C/M/S/ Cameron McKenna

The heavyweight

Comprehensive coverage of this month's banking and insolvency law

August 2007

Looking forward

Developments scheduled for the month ahead

Date	Item	Significance
7 September 2007	**JMLSG publishes draft guidance for e-money**	Comments on the draft guidance are invited.
10 September 2007	**Rating of structured finance products**	Deadline for responses to questionnaire extended.
14 September 2007	**Adherence for Loan Credit Default Swaps Protocol extended**	ISDA say the LCDS Protocol has been extended for adherence.
18 September 2007	**FSA to regulate travel insurance**	Consultation closes on draft legislation.
28 September 2007	**Price controls on SME banking may be lifted.**	Interested parties to comment on the Competition Commission's provisional decision.
28 September 2007	**Draft tax regulations for property securitisation companies**	Provide a borrower in a property securitisation may transfer its tax liabilities to another company in its group. Comments invited.
1 October 2007	**Companies Act 2006, partial implementation**	Sections relating to e.g., loans to directors, AGMs and meetings, written resolutions.
October 2007	**Report on commodity and exotic derivatives**	CESR will report to the Commission.

Date	Item	Significance
12 October 2007	**Consultation ends on Companies Houses questions on the Registrar's rules and related provisions**	Should resolutions be standardised; forms referred to by function, not number? Authentication of documents?
12 October 2007	**Leyland Daf reversal: draft rules**	Comments requested on the draft rules that will rank floating charge recoveries after liquidation expenses.
31 October 2007	**Pre- and post-trading transparency provisions of MiFID to financial instruments other than shares**	CESR report due.
1 November 2007	**Dispute Resolution: Complaints Sourcebook**	A new version will come into effect.
5 November 2007	**Markets in Financial Instruments Directive**	New date for MiFID to be implemented.
December 2007	**Current account market**	The OFT will publish its market study.

Law-Now

Bulletins published on www.law-now.com this month

Registration is free and takes about 90 seconds to complete

Date	Item	Significance
31 August 2007	Two months to go until the new Member Nominated Trustees regime	Affects all pension schemes.
30 August 2007	IP Snapshot	Bringing you monthly news of key developments in intellectual property law.
23 August 2007	Price controls on SME banking may be lifted	Lifting of controls may not be a complete cause for celebration.
23 August 2007	Risk to confidentiality of settlements reached with FSA	A recent decision of the Information Commissioner has highlighted the risk of any settlement or arrangement that firms may have entered into with FSA becoming public.
22 August 2007	Explosion exclusions and additional conditions	A recent case has provided an interesting analysis of two discrete coverage points as between a reinsurer and his reinsured.
20 August 2007	Recent changes in reporting Directors' interests in shares	There have been changes affecting how companies report interests in shares held by their directors and senior executives.
14 August 2007	ID cards: procurement process begins	The UK Government has formally launched the procurement process for the national ID cards scheme.

Table of Contents

Banking

CASES

Bank liability

Duty of care

IFE Fund SA v Goldman Sachs International

[2007] All ER (D) 476 (Jul) [2007] EWCA Civ 811 Court Of Appeal, Civil Division Waller, Gage And Lawrence Collins LJJ 31 July 2007

A claim in misrepresentation and negligence by an investment fund against the arranger of a syndicated investment failed because the arranger did not make the implied representations or owe the duty of care alleged, and because the claim was barred by the terms of a subsequent bondholders' agreement.

On 30 May 2000, the claimant purchased from the defendant bonds and warrants issued by a French company, Autodis SA, for €20m. The transaction was part of the provision of syndicated credit facilities to Autodis. Its purpose was to enable Autodis to take over an English company, Finelist Group plc. The credit facilities were provided in a number of tiers. The claimant contributed to the intermediate tier, referred to as the mezzanine facility. The provision of the syndicated mezzanine credit facilities was arranged by the defendant, who also underwrote the mezzanine facility. Autodis's acquisition was unsuccessful. It transpired that Finelist's financial position was not as had been shown in its audited accounts, and that the group had deceived its auditors by transferring money between different members of the group so as to paint a false picture of its financial position. In October 2000, Finelist was placed into receivership. The claimant brought an action in September 2005 seeking damages for its loss on the transaction against the defendant, on the grounds of misrepresentation, pursuant to s 2(1) of the Misrepresentation Act 1967, and negligence. The claim in negligence was made in alternative ways, either negligent misstatement or a breach of a duty of care to inform. The essence of the claimant's action was that it was induced to enter into the transaction by information provided by the defendant, who presented a picture that was in fact misleading and which was not corrected or qualified after the defendant had cause to doubt its reliability as a result of receiving two reports from investigating accountants, Arthur Anderson. No allegation of dishonesty was made against the defendant or any of its employees. The judge held that a reasonable person would not have understood that the defendant was making any implied representations as alleged by the claimant. There was also a difference between actual knowledge that information previously supplied was misleading and acquisition of information

which merely gave rise to a possibility that the information previously supplied was misleading. In the latter case, the defendant would not be under a duty to the prospective participant to investigate the matter further, or advise the participant. The defendant was not acting as an adviser to the claimant or purporting to carry out any professional service. It was acting for the sponsors. Accordingly, it did not owe the duty of care which the claimant alleged. The claim was therefore dismissed. The claimant appealed.

The appeal would be dismissed.

On the facts, there had been no representations as alleged by the claimant. The contractual terms between them ruled out any representation that the information would be reviewed at any stage before the recipient acquired bonds. The only implied representation was one of good faith. There was no implied representation that the information provided in the reports was accurate. The judge had been entitled to reach the conclusion that it had not been demonstrated by the claimant that the defendant had actual knowledge of information which caused the two reports to be misleading. The judge was correct that there had been no duty of care.

Finance & Security

Guarantees

Effect on guarantee of change to principal contract

Wittmann (UK) Ltd v Willdav Engineering SA

[2007] All ER (D) 505 (Jul) [2007] EWCA Civ 824 Court Of Appeal, Civil Division Ward, Buxton And Moore-Bick LJJ 31 July 2007

Notwithstanding changes to the original purchase contract brought about by financing arrangements, a parent company as guarantor remained liable under a guarantee in respect of its subsidiary's residual liability in respect of the purchase price of goods.

The claimant carried on business as a supplier of process equipment. For some years, it had supplied equipment for use in manufacturing parts for motor vehicles to A Ltd. As a result of those past dealings, the claimant had become aware that A generally obtained financing of one kind or another for individual purchases. On many occasions, at A's request, the claimant had invoiced a finance house for goods supplied to A, although on some occasions it had invoiced A itself. An agreement was reached for the purchase of equipment, which would be shipped to A's wholly owned subsidiary. In the course of negotiations, A had made it clear to the claimant's managing director that it intended to obtain finance to enable it to pay for the goods, but as time passed it became apparent that satisfactory

arrangements had not been put in place. The claimant had the goods ready for shipment, but was unwilling to start making delivery until A had made the necessary arrangements to ensure that payment would be made in due course. A arranged for the defendant, its ultimate parent company, to guarantee payment of the price. In return, the claimant agreed to vary the terms of payment under the principal contract. Following the execution of the guarantee, the claimant began shipping goods in accordance with the principal contract, and A continued to seek financing. In due course, it managed to obtain the support of three separate finance companies, each of which was prepared to make part of the goods available to it on lease-purchase terms. As a result the claimant entered into agreements with A and with each of the finance companies under which title in certain goods passed to each finance company in return for payment of part of the relevant purchase price. When A failed to meet its residual obligations under the principal contract, the claimant commenced proceedings against the defendant, seeking payment under the guarantee. The defendant denied liability. It argued that it had guaranteed the obligations of A under its contract for the purchase of equipment from the claimant and the arrangements with the finance companies had resulted in the discharge of that contract and the substitution of new contracts which did not fall within the terms of the guarantee. The judge rejected that argument. The defendant appealed.

The appeal would be dismissed.

On the evidence, both parties had been aware at the time the guarantee was given that A was seeking to put in place financing arrangements which would result in title to the goods being transferred to one or more finance companies and A remaining liable for part of the price of the goods. In those circumstances, it was difficult to accept that the parties intended that the new arrangements should entirely discharge the original contract and replace it with one or more new contracts to which the guarantee would not apply. The effect of the new arrangements was that A's original obligation to pay the price of the goods was discharged to the extent that the claimant obtained the right to obtain payment from the finance companies, but remained in existence to the extent that it did not. A's obligation to pay for the goods was not wholly discharged but was merely reduced in amount to take account of the obligations assumed by the finance companies. The guarantee could not, therefore, be said to lack content. Notwithstanding the changes to the original contract brought about by the financing arrangements, the defendant remained liable under the guarantee in respect of A's residual liability in respect of the purchase price of the goods.

LEGISLATION

Companies

Companies Act 2006

Table of commencement dates

BERR has published a table of commencement dates for the Companies Act 2006. The table deals with commencement on a part by part basis highlighting any sections which come into force separately from the bulk of the relevant part.

The full text is available at http://www.berr.gov.uk/files/file40844.doc

BERR, August 2007

The Companies (Model Articles) Draft Regulations 2007

These Regulations, made under section 19 of the Companies Act 2006, prescribe model forms of articles of association for—private companies limited by shares (regulation 2 and Schedule 1), private companies limited by guarantee (regulation 3 and Schedule 2), and public companies (regulation 4 and Schedule 3).

These model articles will automatically form the articles of association for companies formed under the Companies Act 2006 which either do not register their own articles of association with the registrar of companies under that Act, or, if they do so, do not exclude the model articles in whole or in part (section 20 of the 2006 Act). Other companies are free to adopt the model articles in whole or in part. Regulation 5 saves the previous versions of model articles in force at the time that a particular company was originally registered under previous companies legislation.

http://www.berr.gov.uk/files/file40794.doc

Anticipated date in force 1 October 2008

MiFID

Publication of the regulation containing the MiFID transitional provisions

The Financial Services and Markets Act 2000 (Markets in Financial Instruments)(Amendment No.2) Regulations 2007 (SI 2007/2160) (Regulations) have been made available on the website of the Office of Public Sector Information.

The Regulations make MiFID implementation easier for firms and the FSA.

Some of the provisions in these Regulations will come into force on 15 August 2007 and the remaining provisions will come into force on 1 November 2007 (*Ed note: MiFID will now be implemented on 5 November).*

HM Treasury will be publishing a regulatory impact assessment of the effect of this instrument on the costs of business.

http://www.opsi.gov.uk/

Securitisation

Temporary tax regime for securitisation companies to be extended

On 21 August 2007, HMRC issued draft regulations extending the temporary regime for securitisation companies (for those companies that do not fall within the permanent regime introduced from 1 January 2007) to the end of 2016. The draft regulations also allow for companies to elect out of the temporary regime and provide for situations where, while the temporary regime applies, their accounting methods change.

http://www.hmrc.gov.uk/practitioners/securitisation/dregs-sec83.htm

Tort

Rome II

Published in Official Journal

The Rome II Regulation (Regulation (EC) No. 864/2007) was published in the Official Journal of the European Union L299/40 on 31 July 2007. The Regulation will apply from 11 January 2009.

ARTICLES

Banking

Payment Services Directive

An introduction to the Payment Services Directive

After some 16 months of wrangling, resulting in extensive amendments to the European Commission's originally proposed text, the European Parliament has at long last adopted the proposal for the Payment Services Directive. This will now be forwarded to the EU Council for final adoption and is to be transposed into national law by 1 November 2009 at the latest.

(P Robertson: IHL, 07/08.07, 31) 07.32.022

Capital Markets

ISDA/FpML for Financial Derivatives

This article provides an overview of the definition of financial derivatives, and the work of ISDA which is the global trade association for the privately negotiated "over the counter" derivatives industry, especially as regards their work on standardised legal definitions. After having established this background, it then considers the evolution of these products, representation in both human and machine-readable form, which is driven by the need for automation in response to market growth and regulatory requirements.

(A. Parry: JIBLR, 09.07, 495) 07.35.031

What is the United States doing about the competitiveness of its capital markets?

In November 2006, the Committee on Capital Markets Regulation issued policy recommendations as to what the United States should do about the problem that US public equity markets are increasingly losing business to foreign public or US private markets. The report was followed by two others, the first in December 2006 by McKinsey & Company for Senator Charles Schumer and Mayor Michael Bloomberg, and the second in March 2007 by an independent Commission of the Chamber of Commerce. These reports also find a competitive problem and make their own reform recommendations.

(H.S. Scott: JIBLR, 09.07, 487) 07.35.030

Consumer credit

The Consumer Credit Act 2006; real additional mortgagor protection?

Will the Consumer Credit Act 2006 will increase the protection available to mortgagors. Details the background to the Act, its main provisions, the factors determining when a mortgage will be governed by its rules, the operation of its unfair credit relationship (UCR) and the requirements for setting a mortgage aside. Reviews the issues governing the interaction between the UCR and traditional equitable remedies such as setting a mortgage aside for undue influence. Includes a diagram explaining when a mortgage is classed as a "first mortgage" under the Act.

Conveyancer and Property Lawyer Conv. (2007) July/August Pages 316-339; 1/7/2007-1/8/2007; Sarah Brown (University of Leeds)

Contract

Avoiding challenges to the enforceability of settlements: entire agreement clauses

Entire agreements are a standard part of most contracts. Their intention is to ensure that the contractual relationship is governed by one document that sets out the agreements that have been reached, and that the scope to bring claims for other statements or representations made during negotiations made during negotiations is excluded or (more likely) severely limited. The recent case of *Crystal Decisions (UK) Ltd and others v Vedatech Corporation* illustrates the usefulness of an entire agreement clause in the context of settlements.

(J. Maton: IHL, 07/08.07, 39) 07.32.029

Finance & Security

Cash management

Developing a cash culture

With debt levels rising by the year, there is an urgent need for highly leveraged companies to manage their cash more effectively to avoid falling into distress. By building a cash culture, management can start to get working capital under control and win the confidence of banks and the capital markets.

(E Connaughton: ICR, 08.07, 213) 07.35.028

Credit risk

Exposure management: key issues affecting energy exchange credit risk policy and procedures

This article explores the key considerations shaping the credit risk policies and risk assessment procedures in the energy commodity markets.

(D. Ezickson, A. Kramer & P. Samant: BJIBFL, 07/08.07, 393) 07.32.001

Debt markets

Is the future secure for second lien Lenders in Europe?

Second lien financings continue to be increasingly popular in the United States and have gained a strong foothold in Europe. This article compares some of the main structural features of European and US second lien debt and looks at whether the future is secure for investors in this relatively new addition to the European debt market.

(C Wells & N Devany: JIBLR, 08.07.443) 07.33.076

Environment

What a relief

A European legal background to the contaminated land waste tax relief, the recent proposals for abolition and the implications for those involved in the development of contaminated sites.

P. Sheridan & A. Miller, CMS Cameron McKenna LLP CIWM, 07.07, 68 07.32.041

Hedge Funds

Side letters – are funds hedging their bets?

Hedge fund managers often provide certain investors in hedge funds with separately negotiated 'side letters' granting terms that are different from the fund's standard offering documents. Regulators in the UK and the US have voiced concern at the potential problems presented by the use by hedge funds of such letters. Side letters have also been the subject of recent guidance from AIMA. This article looks at some of the practical problems and considers some legal issues associated with these documents.

(K. Jarvis & J. Sahora: BJIBFL, 07/08.07, 384) 07.32.004

Finance

Credit pooling

This article considers the new technique of credit pooling to manage credit portfolios as exemplified by a number of successful transactions in the German savings bank sector.

(O.H. Behrends & F Bierwirth: BJIBJL, 07/08.07, 391) 07.32.002

Property Finance

Commonhold – it's not just about flats

There is a widely-held view that the commonhold system is applicable only in the residential context, where it represents another attempt to deal with the perceived iniquity of leasehold tenure. While there is a measure of truth in this, commonhold is intended to be available in relation to all types of property. In the Australian and

American systems on which it is based, commonhold (or its equivalent) is widely used in the commercial context. This article examines the pros and cons of doing so.

(J. Stoodt: IHL, 4.07, 93) 07.34.129

Merrill Lynch International Bank Limited v Winterthur Swiss Insurance Company

[2007] EWHC 893 (Comm 28/2007)

This recent case before the Queen's Bench in the High Court shows the importance of ensuring that 'event of default' provisions in contracts are broadly defined to cover all potential proceedings both within the English jurisdiction and in any other foreign jurisdiction. The High Court held that the institution of safeguard proceedings by the Eurotunnel companies amounted to a bankruptcy event of default under an ISDA master agreement and triggered a back-to-back credit indemnity insurance.

(L Hales & D Newton: ICR, 08.07, 215) 07.35.036

Regulatory

EU

European regulation of payment services–the story so far

"Payments are the 'oil in the wheels of the internal market'". To have a fully effective internal market, the European Union (EU) needs a "Single Payment Area", with a level playing field for efficient and secure cross-border payments. Restrictions on cross-border payments within the EU create a friction effect that limits the internal market, adds costs to consumers and businesses, and waste resources.

(R Bollen: JIBLR, 09.07, 451) 07.35.029

MiFID

Outsourcing in the financial services sector – are you ready for MiFID?

Lawyers involved in outsourcing in the financial services sector need to understand the implications of MiFID if their clients are to meet the (rapidly approaching) 1 November deadline *(Ed note: now 5 November 2007)*. This article considers how the new rules affect financial institutions and their outsourced service providers.

(J Gill: IHL, 7.07, 78) 07.31.007

TCF

Treating customers fairly: the challenges of principles-based regulation

The Financial Services Authority's move to principles-based regulation represents a challenge to firms and those advising them. This article looks at the background to this initiative and examines the lessons that can be learned from the implementation of the Treating Customers Fairly programme.

(J Patient: JIBLR, 08.07, 420) 07.33.077

Securitisation

Better execution

Regulation is promoting pricing transparency and best execution for securities for all sectors of the capital markets. However, in fixed income dealer markets like securitisation, the industry is doing a good job of self-regulation towards improved transparency.

(H Dhillon, ISR, 08.07,36) 07.35.032

The value of a smile

The CDO market is one of the fastest moving areas in securitisation, but also the most controversial. Behind the recent US sub-prime crisis there is a longer running issue–are CDOs reaching a level of abstraction and obscurity at which they cannot be meaningfully valued? How can cash investors, without the modelling capability of investment bank underwriters, keep up?

(D Sokolov: ISR 09.07, 33) 07.35.033

TECHNICAL

Banking

Review of the cash ratio deposit scheme

Consultation on proposed changes

Under the terms of the "cash ratio deposit scheme", certain authorised institutions (under the Financial Services and Markets Act 2000) to accept sterling deposits, place non-interest bearing deposits with the Bank of England. The Bank then invests the deposits using the income earned to fund its monetary and financial stability functions.

HM Treasury is seeking views on the findings in the latest review of the scheme.

www.hm-treasury.gov.uk/media/6/F/crd_100807.pdf

(HM Treasury, August 2007)

Personal internet security

House of Lords Science & Technology Report

Section 2 of the report discusses financial fraud such as phishing and personal identity theft, noting that "figures on the scale of the problem are hard to come by. Indeed, the lack of data on identity theft is symptomatic of a lack of agreed definitions or detailed statistics on almost all aspects of Internet security" and criticises the banking industry in section 5 over its lack of security measures. It suggests that the lack of a single regulatory regime adds to the problems.

It recommends that the Government introduce legislation, consistent with the principles enshrined in common law and, with regard to cheques, in the Bills of Exchange Act 1882, to establish the principle that banks should be held liable for losses incurred as a result of electronic fraud and suggests that the Government consult on a data security breach notification law.

http://www.publications.parliament.uk/pa/ld200607/ldselect/ldsctech/165/165i.pdf

Capital Markets

Intermediated Securities

UNIDROIT publish further Preliminary Draft Convention on Substantive Rules Regarding Intermediated Securities

On 9 August 2007, the International Institute for the Unification of Private Law (UNIDROIT) published a further Preliminary Draft Convention on Substantive Rules Regarding Intermediated Securities (the Convention).

The draft supersedes the November 2006 draft.

Intermediated securities are securities that are held not directly by investors but

indirectly through a chain of intermediaries. The Convention has been proposed to improve the legal framework for securities holding and transfer, with an emphasis on cross-border situations.

It is expected to be finalised in early 2008.

ISDA

European Loan CDS Standard Terms Supplement and form of Confirmation

The ISDA Standard Terms Supplement and form of Confirmation for Credit Derivative Transactions On European Leveraged Loans were published on 30 July.

They are available on ISDA's website: www.isda.org

Adherence for Loan Credit Default Swaps Protocol extended

ISDA announce that after requests from members, the LCDS Protocol has been extended for adherence until Friday, September 14, 2007.

Payment systems

Payment and securities settlement systems in the EU

The fourth edition of the Blue Book, issued by the European Central Bank, describes the major payment and securities settlement systems operating in the Member States.

The report is divided into two volumes; the first contains a chapter on the euro area and individual country and chapters for the countries of the euro area, while the second contains the country chapters of the non-euro area countries.

http://www.ecb.int/pub/pdf/other/ecbbluebookea200708en.pdf

Fraud

Money laundering

JMLSG publishes draft guidance for e-money

The Joint Money Laundering Steering Group (JMLSG) has published for comment draft amended guidance for electronic money. This will be included in Part II of the JMLSG's amended 2006 Guidance which contains supplementary sector specific guidance.

The purpose of the guidance is to provide clarification to e-money issuers on verification of identity and other customer due diligence measures required by legislation. It covers products that are card-based as well as those that are entirely software-based.

The guidance can be used by all issuers of e-money, regardless of whether they are regulated by FSA or operate under a small electronic money issuers' waiver.

Comments on the draft guidance are invited by 7 September 2007.

Regulation

Insurance companies

Run-off and Schemes of Arrangement

On 31 July 2007, the FSA published a "process guide" to decision making on schemes of arrangement for insurance firms. The guide is of interest to anyone involved in the UK insurance run-off market.

A scheme of arrangement (Scheme) is a compromise or arrangement between a company and its creditors (or any class of them) under section 425 of the Companies Act 1985. Schemes have been used for insolvent insurers as a more flexible and cost-effective alternative to liquidation. More recently, Schemes have been used by solvent insurers looking to conclude all or part of their business.

Although Schemes are not governed by the Financial Services and Markets Act 2000, a firm proposing to implement a Scheme must notify the FSA and construct and implement the Scheme in compliance with the FSA's Principles for Businesses.

In the guide, the FSA explains how it envisages Schemes and its process for reviewing Schemes proposed by firms it regulates, including the factors the FSA takes into account in its assessment of a Scheme.

Securitisation

Tax

Draft tax regulations for securitisation companies and insurance SPVs

On 23 August 2007, HM Revenue & Customs published two draft regulations for securitisation companies:

- 1) Property securitisations.

The regulations provide that a borrower (that is, a property-holding company that does not itself issue notes) in a property securitisation may transfer its UK corporation tax liabilities (other than in relation to chargeable gains) to another company in its group for UK tax purposes.

- 2) Insurance special purpose vehicles.

The regulations provide that an insurance special purpose vehicle may, for UK corporation tax purposes, calculate its profits and losses on the basis of UK GAAP as it applied for periods of account ending 31 December 2006 but excluding FRS 26 (Financial Instruments: Measurement), as opposed to current UK GAAP or IAS.

Comments are invited on the draft regulations and should be submitted by 28 September 2007.

HMRC
http://www.hmrc.gov.uk/practitioners/securitisation/dregs-sec83.htm

NOTICES

Banking

Charges

OFT files details of case against unauthorised overdraft charges

The OFT filed on 31 August 2007 particulars of claim at the High Court on the application of the law in respect of unauthorised overdraft charges. The OFT says these documents will be available on the OFT website next week after they have been served on the other parties. The documents relate to the question of whether the fairness test in the Unfair Terms in Consumer Contract Regulations (UTCCRs) applies to the relevant charges.

The OFT is continuing its financial investigation to determine whether or not unauthorised overdraft charges are fair, based on its view that the fairness test does apply to them. This investigation is due to be completed by the end of the year.

The banks take the view that the charges are not covered by the fairness test in the UTCCRs and the court case at the beginning of 2008 is designed to test this point of law. It will not lead to a judgment as to whether the charges themselves are fair or not. The OFT will decide after the initial judgment what steps to take should it win the test case and conclude from its financial investigation that any of the charges are unfair. The OFT will publish its market study on the current account market in December 2007.

http://www.oft.gov.uk

Competition

Price controls on SME banking may be lifted

On 23 August 2007, the Competition Commission (CC) provisionally decided that price controls on the UK's four largest clearing banks servicing small and medium size enterprises should be lifted. The controls currently require the banks to offer SMEs an account that pays interest on credit balances of 2.5% below base rate or higher, or does not levy standing charges or charges for core money transmission services, or both.

The controls currently apply to Barclays Bank plc, HSBC Bank plc, Lloyds TSB Bank plc and the Royal Bank of Scotland Group plc.

This should not be seen as giving the banks back complete freedom over pricing. The CC has provisionally decided to keep in place certain behavioural undertakings aimed at easing the process of switching account provider and recommends that the Office of Fair Trading take action to reinforce the awareness and impact of the behavioural undertakings. The CC's recommendations are that the OFT should:

- actively monitor all SME banks' behaviour following the lifting of the

price controls, and raise awareness of any worsening of their offers;

- work with the banks to ensure that SMEs become more aware of the banks' obligations to make it quick and easy for them to switch accounts; and
- explore with the British Bankers' Association the scope for including these issues in the voluntary Banking Code at its next review.

The next step is for interested parties to comment on the CC's provisional decision. These comments should reach the CC by 28 September 2007. This is the banking sector's chance to have its say and engage with the OFT/CC in relation to SME banking, particularly in the light of the proposed awareness raising role of the OFT and proposals regarding the Banking Code review.

All of these controls stem from the CC's 2002 investigation into banking services to SMEs. This was at least in part prompted by concerns about the level of charges imposed on SMEs for banking services. In 2006/7 the OFT carried out a review of all of the undertakings imposed following the CC's SME report. It made recommendations to the CC, which itself also reviewed the undertakings, culminating in the 23 August provisional decision.

Law-Now (www.law-now.com) 23 August 2007

Unclaimed assets

Unclaimed assets within the financial system – Treasury Select Committee

The report:

- considers the Government's proposals for the scheme and disputes its arguments for pursuing a voluntary approach, whereby banks and building societies will be under no obligation to participate,
- examines whether consumer interests will be adequately safeguarded and whether the Banking Code is the appropriate regulatory vehicle.

It sets out minimum requirements for external auditors to verify participation by the financial institutions. In relation to the proposal that dormancy should be identified after 15 years of no customer activity, the report considers that 15 years is too long but welcome the fact that all forms of customer activity will be recognised, not merely customer-initiated transactions. Such non-transaction activity should be defined and evidence must be retained by the financial institutions to prove an account's dormancy. With regard to the scope of the scheme, it recommends that NS&I be included and suggests that the Government investigates proposals for the scheme to include other classes of unclaimed asset, including insurance. It suggests a single search facility for reclaims (at present, BBA, BSA and NS&I run separate facilities) The report also notes the TSC's disappointment at the lack of public consultation on the

priorities for disbursement, saying that the Government has missed an opportunity to improve the financial strength of the third sector.

http://www.publications.parliament.uk/pa/cm200607/cmselect/cmtreasy/533/533.pdf

The BBA is working with BSA and NS&I:

http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=145&a=10181

Capital markets

EC methodology for monitoring equities and bonds trading and post-trading activities

The European Commission published a methodology for monitoring prices, costs and volumes of equities and bonds trading and post-trading activities, developed by Oxera Consulting Limited.

Trading and post-trading services play an important part in the overall functioning of financial markets. Efficient trading and post-trading services that do not fail are essential. The methodology was commissioned to compliment the Commission's policy initiatives aimed at fostering safe and efficient financial markets.

Using the methodology, the Commission will be able to:

(1) measure the end-to-end costs incurred by an investor in executing, clearing and settling a trade;

(2) measure the separate costs of individual trading and post-trading services provided by different agents, including stock exchanges, brokerage firms and custodians;

(3) monitor changes in these costs and activities over time;

(4) understand the drivers behind these changes; and

(5) assess the effects of both its own policies and industry and government led initiatives.

The Commission intends to apply the methodology in 18 financial centres in the European Union and in Switzerland over the next three years, starting in September 2007.

2 August 2007

Company

Companies Act 2006

Companies House FAQs for 1 October 2007 implementation

Companies House has published some frequently asked questions relating to the next stage of the implementation of the Companies Act 2006 on 1 October 2007.

The areas covered are:

- (1) request to inspect the register of members (sections 116 to 119. 2006 Act);
- (2) requirement for the directors' report to contain a business review (unless the company is subject to the

small companies' regime) (section 417, 2006 Act);

- (3) Table A (Table A is to be amended from 1 October 2007 to reflect the new directors' duties regime and changes to meetings and resolutions);
- (4) Resolutions, changes to annual general meetings and notice periods for shareholder meetings; and
- (5) Form 318 which will be used until 30 September 2008 to notify the location of directors' service contracts (section 228, 2006 Act) and details of any "qualifying indemnity provision" (section 234 to 236, 2006 Act made for a director (section 238, 2006 Act).

The information in the FAQs has also been published in the form of a note which can be accessed from the October 2007 "implementation" page on the Companies House website.

Finance & Security

LMA

"Private and Inside Information in the Loan Market"

The LMA has published a new paper titled "Private and Inside Information in the Loan Market" which provides examples of situations that could arise as a result of institutions being in receipt of information.

A copy of the paper can be found on the LMA website in the following pages:

- 1 - the Visitors Home page among the Press releases and
- 2- in the Members/Documentation/Non-Public Information page.

www.lma.eu.com

German law investment grade facility agreement

The LMA say the German law investment grade facility agreement has been finalised and will be launched soon.

Mortgages

Exit fees

FSA update on mortgage exit administration fees

On 1 August 2007, the FSA published a press release giving an update on how mortgage lenders have responded to concerns that mortgage exit fees have been increased unfairly.

The FSA had asked lenders to review their mortgage contracts for future customers and decide whether or not they needed to amend their mortgage exit fees in light of the FSA's January 2007 Statement of Good Practice. The FSA expected lenders to have made any necessary changes by 31 July 2007. Having contacted a sample of firms in the mortgage market to find out the outcome of their reviews, the FSA has found that:

- (1) Most major lenders have opted to either charge a fee that cannot be

varied during the life of the mortgage or to totally remove the mortgage exit fees.

- (2) Other lenders will charge a mortgage exit fee which reflects the administrative costs when the customer exits the mortgage, which they can only change for valid reasons clearly explained in the contract at the outset.

In relation to how these firms will treat their existing customers, the FSA has found that

- over 95% of the industry has decided to either charge no mortgage exit fee, or charge the original mortgage exit fee or a lower amount.
- The remaining 5% of the industry that has decided to either charge the current increased mortgage exit fee or a mortgage exit fees higher than the original amount will have to justify this decision to the FSA.

  The FSA intends to take further regulatory action if lenders are not able to justify their position.

The FSA has indicated that it will continue to closely monitor how firms treat their customers in this area.

http://www.fsa.gov.uk/pages/Doing/Regulated/consumer/tackle/meafs/index.shtml

Statistics

CML arrears and possessions

The Council of Mortgage Lenders has published its half-yearly data on mortgage arrears and possessions. The CML has also substantially revised its previously published data back to the beginning of 2003.

The full text is available at http://www.cml.org.uk/cml/media/press/1239

(CML, 03.08.07)

Fraud

Anti-money laundering

ARA secures £1.8m London property in settlement in alleged money laundering case

On 17 July 2007 the Assets Recovery Agency was granted an Order by the High Court in London vesting a property currently valued at £1.8 million in the Trustee nominated by the Agency. This was in settlement of a series of civil recovery and tax actions by ARA who alleged that the assets in question were the proceeds of crime.

http://www.gnn.gov.uk/content/detail.asp?ReleaseID=305808&NewsAreaID=112&NavigatedFromSearch=True

Assets Recovery Agency, 7.8.07

Home Office consults on prescribing the form and manner of suspicious reporting under POCA

On 30 July 2007, the Home Office published a consultation document entitled Tackling Money Laundering: Suspicious Activity Reports: prescribed form and manner.

The Home Office is seeking views on whether its proposals to prescribe the

form and manner for reporting suspicious activities under section 339 of the Proceeds of Crime Act 2002 (POCA) are acceptable and whether or not they would result in a significant burden on industry.

The consultation follows the review of the suspicious activity reporting regime carried out by Sir Stephen Lander in 2005-2006. This review recommended enacting section 339 of the POCA, which enables the form and manner of reporting suspicions to be prescribed by order by the Secretary of State, on the basis that this would contribute to improving the operation of the current regime.

The consultation is open to other Government departments, interested organisations and members of the public and the final date for comments is 22 October 2007.

The Home Office plans to publish a summary of responses one month after the consultation closes. Subject to responses, the Home Office then proposes to lay an order under section 339 of the POCA to prescribe the form and manner of reporting.

Regulatory

CEBS

CEBS publishes the first part of its technical advice to the Commission on liquidity risk management

Technical advice on liquidity risk management for the European Commission has been published by the Committee of European Banking Supervisors (CEBS). It takes the form of a report published on 15 August 2007 in response to the EC's call for advice in March this year on the regulatory frameworks for supervising liquidity risk adopted in the EEA. The EC is interested in the reasons for different approaches being adopted.

The report notes that only a few countries have made major changes to their regulatory frameworks, there is broad agreement on the aims of liquidity supervision and the effect of growth of the EU had led to more tensions in regulatory requirements experience by domestic banks owned by foreign parent banks.

CEBS will continue work on a number of issues in the report and this work is due by the end of January 2008

CESR

Rating of structured finance products

CESR publishes responses to questionnaire

On 24 August 2007, the Committee of European Securities Regulators (CESR) published the non-confidential responses received to the questionnaire that it published on 22 June 2007 on the rating of structured finance instruments. At the same time, it extended the deadline for responses (originally 31 July) to 10 September in order to allow a maximum of interested parties to provide their input.

CESR will be meeting with the Credit Reference Agencies (CRAs) in October

2007 to obtain first hand information from them on how they develop ratings for structured finance products. CESR will also be meeting with Commissioner McCreevy in the near future to discuss the role of CRAs as regards the rating of structured finance instruments. CESR will assess whether to hold a hearing to give market participants the opportunity to further express their views on this issue.

http://www.cesr-eu.org/popup2.php?id=4714

Advice on non-equities transparency

CESR's technical advice to the European Commission (Commission) on non-equities transparency. This advice was published by the Commission on 19 July 2007. CESR has also published a feedback statement to accompany its advice that explains the decisions made.

Report on commodity and exotic derivatives

A compilation of responses by CESR Members to the Commission's request for initial assistance on commodity and exotic derivatives and related business.

This report covers the first part of the Commission's request and includes an initial fact-finding exercise on the regulation and operation of commodity and exotic derivatives in member states. CESR will develop a follow up report for the Commission that will address the remaining areas of its request for advice in October 2007. This will include the application of the MiFID exemptions and Article 38 of the MiFID implementing Regulation which set out the requirements for persons exercising significant influence over the management of the regulated market.

9 August 2007

FSA

Implementation of MiFID

This issue focuses solely on the changes to FSA's transaction reporting regime in relation to the implementation of MiFID. It is noted that, following discussions with reporting firms and trade bodies, the UK implementation date for the new transaction reporting regime will be Monday 5 November 2007 on the grounds that moving from a mid-week "cutover" *(has anyone come across this word before?)* will significantly reduce the implementation risk associated with the transition to the new reporting regime for both firms and ARMs.

http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter22.pdf

MarketWatch Issue 22

MiFID Connect announces change to plans on guidelines

On 31 August 2007, MiFID Connect announced a change of plan relating to the production of guidelines to help firms that have to implement the Markets in Financial Instruments Directive.

At the outset of the MiFID Connect project, the following areas were identified as areas MiFID Connect would work on by producing guidelines:

- (1) Outsourcing.
- (2) Suitability and appropriateness.

- (3) Investment research.
- (4) Best execution.
- (5) Conflicts of interest.

As previously reported by PLC Financial Services, Guidelines confirmed by the FSA on outsourcing, suitability and appropriateness and investment research have already been published. However, MiFID Connect has now concluded that it will not product Guidelines on best execution or conflicts of interest.

On best execution, MiFID Connect decided that due to the existence of helpful materials on best execution, published by the European Commission, the Committee of European Securities Regulators (CESR) and the FSA, it would not be appropriate to develop general Guidelines. MiFID Connect recognises that there will still be issues about how best execution applies to specific markets and as a result, some trade associations may decide to issue additional sector specific information.

On conflicts of interest, instead of producing Guidelines confirmed by the FSA, MiFID Connect is working on an information memorandum on conflicts of interest that will not be confirmed by the FSA. MiFID Connect hopes to publish this document in September 2007.

http://mifidconnect.com/bba/jsp/polopoly.jsp?d=569&a=7555

FSA publishes policy statement on best execution

The FSA have published Policy Statement 07/15 (PS 07/15) in which it reports on the remaining best execution issues under the Markets in Financial Instruments Directive (MiFID) arising from Consultation Paper 06/19 and Discussion Paper 06/3. The FSA covered the other issues relating to best execution in Policy Statement 07/6.

Many respondents raised questions which were answered in the Questions and Answers published by the Committee of European Securities Regulators in May 2007. Where this is the case, the FSA refers to the QA which is appended to PS 07/15. For issues not addressed by the QA, PS 07/15 contains the FSA's feedback, which includes:

(1) The FSA considers that firms need only notify their clients about material changes to their execution policy rather than obtaining their consent. However, firms must decide how best to meet this requirement.

(2) The FSA does see a possibility for firms to make contractual promises about execution quality to eligible counterparties without becoming subject to regulatory requirements for best execution in certain circumstances.

(3) The FSA has no plans to provide execution quality data on over-the-counter markets.

(4) The FSA does not see MiFID as requiring firms to establish both an execution policy and a 'transmission' policy when portfolio managers reserve the option to either place orders with other entities for execution or execute their own client orders.

PS 07/16 also contains FSA's feedback on issues about the scope of the best execution requirements. Like CESR, the FSA considers that the European

Commission's answers on scope (appended to the CESR QA) form a sufficient basis for implementation.

Finally, the FSA gives feedback on how MiFID's best execution requirements might apply to specialist regimes, including corporate finance businesses and venture capital firms.

7 August 2007

FSA publishes initial observations regarding ICAAPs received to date

The FSA has published two papers setting out its initial observations from the Internal Capital Adequacy Assessment Process submissions received from small to medium sized banks and building societies.

Feedback and final rules on Article 4 MiFID Implementing Directive - notification matters

On 30 July 2007, the FSA published a policy statement on reforming conduct of business regulation, giving final feedback on CP 06/19 (PS 07/14).

In this policy statement, the FSA explains its final decisions in light of the agreement reached with the European Commission on the notifications under Article 4 of the Markets in Financial Instruments Directive Level 2 Implementing Directive.

The FSA has confirmed that it will retain a number of specific consumer protection measures when its new conduct of business sourcebook (COBS) comes into force on 1 November 2007.

In some cases, firms will have greater flexibility to determine how best to meet the required standards.

In addition, the FSA has decided to withdraw some of the Article 4 notifications made in January 2007, demonstrating its commitment to minimise super-equivalence in its MiFID implementation.

FSA publishes its Transaction Reporting User Pack

On 30 July 2007, the FSA published its Transaction Reporting User Pack (TRUP).

The aim of the TRUP is to give detailed instructions and guidelines to help firms prepare for transaction reporting to the FSA following the implementation of the Markets in Financial Instruments Directive (MiFID) on 1 November 2007 *(Ed note: now 5 November)*. The TRUP does not contain formal guidance. The areas covered within the TRUP are:

- (1) Reportable transactions after MiFID.
- (2) Obligation to make a transaction report.
- (3) Who should we transaction report to?
- (4) How to complete a transaction report.
- (5) How do I send transaction reports to the FSA after MiFID?
- (6) Frequently asked questions.

Compliance departments of all relevant firms must make sure they understand how they will have to report transactions once MiFID is implemented and what

changes will have to be made to current transaction reporting processes.

The changes to the FSA's Handbook covered by the policy statement are set out in the Conduct of Business Sourcebook (MiFID, Article 4 and Other Amendments) Instrument 2007 (2007/44), found in Annex 2 of the policy statement.

Settlement

Eurosystem

Update of the assessment of securities settlement systems in the euro area

In the context of the first assessment of relayed links, the Governing Council of the European Central Bank has updated the assessment of securities settlement systems eligible for the settlement of collateral for Eurosystem credit operations.

The full text is available at: http://www.ecb.int/press/pr/date/2007/html/pr070731.en.html

(ECB, 31.07.07)

Insolvency

Cases

Disqualification Proceedings, Administration and Automatic Dissolution

Secretary Of State For Trade & Industry V (1) Jason Arnold (2) Keith James Hopley

[2007] EWHC 1933 (Ch) Ch D (Manchester) (Judge Pelling QC) 10/8/2007

On its proper construction the Company Directors Disqualification Act 1986 s.6(3)(c) conferred jurisdiction to commence disqualification proceedings even where automatic dissolution had occurred by operation of the Insolvency Act 1986 Sch.B1 para.84(6).

The applicant Secretary of State applied for a declaration in relation to director disqualification proceedings which had been commenced under the Company Directors Disqualification Act 1986 s.6 after the company had been placed in administration and then dissolved by operation of the Insolvency Act 1986 Sch.B1 para.84(6). The perceived difficulty which arose was whether the court had jurisdiction to entertain the disqualification proceedings as the court which "has" jurisdiction to wind up the company within s.6(3) of the Disqualification Act or whether since the company no longer existed the secretary of state had to make an application to restore the company to the register.

HELD: When consideration was being given to reforming the law applicable to administration by introducing Sch.B1 into the Insolvency Act 1986, consideration was also given to amending s.6(3) of the Disqualification Act. It had not been necessary to amend s.6(3)(c) to take account of automatic dissolution under Sch.B1 para.84(6) since on its proper construction it conferred jurisdiction even where automatic dissolution had occurred. The word "has" in the phrase "which has jurisdiction" related back to the phrase "has at any time been appointed" with the result that the question that had to be asked when considering jurisdiction was whether there was a court with jurisdiction to wind up the company concerned at the date when the administrator or administrative receiver was appointed. That approach was entirely consistent with the methodology in the rest of s.6(3). That interpretation avoided an absurdity and enabled the disqualification proceedings to be resolved quickly on their merits.

Declaration granted.

Statutory demand

Bryce Ashworth v Newnote Ltd

[2007] EWCA Civ 793 CA (Civ Div) (Buxton LJ, Lawrence Collins LJ) 27/7/2007

In the circumstances, a statutory demand should have been set aside where the debtor had raised genuine triable cross-claims that exceeded the amount of the demand.

The appellant (X) appealed against a decision upholding a statutory demand by the respondent former employer (N). Following X's resignation as a director of N, concerns had been expressed about X's explanation as to misappropriated funds and N had summarily dismissed X for gross misconduct. Thereafter, N served on X a statutory demand that included an overpayment by N of £10,000 in respect of a loan, which X did not dispute, and £2,000 that X had allegedly taken from N. X admitted that he owed a sum, but cross-claimed for various expenses, which included a claim for salary in lieu of notice. A district judge held that X had raised genuine triable issues and set aside the demand on the basis that the cross-claims exceeded the amount of the demand. But on appeal by N, a circuit judge held that there remained a debt against which there were no genuinely triable cross-claims. The main issues were whether the circuit judge had been entitled (i) to hold that the district judge had given insufficient reasons for his decision; (ii) to hold that X's claim to salary in lieu of notice should be rejected on the ground that N had been entitled to dismiss him summarily because he had retained £10,000 paid to him by mistake; (iii) to dismiss X's claim that he had not taken the £2,000; (iv) not to permit N to rely on a new point that X held the £10,000 on trust and that there was no cross-claim available to X in his capacity as an employee.

HELD: (1) A judicial decision that affected the substantive rights of the parties should be reasoned. A judge had to explain why he had reached the decision, and the scope of the duty depended on the subject matter of the case, English v Emery Reimbold & Strick Ltd (2002) EWCA Civ 605, (2002) 1 WLR 2409 considered. Although the district judge's reasons were short, they had met the test in the context of the instant case. (2) It was not appropriate to use the statutory demand procedure to decide whether N had been entitled summarily to dismiss X. The district judge had been right to decide that the claims were part of a course of dealings between the parties over a lengthy period of time and involving a number of other issues relating to the employment and contractual relationship between the parties. (3) In the context of a cash business whose record-keeping and method of operation had been very haphazard, it had not been open to the circuit judge to summarily dismiss X's claim that he had not taken the £2,000. (4) The circuit judge had not permitted the new point to be argued and there were no grounds for interfering with that exercise of discretion. It involved difficult points of law, which had not been settled, and which were unsuitable for determination on a summary application, particularly in a case where there might be an issue as to whether the money was paid by mistake. (5) For the purpose of setting a statutory demand, the cross-claim had to be genuine and serious or of substance or raise a genuine triable issue, Kellar v BBR

Graphic Engineers (Yorks) Ltd (2002) BPIR 544 considered. There was no practical difference between "genuine triable issue" and "real prospect of success", Popely v Popely (2004) EWCA Civ 463, (2004) BPIR 778 considered. The statutory demand was set aside.

Appeal allowed

Creditor rights and set off in administration

Hammonds (a firm) v Pro-fit USA Ltd

[2007] All ER (D) 109 (Aug) [2007] EWHC 1998 (Ch) Chancery Division Warren J17 August 2007

The High Court has given guidance on the interpretation of the terms "the company is or is likely to become unable to pay its debts" and "reasonably likely to achieve the purpose of administration" where used in paragraph 11 of Schedule B1 of the Insolvency Act 1986 (Insolvency Act). The court has also given guidance on the interpretation of the term "creditor" where used in paragraph 12(1)(c) of Schedule B1 of the Insolvency Act.

There was no established practice in relation to applications for administration orders similar to that which applied in relation to winding-up petitions where there was a disputed debt or cross-claim and it was not appropriate to create such a practice.

The respondent company owned, subject to certain licences, a wide portfolio of intellectual property rights, related know-how and confidential information relating to 'imparting stretch to fabrics' which had 'a variety of commercial applications, including waistbands, lingerie, shirt collars, tapes, industrial shrinkage and finishing'. The company began instructing the applicant firm in February 2004, largely in relation to commercial work, licensing deals and disputes with third parties in relation to intellectual property rights. Subsequently, the firm sought £556,450 in unpaid fees and entered into negotiations with the company in order for the repayment of the debt to be restructured. During the negotiations, certain intellectual property rights were transferred by the company to an associated company. The negotiations collapsed, the firm terminated its retainer and applied to the court for an administration order in relation to the company. The company cross-claimed alleging negligent deficiencies in the advice given by the firm and seeking damages resulting in a potential set-off against the sums claimed by the firm.

The firm contended that the licence granted to the associated firm had been at a substantial undervalue and the cross-claim was spurious. The firm also relied on a well established line of authorities, in the context of winding-up petitions, that indicated that the court had jurisdiction to allow a petition to proceed even where the debt was disputed on bona fide and substantial grounds. The company argued that it was solvent able and to pay its debts as they fell due. Further, it asserted that the cross-claim was genuine.

The issue for the determination of the court was dependant on the damages that might be awarded on the cross-claim, whether the firm could be construed as a 'creditor' at all, and how the potential set-off could impinge on the exercise of the court's discretion to grant an administration order under Sch B1 of the Insolvency Act 1986.

The court ruled:

A person was a 'creditor' within the meaning of the 1986 Act so long as he had a good arguable case that a debt of a sufficient amount was owing to him. There was no established practice in relation to administration applications that was similar to that which applied in relation to winding-up petitions and it was inappropriate to create such a practice. The court's discretion was at large and was not constrained by any practice similar to that adopted in relation to winding up petitions.

The differences in nature between winding-up and administration led to the conclusion that there was no prima facie reason for importing into administration the practices developed in relation to winding-up.

On the evidence, the company was or was likely to become unable to pay its debts within the meaning of the 1989 Act, and even if the company was able to pay its debts as they fell due it was likely that it would be unable to do so in the foreseeable future so that it was 'likely to become unable to pay its debts'. The court had been satisfied that there was jurisdiction to make an administration order. In the circumstances of the instant case, given the substantial argument that the granting of the licence to the associated company had been at an undervalue, the court would accede to the firm's application, subject to giving the company an opportunity to obtain a surrender of the licence from the associated company.

Legislation

Leyland Daf reversal: draft rules

The Insolvency (Amendment) Rules 2008 No. 0000

The draft rules reversing the decision in re Leyland Daf have been published. The Insolvency Service has asked for comments by 12 October 2007.

Following the judgment of the House of Lords in *re Leyland Daf Ltd* in March 2004, where it was held that property subject to a floating charge was not available to fund the general expenses of a winding up, a provision has been included in section 1282 of the Companies Act 2006 to partially reverse the decision by inserting section 176ZA into the Insolvency Act 1986 (payment of expenses of winding up (England and Wales)).

The draft legislative rules can be found on The Insolvency Service's website at www.insolvency.gov.uk, under the section "Policy Changes & Evaluation".

Articles

Administration

Metronet files administration

On 18 July Alan Bloom, Maggie Mills, Roy Bailey and Stephen Harris of Ernst & Young (E&Y) were appointed administrators to Metronet, the contractor responsible for maintaining two thirds of London's Underground network. The case is one of the three largest administrations in British history, and comes against a background of a flat market for big restructurings, despite the current upheavals in the credit markets.

(Global Turnaround: 08.07, 1) 07.35.042

Obtaining an administration order to facilitate a pre-packaged sale of the business and assets, in the face of opposition from the majority creditor

Re DKLL Solicitors

DKLL was an unlimited liability partnership formed in 2000, as an amalgamation of eight local firms of solicitors that had been trading in the Surrey area from as early as 1940. The partnership provided general legal services including family and matrimonial, property, criminal, commercial litigation and commercial conveyancing, to both individuals and businesses. The partnership had two equity partners and four salaried partners and employed 55 staff operating out of four offices.

(M Cohen: ICR, 08.07,218) 07.35.035

Cross-border

German companies heading towards England for their rescue

Until the early days of this century, insolvencies mainly remained a national matter with some exceptions in the Anglo-American hemisphere. Few cases, like the Maxwell insolvency where insolvency administrators in the UK and the US orchestrated their efforts through so-called protocols, required a more international approach to insolvency.

(A Tashiro & V Beissenhirtz: ICR, 08.07, 171) 07.35.041

The lessons of Schefenacker

German auto parts maker Schefenacker has migrated to the UK in order to take advantage of more user-friendly insolvency laws for its restructuring. The deal has recently completed. Rick Mitchell, an American lawyer working in McDermott Will & Emery's London office, advised the original owner Dr. Alfred Schefenacker throughout the controversial process. Mitchell believes valuable lessons have been learned.

(R. Mitchell: Global Turnaround, 08.07, 8) 07.35.043

Creditors' rights in France after the reforms of 26 July 2005–part 1

France does not enjoy a reputation abroad as a country with a good investment climate, at least in the sense that creditors'

rights are necessarily well protected. Any 'Doing Business' report with regard to France appears to embody that perception and the French naturally consider such a perception to be incorrect: however, it must be admitted that France shares some of the blame for any impression of negativity owing to its relative lack of effort in explaining its legal system properly or clearly to those outside the jurisdiction. Moreover, misunderstanding necessarily entails distrust.

(I Didier: ICR, 08.07, 178) 07.35.040

EIR International Insolvency Caselaw Alert

Available for download at www.eir-database.com

This issue features the latest case law on the European Insolvency Regulation as well as articles on recent developments in cross-border insolvencies:

Otto Eduardo Fonseca/Paulo Penalva Santos: VARIG-Recovery

- Antonio Auricchio/Rita Gismondi: Amendments in Italian Insolvency Law
- Russell C.Silberglied/Jonathan P.Friedland: Fiduciary Duties of Directors
- Luigi Maccaroni: European Insolvency Regulation: recent issues
- Peter J.M.Declerq: Secondary Proceedings
- Peter J.M.Declerq: Second-Lien Lending
- James F.Hart: Solvency Determination
- Laszlo Csia: Modifications of the Hungarian Bankruptcy Act
- Kathy Stones/Andrea Saavedra: COMI in Europe and the US

EIR issue (No.15 - III/2007)

Case law round-up

Corporate insolvency law: an end of term report

This article is a must-read for anyone wanting to make sense of insolvency cases over the past year. David Milman draws together themes, puts the case-law in context and suggests how things might move forward in the next year.

Sweet & Maxwell's Company Law Newsletter August 2007

High Yield

The European High Yield Association's proposals to the UK Treasury

The European High Yield Association ('EHYA') is a trade association representing participants in the European high yield bond market. It has various committees and subcommittees, including its European Insolvency Reform Committee. That Committee which we co-chair, includes numerous insolvency professionals with experience of recent insolvencies and restructurings, and who will doubtless be at the forefront of the much-anticipated wave of restructurings to come. The Committee recently submitted to the UK Treasury a paper outlining its views on the urgent need for insolvency reform in the UK.

(G. Strub, A. Wilkinson & C. Hall: ICR, 08.07, 169) 07.35.045

Restructuring

The Adelphia restructuring freak–or prototype?

In 2002 the reorganisation of America's sixth largest cable company, Adelphia, was set to be a quick US$19 billion debt for equity swap under Chapter 11. Five years later this spring a US bankruptcy judge finally approved Adelphia's fifth reorganisation plan, following one of the longest and most bitter inter-creditor disputes between competing groups of hedge funds ever seen in Chapter 11. This has prompted US professionals to worry: instead of being just a one-off, is Adelphia the future of big restructurings? Will the increasing involvement of hedge funds and their willingness to use aggressive strategies spur a new generation of inter-creditor battles lasting years rather than months?

(Global Turnaround: 08.07, 9) 07.35.044

Scheme of arrangement

Practical users of a scheme of arrangement–Marconi plc and Marconi Corporation plc

The restructuring of the Marconi group in 2002/2003 was one of the largest and most complex ever carried out. A consensual restructuring of circa GBP 5 billion of debt was implemented without the need for an insolvency process, using section 425 Schemes of Arrangement under the UK Companies Act, combined with section 304 US Bankruptcy Code orders for the top two companies of this multinational group. The remainder of the group was left free to operate normally.

(S. Bewick: ICR, 08.07, 186)

Technical

Pre-appointment expenses in administration

There has been some correspondence between the City of London Law Society Insolvency sub-committee and the Insolvency Service setting out detailed comments on the draft legislative amendments seeking to address the uncertainty surrounding pre-appointment expenses in administration.

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

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