

## **CASES**

**2.3.1 - The Corporate Manslaughter and Corporate Homicide Act of 2007** will mostly come into force on 6 April 2008.

### **9.1.2 - Anglo-Petroleum Ltd v TFB (Mortgages Ltd) [2007] BCC 407 CA**

Shares in P were sold by P's parent company R to K. R agreed to release indebtedness to R of £30m by P, and P agreed to pay some of the money back; £6m immediately, and a further £9m at a later stage. K guaranteed performance of the obligation that was owed to R. It was held that there was no breach of s151 of the Companies Act 1985 (now largely s678 CA 2006). P's liability to R had been reduced but this was not financial assistance, it merely made the company more attractive to an acquirer.

### **12.7 - Foster Bryant Surveying Ltd v Bryant and Savernake Property Consultants [2007] EWCA Civ 200**

The respondent Mr Bryant resigned as a director of Foster Bryant Surveying Ltd. He had been running the business with Mr Foster. Mr Bryant's wife had also been employed as a Chartered Surveyor but was dismissed unilaterally by Foster on the grounds of redundancy. Bryant then resigned but the resignation was not effective for two months during which time he continued to work for the company. During this time a key client, Alliance, approached Bryant and suggested that the business from Alliance should be split between Bryant and Foster but Foster refused this and instead sued Bryant and Savernake Property Consultants who were then in receipt of some of the business. Savernake Property Consultants were the business that Bryant had set up.

The Court of Appeal held that the resignation by Bryant had had no ulterior motive and that the approach had been made by Alliance to Bryant and not the other way around and this was significant and that all of the dealings had been completely open and transparent. The Court of Appeal held that there had been no breach of director's duty.

### **12.7 - Kingsley IT Consulting Ltd v McIntosh [2006] BCC 875 (High Court)**

Kingsley got an order for an account of profits against McIntosh who had put in place groundwork for diverting corporate opportunities whilst still a director.

### **12.8 - Shepherds Investments Ltd v Walters [2007] IRLR 110**

The plaintiff company had a claim against former directors for diversion of business opportunities and setting up a rival competing company. Judgement was given to the company as there was a breach of the director's duty of loyalty and non-competition.

### **14.3.3 - A case referred to in the textbook is analysed more fully - Gamlestaden Fastigheter AB v Baltic Partners Ltd [2007] UKPC 26**

The case was a Privy Council appeal from Jersey. Two issues were involved in the case concerning the application of a provision in Jersey law, very similar to what is now s994 CA 2006 (statutory minority remedy).

The appellant, Gamlestaden Fastigheter AB (GF) entered into a joint venture with Mr Karlsten to invest in commercial property. It operated through the first respondents, Baltic Partners Ltd (Baltic). This was a Jersey company. GF held 22% of the shares and Hengoed Ltd held 78%. Hengoed was owned and controlled by Mr Karlsten. The only asset that Baltic held was a limited partnership comprising of Mr Karlsten and his business partner, Mr Hansen, which had been set up in Germany. This controlled property in Germany.

Karlsten and Hansen withdrew DM 112.5 million from the partnership which they then converted into a company (SPG). This effectively eliminated the debt balances from Karlsten and Hansen to the business. SPG became insolvent as did Baltic.

A derivative action failed as it was not within the exceptions of Foss v Harbottle. An appeal was made against this decision but was adjourned while proceedings went forward under the equivalent of s994 CA 2006.

The Privy Council held that the equivalent of s994 could be used even though it was protecting the shareholder's interests as a creditor. Robert Walker J said "I have little hesitation in coming to the conclusion that arrangements were a reflection of and sufficiently connected with membership as to be within the scope of [the section]".

The Privy Council further held that a derivative action could be brought in respect of a wrong to the company by these proceedings. On the face of it this seems contrary to the rule in Foss v Harbottle and clearly it is a circumvention of the rule.

The important aspect of the case is that membership interests are being construed very, very broadly in the context of S994 CA 2006

### **14.4. Hawkes v Cuddy [2007] EWHC 1789**

The petitioner H held one share in Neath Rugby Club and applied for summary judgement under s459 (now s996 CA 2006). The first respondent held the only other share in the Club and she applied to strike out the claim. Clubs were being reorganised in Wales where the club was situated. Previously Neath had been run by a company (Gowerpark) and was controlled by the Welsh Rugby Union.

The Welsh Rugby Union re-organised teams on a regional basis and Neath became part of the (Neath-Swansea) Ospreys team.

Gowerpark went into insolvent liquidation. Its trading name was Neath Swansea Rugby Limited. Mr Cuddy, the second respondent, was involved in the management

of both Gowerpark and of the subsequent Neath Rugby Club Ltd, and this clearly raised a potential s216 liability (use of insolvent company's name).

The court held in relation to the petition that relied inter alia on the possible infringement of s216 and of the fact that the petitioner was not advised of this by lawyers that this was an appropriate ground for a s459 petition and that this, therefore, would not be struck out.

The court held that the route to relief under what was then s459 was not confined to equitable principles but could apply in relation to breaches such as that alleged of s216 of the 1986 Act.

It was further held that the claim under s216 of the Insolvency Act was a tenable claim as Gowerpark had traded under a name that was similar to that of Neath prior to its liquidation, and Cuddy was concerned in the management of both companies.

The cross petition to dismiss the s459 claim was therefore dismissed.

#### **14.4 - Richardson v Blackmore [2006] BCC 276**

R and W offered to sell shares to B. B had forged a letter purporting to be from another company giving a low valuation when B was offering to acquire shares. It was held that such conduct could exclude a remedy but here the conduct was not sufficiently serious nor proximate to the unfair prejudice of exclusion and therefore could not exclude a remedy under s461.

#### **15.10.5 - NBH Ltd v Hoare [2006] 2BCLC 649**

In this case the defendant company was the sole shareholder of the company. It was held that it was sufficient to satisfy the requirement of approval under s320 of the Companies Act 1985 (now s190 CA 2006) that the shareholder approved the action. This was sufficient under the principle in *Re Duomatic* (1969) despite the absence of any formal resolution.

The same principle was applied here as in, e.g. *Re Express Engineering Works Ltd* (1920).