Collateral Opinions

ISDA has published a new collateral opinion from **Hungarian** counsel, Allen & Overy.

Netting and Collateral Update Requests

Request letters for 2006 updates were sent to counsel in September. Updates are posted as ISDA receive them.

All completed opinions are available on ISDA's website at www.isda.org under "Opinions".

Netting Legislation

ISDA's website www.isda.org – "Opinions" – "Status of Netting Legislation" has an updated list of netting legislation.

Finance and Security

Loans

Revised LMA documents

The exercise to revise the rubric on the LMA recommended documents continues and the revised versions of the investment grade primary documents and the leveraged primary documents was launched on 25 January 200**7**.

There are some additional changes to the documents as follows:

- Investment Grade Primary

The principal changes (in addition to some smaller drafting changes) are the new provisions providing for

(i) automatic cancellation of the Total Commitments at the end of the relevant Availability Period; and

(ii) a turnover trust in the guarantee provisions.

It is recommended that members file copies of the current documents in preparation for the release of the revised documents next week.

- Leveraged Primary

The principal changes (in addition to some smaller drafting changes) are

(i) the incorporation of the Financial Covenant Provisions and related changes to the definitions into the body of the document and the consequential changes to the use of certain financial definitions throughout the document;

(ii) a new provision providing an automatic cancellation of unutilised Commitments at the end of the relevant Availability Period;

(iii) a new provision incorporating a turnover trust in the guarantee provisions;

(iv) an alteration to the guarantee provisions to guarantee the Parent's obligations; and

(v) a note to the Form of Transfer Certificate and to the form of Assignment Agreement to emphasise that the New Lender is responsible for due diligence on security issues on transfers.

Risk Sharing Finance Facility

The European Commission and the European Investment Bank have joined forces to set up the Risk Sharing Finance Facility.

RSFF is an innovative scheme to improve access to debt financing for private companies or public institutions promoting activities in the field of: Research, Technological Development Demonstration Innovation investments

(EIB, 11.01.07)

Mortgages

Consultation on the Report of the Mortgage Funding Expert Group and the Report of the Mortgage Industry and Consumer Dialogue

The European Commission has published reports from the Mortgage Funding Expert Group (MFEG) and the Mortgage Industry and Consumer Dialogue (MICD), established in April 2006 to explore the issues of mortgage and consumer protection. The report of the MFEG reviews all barriers to the emergence of an efficient and competitive pan-European mortgage funding market, and proposes solutions to remove existing obstacles. It focuses on both primary and secondary markets and covers all funding techniques such as deposits, covered bonds and residential mortgage backed securities. The MICD explored in detail four key consumer protection issues, namely pre-contractual information, advice, early repayment and the annual percentage rate of charge. The reports will assist the Commission in finalising its White Paper, due in June 2007.

Copies of the report are available from http://ec.europa.eu/internal_market/finservices-retail/home-loans/integration_en.htm

(CEC, January 2007)

CML reacts to reports on European mortgage markets

The Council of Mortgage Lenders today responded to the European Commission's publication yesterday of two working group reports on mortgage funding and consumer protection in European mortgage markets.

(CML, 18.01.07)

Insolvency Cases

Appointment of administrators – what does "presentation of the petition" mean?

Re Blights Builders Ltd

Chancery Division, Birmingham Judge Norris Qc Sitting As A Judge Of The High Court 2 October 2006 (Reported 24 January 2007)

Company – Administration order – Administrator – Restrictions on power to appoint – Winding up petition presented and not disposed of – Meaning of 'presentation of the petition – Whether appointment of administrators valid – Insolvency Act 1986, Sch B1, paras 22, 25, Insolvency Rules 1986, SI 1986/1925, r 4. 7.

Insolvency Act 1986, Sch B1, para 25 provides: 'An administrator of a company may not be appointed under paragraph 22 if - (a) a petition for the winding up of the company has been presented and is not yet disposed of'.

The company was effectively a one-man building company. On B's death, the company lost its management, ceased operations and was discovered to be insolvent. On 5 July 2006 one of its creditors presented a petition for the winding up of the company. On 20 July B's executors exercised the votes attaching to his shares and appointed joint administrators (the applicants) of the company under para 22 of Sch B1 to the Insolvency Act 1986. By para 25 of that schedule an administrator might not be appointed under para 22 if a petition for the winding up of the company had been presented and not disposed of. The executors were unaware of the petition and accordingly gave notice of their intention to make the appointment on 21 July, obtained the consent of the charge holder to the appointment on 24 July, and filed notice of their appointment at court. On 25 July 2006 the court sealed and issued the winding up petition presented on 5 July, and it was served on the registered office of the company. The applicants sought directions as to the validity of their appointment. The petitioning creditor applied for the making of an administration order in place of the winding up order.

The applicants contended that the petition was presented on 5 July 2006.

The question arose as to the meaning of 'presentation of the petition'.

HELD: Presentation of the petition took place when the petition was delivered to the court for issue, not when issued.

Rule 4.7 of the Insolvency Rules 1986, SI 1925/1986, made it clear that two stages were involved. The first was the presentation or the filing or the delivery of the petition to the court. The second was the issue of the petition by the court for

service. When para 25 of Sch B1 referred to the presentation of a petition, it meant its delivery to the court or its filing notwithstanding that that date might be well in advance of the date when the petition was sealed and issued. Moreover, that was reflected in the practice of the court.

Accordingly the appointment of the joint administrators was invalid since the company had no power to appoint them by reason of the existence of a winding up petition that had not been disposed of.

The court would make a declaration that the joint administrators' appointment was invalid, an indemnity in respect of the actions taken by them whilst acting as administrators and a declaration under para 104 of the schedule that their acts as joint administrators were valid. Further, the court would make the administration order sought by the petitioning creditor and dismiss the winding up petition.

Contested administration application

Quality Kebab Ltd v Danbury Foods Ltd [2006] EWHC 1764 (Ch)

This is a helpful example of the approach adopted by the court to a contested administration application where it is alleged that the conduct of the company's directors deserves to be investigated.

The company in this case manufactured doner kebabs for sale to kebab restaurants (as might be guessed from its name).A winding up petition had been presented against it by its main supplier, Danbury Foods Ltd. Danbury Foods was owed around £720,000 and the company was hopelessly insolvent.

The administration proposal envisaged the sale of the company's trading name, goodwill, residual stock and fixed assets to a connected company, Quality Kebab Properties Ltd. The sale price was to be £25,000.The major benefit of the proposal was that the company's liabilities to its employees were also to be taken on by Quality Kebab Properties.

Danbury opposed the making of an administration order on two grounds. First, it said that the court could not be satisfied that the administration was likely to achieve its purpose and provide a better return to the creditors as a whole. Second, it said that the demise of the Company was such that it called for investigation, which could only be done by a liquidator. Accordingly it said that the more appropriate course of action would be to wind the company up.

The deterioration in the Company's financial position had been dramatic. In 2003/2004 its profits had been £207,000 on a turnover of about £4.5m. In 2004/2005 its profits had increased to £437,000 on a turnover of about £6.4m.

However in 2005/2006 its fortunes had taken a significant turn for the worse, and a loss of £380,000 was incurred. Moreover since January 2006 the company's assets had decreased still more.

As for whether the administration was likely to achieve its purpose, Danbury argued that the company's assets were all held on leases from the connected company, with the result that the connected company could effectively veto any sale to a third party.

The judge did not consider this to be a reason why the administration would not achieve its purpose. On the other hand the judge did agree that the affairs of the company did merit investigation. However he concluded that this was not a reason for not making an administration order. On the contrary, he thought it would be wrong to decline to make the order sought given the conclusion he had reached that the administration was most likely to achieve the best result for the Company's creditors. He also considered that the directors' conduct would be adequately investigated by a liquidator appointed after the conclusion of the administration.

With thanks to 11 Stone Buildings Newsletter Spring 2007 for this summary

Insurer with a subrogated interest had no proprietary interest in assured's legal claim

Re Ballast Plc Sub Nom St Paul Travellers Insurance Co Ltd v (1) Nicholas James Dargan & Nicholas Guy Edwards (As Joint Liquidators Of Ballast Plc) (2) Mott Macdonald Ltd

[2006] EWHC 3189 (Ch) Ch D (Lawrence Collins J) 15/12/2006

Where the property disclaimed by liquidators in respect of which an insurer sought a vesting order was an assured's legal claim, that vesting order was refused because the insurer's subrogated right to the claim was not a proprietary interest.

Relevant accounts to assess dividend payments

Re Logic Alliance Ltd (In Liquidation) sub nom the Joint Liquidators v (1) J A Taylor (2) J Puresevic

Ch D (Bristol) (Bernard Livesey QC) 24/11/2006

There was no realistic prospect that a trial judge would accept an interpretation of the Companies Act 1985 s.270(3) that "relevant accounts" for determining if dividends were justified meant the last annual accounts that had been filed, even if a further accounting period had passed in respect of which no accounts were laid before the making of the distribution.

Reviving insolvent company – Hong Kong

Re Legend International Resorts Ltd

CA CV 223/2006 24 NOVEMBER 2006
Hon Rogers VP, Le Pichon JA and Stone J

Companies and Corporations - Winding up - Company insolvent - Proposal to re-structure company in foreign proceedings - Way in which company may be revived

In this case, the Hong Kong Court of Appealdisapproved of using provisional liquidators to get a moratorium when a rescue, not a liquidation, was intended. This is what used to be done for insurance companies, before administration was possible. In Hong Kong, there is no rescue mechanism and the case should be borne in mind when lending to a Hong Kong company or when looking at options in a distressed situation for a Hong Kong company.

Articles

Deepening insolvency – is the newest tort dead?

The US theory of 'deepening insolvency' has been described as the 'fraudulent prolongation of a corporation's life beyond insolvency, resulting in damage to the corporation caused by increased debt'. While its case law has developed gradually over the past few decades, courts in the United States have addressed deepening insolvency with increasing frequency over the past five years. Courts have been deeply divided in interpreting deepening insolvency as either an independent tort or cause of action deserving of its own remedies, or merely a measure of damages for other related claims such as fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and professional malpractice or negligence.

(L. A. Larose and S. S. Kohn and A. B. Feldman: ICR, 3(6), 352) 07.03.30

Mystery of the Sphinx – COMI in the US

The judgment of Judge Drain in *Re Sphinx Ltd*, a case in the Southern District Court of New York on September 6, 2002 appears to be the first in relation to a contest over the location of the "centre of main interests" of a debtor in the context of Ch.15 of the US Bankruptcy Code, the US enactment of the UNCITRAL Model Law.

(G. Moss: Insol Int, 1.07, 4) 07.02.018

Administration costs: some welcome news

Two recent decisions of the High Court may provide some welcome relief to those concerned in the administration of insolvent trading companies and seeking to be paid for their efforts. Since the coming into force of the Enterprise Act 2002 there have been two significant questions in relation to costs that hitherto have remained unanswered: the first relates to the issue of monies provided to an administrator in order to fund his trading of the business in administration and the second is in respect of costs incurred by an IP prior to the commencement of the administration and his appointment.

(A. Bacon: Insol Int, 1.07, 1) 07.02.017

Administrators abroad – when in Rome do as the Romans?

The EC Insolvency Regulation (1346/2000) (the 'regulation') has caused considerable debate since it came into force across the EU (with the exception of Denmark) in May 2002. This debate has primarily concerned the interpretation of the centre of main interests concept and the recognition of insolvency proceedings commenced in one EU member state by other EU member states. However, as the regulation has now been in force for some time, its impact on other issues is now being seen, in particular the choice of law

rules regarding certain matters arising in insolvency proceedings.

(J. Marshall and N. Herrod: JIBFL, 12.06, 490) 07.02.014

All the appropriate solutions

Discusses the Court of Appeal ruling in *Thomas v Ken Thomas Ltd* on whether:

- (1) a landlord had waived his right to forfeit the lease of an insolvent tenant by accepting a payment of rent;
- (2) the right to forfeit had been lost when a company voluntary arrangement was concluded; and
- (3) had forfeiture been possible, the terms of relief should not have included payment of VAT.

Considers whether a debtor was permitted to appropriate payments to a specific debt.

Cases: Thomas v Ken Thomas Ltd (2006) EWCA Civ 1504; (2006) 42 EGCS 244 (CA (Civ Div))

Estates Gazette E.G. (2007) No.0701 Page 91 6/1/2007 Sandi Murdoch

BLOG

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