

3~4 Digest

A Monthly Review of Relevant News, Cases and Articles

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The list of cases in which English courts have concluded that there was a compelling reason not to provide a foreign court with assistance under s.426 of the Insolvency Act 1986 continues to grow. In Re Southern Equities Corporation Ltd (unreported, 1 March 1999) the High Court followed the decision of Evans-Lombe J in Re J N Taylor Finance Ltd and refused to assist the Liquidator of the Bond Group in Australia by ordering a private examination of an individual where proceedings had already been commenced by the Liquidator against an associated firm of accountants in Australia.

In the meantime the commencement of the Civil Procedure Rules is now less than a month away. The DTI, with the assistance of a committee chaired by Mr Justice Evans-Lombe and which included Robin Dicker and Glen Davis, has drafted amendments to the Insolvency Rules to ensure that they will now also apply to insolvency proceedings. All indications at the moment are that the courts intend to take an increasingly active role in case management and that in future cases may be won or lost in the course of the early hearings.

This issue, which was compiled by David Allison, a pupil in Chambers, digests material up to 28 February 1999.

Lucy Frazer and Jeremy Goldring

GENERAL NEWS

Bill presented to prevent company appraisers becoming receivers or liquidators

A Private Member's Bill was presented in the House of Commons on 3 February 1999, which, if implemented, would disqualify from appointment as receiver or liquidator of a company any person who had been called in to carry out a financial appraisal of the company.

Duties of Directors

The Law Society published a supplementary submission of its comments to the Law Commission on the paper "Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties".

Improving Board Effectiveness

The Institute of Directors has published a report "Assessing Board Effectiveness" which suggests a means of appraising a board of directors. The report also provides information about the selection and nomination of directors.

New Financial Reporting Standard

On 18 February 1999, the Accounting Standards Board published a new financial reporting standard, FRS 15 Tangible fixed assets. The standard sets out the accounting requirements in respect of the initial measurement, valuation and depreciation of tangible fixed assets, except for investment properties.

Guidance on EC merger regulation

The Institute of Chartered Accountants has published guidance on the EC merger regulation. It provides an introduction to the application and relevance of the merger regulation (4064/89, OJ 1990 L257/13) to acquisitions and mergers in the UK and the EU.

ICAEW has also set up a Company Law Review Co-ordinating Group to act as a focus for ICAEW members' comments on the DTI's ongoing review of company law.

FSA Ombudsman

On 22 February the Financial Services Authority announced the appointment of a board to run the single FSA Ombudsman Scheme. The chairman is Andreas Whittam Smith.

Insolvency Statistics for 1998 fourth quarter

There were 3,346 compulsory and creditor's voluntary liquidations. This was an increase of 0.1% over the third quarter, but 6.8% more than the 3,132 insolvent liquidations in the last quarter of 1997. The provisional total number of insolvent liquidations in 1998 was 13,203.

ADMINISTRATION

Re Mark One (Oxford Street) plc Ch Div.

Digested at Vol.4, No.6. Now further reported at [1999] 1 All ER 608.

[Gabriel Moss]

Tom Wise Ltd v Fillmore [1999] BCC 129. Ch Div. (Rattee J)

If work done by administrators was in connection with the administration of trust assets in which the company had no interest, the Court had a discretion whether to order costs and remuneration of the administrators to be met out of those assets.

ARBITRATION

Ali Shipping Corporation v Shipyard Trogir CA

Digested at Vol.3, No.4. Now further reported at [1999] 1 WLR 314.

Azov Shipping Co v Baltic Shipping Co QBD (Com Ct)

Digested at Vol.4, No.10. Now further reported at [1999] 1 All ER 476.

Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd, The Smaro CCH Commercial

Law Newsletter Report 14, February 1999.

QBD (Com Ct) (Rix J)

An implied request was sufficient to commence arbitration. Section 34(3) of the Limitation Act 1980 only applied by analogy and express language in the terms of the Act was unnecessary. The question was whether the notice sufficiently, or in substance, made clear that the respondent was expected to act on the claimant's submission of a dispute to arbitration, on his invocation of the arbitration clause, so as to participate in the submission of the dispute to arbitration.

Huyton SA v Peter Cremer GmbH & Co CCH Commercial Law Newsletter Report 14, February 1999. QBD (Comm Ct) (Mance J)

Arbitration proceedings were restrained pursuant to an agreement of the parties. The claim that the agreement was not binding because it had been entered into because of economic duress was rejected. There had been no illegitimate pressure on the defendant. If there had been illegitimate pressure, the defendant had failed to show that it was a significant cause of entering into the agreement.

Inco Europe Ltd v First Choice Distribution CA Digested at Vol.4, No.9. Now further reported at [1999] 1 WLR 270

Minmetals Germany GmbH v Ferco Steel Ltd *The Times*, 1 March 1999. *The Independent*, 2 February 1999. QBD (Comm Ct) (Colman J)

By agreeing the place of a foreign arbitration, a party not only agreed to submit all contractual disputes to arbitration but also agreed that the conduct of the arbitration should be subject to the supervisory jurisdiction of the courts of that place.

BANKING

Provincial North West plc v Bennett *The Times*, 11 February 1999. CA (Nourse and Henry LJ)

A term of a facility letter from a bank offering a loan charging interest at the rate of 3 per cent above the bank's base rate was to be construed as referring to the bank's base rate for the time being and from time to time and thus did not require it to give written notice of variation of the base rate to the borrower.

The Honourable Society of the Middle Temple v Lloyds Bank plc *The Times*, 8 February 1999. QBD (Comm Ct) (Rix J)

Where an English clearing bank collected a stolen English cheque marked "a/c payee only", as agent for a foreign collecting bank, whose customer was not the payee of the cheque and who took off with the

proceeds, the English clearing bank was liable to the true owner of the cheque.

Hudson: "Derivatives: internal controls for end-users and sellers", *The Company Lawyer* Vol.20, No.2 February 1999.

Lastra: "Banking Regulation in the 1990s", [1999] *JIBL* Vol.14, Issue 2, 45.

Pugh-Thomas: "The Bank - An Attractive Deep-Pocket Defendant (Part II)", [1999] *JIBL* Vol.14, Issue 2, 50.

Ward and McCormack: "A New Application for the Doctrine of Subrogation", [1999] *JIBL* Vol.14, Issue 2, 39.

BANKRUPTCY

Morris v Wentworth-Stanley CA

Digested at Vol.4, No.9. Now further reported at [1999] 2 WLR 470.

Case Note: *Re Devinder Singh Rayatt*, application of section 310(2) of the Insolvency Act 1986, *Insolvency Intelligence* Vol.12, No.1 January 1999.

COMPANY

MacPherson v European Strategic Bureau Ltd *The Times*, 1 March 1999. Ch Div. (Ferris J)

There was no unlawful distribution contrary to section 263(1) of the Companies Act 1985 where the shareholders of a quasi-partnership, in which the participants received any income only from the profits made by the business, entered into an agreement under which the departing shareholders were paid a percentage of profits earned from contracts on which they had worked prior to their departure in proportion to their former stake in the company.

Re Legal Costs Negotiators Ltd *The Independent*, 1 March 1999. CA (Roch, Peter Gibson and Henry LJ)

On an application by a minority shareholder to strike out a petition brought under section 459 of the Companies Act 1985 by the majority shareholders to force him to give up his investment in the company, the court could look at the realities of the case, and take a pragmatic view that the petition should not be allowed to proceed where the likelihood of the trial judge exercising his discretion to grant the relief claimed was so remote that the case could be described as perfectly hopeless.

Satnam Investments Ltd v Dunlop Heywood & Co Ltd *The Times*, 31 December 1998. CA (Nourse, Schiemann and Brooke LJ)

A company which had received confidential information relating to a rival from a third party in breach of his fiduciary duty did not necessarily hold that information on constructive trust.

Wright v Atlas Wright (Europe) Ltd *The Times*, 3 February 1999. CA (Kennedy, Aldous and Potter LJ)

Agreements between a company and its directors providing for payments for life terminable only by the recipients and not by the company were valid and enforceable even though the procedural steps set out in section 319 of the Companies Act 1985 had not been complied with, since the real consent to the agreements was given by the sole shareholder of the company for an act which was *intra vires* the company's powers. Applying the principle in *In re Duomatic* [1969] 2 Ch 365, the formalities in section 319 were amenable to waiver by the class for whose benefit and protection it was designed, namely shareholders.

CONTRACT

Global Container v State Black Sea [1999] 1 Lloyd's Rep. 127. CA (Hobhouse and Millett LJ, Sir Roger Parker)

The words "to be finalised as per terms and conditions herein above" were held not to prevent there being a concluded agreement, as the part "to be finalised" simply referred to the mechanics which were involved in the implementation of the agreement.

CONFLICT OF LAWS

Airbus Industrie GIE v. Patel HL

Digested at Vol.4, No.4. Now further reported at [1999] 1 AC 119.

Askin v Absa Bank Ltd *The Times*, 23 February 1999. CA (Peter Gibson, Robert Walker and Tuckey LJ)

On an application to stay proceedings on the ground of *forum non conveniens*, it was for the defendant to show that another appropriate forum was available. It was for the plaintiff to show that nevertheless justice required trial in England, and the availability *in practice* of the other forum was relevant at that second stage.

Coutts & Co v Midas Productions *Unreported*, 22 January 1999. QBD (Comm Ct) (Toulson J)

In considering whether to stay proceedings on the grounds of forum non conveniens, the court is required to look at the matters which are likely to be in issue. If there is no defence, or any possible defence is vanishingly thin, this is a relevant matter to be taken into account. Although there may have to be detailed investigation of events in the United States, given that these will be in issue between the other parties to the litigation in any event, a stay would not be granted.

[Robin Dicker]

Domicrest Ltd v Swiss Bank Corporation QBD (Comm Ct)

Digested at Vol.4, No.7. Now further reported at [1999] 2 WLR 364.

Jordan Grand Prix Ltd v Baltic Insurance Group HL.

Digested at Vol.5, No.1. Now further reported at [1999] All ER 289.

Pearce v Ove Arup Partnership Ltd *The Times*, 10 February 1999. CA (Roch, Chadwick and May LJ).

An English court was not required to refuse to entertain a claim in respect of alleged infringements of Dutch copyright on the basis that the infringements were not actionable torts under English law.

Refco Inc v Eastern Trading Co. [1999] 1 Lloyd's Rep. 159. CA (Millett, Morritt, and Potter LJ)

The approach to an application for interim relief under section 25 of the Civil Jurisdiction and Judgments Act 1982 was to consider first if the facts would warrant the relief sought if the substantive proceedings were brought in England; if the answer to that was in the affirmative the next question was whether in the terms of section 25(2) the fact that the primary Court had no jurisdiction made it inexpedient to grant the interim relief sought. Where it was clear that the primary court was well content that application for ancillary relief should proceed in England and be determined by the English Courts according to English principles, it would not have been inexpedient to grant the relief sought.

Reunion Europeene SA v Spliethoff's Bevrachtungskantoor BV ECJ

Digested at Vol.4, No.10. Now further reported at [1999] CLC 282.

The "Irimi A" [1999] 1 Lloyd's Rep. 196 QBD (Comm Ct) (Tuckey J)

It was for the party seeking an anti-suit injunction to restrain proceedings in another jurisdiction to prove that the proceedings abroad were vexatious, and this would generally require him to show that the plaintiff could not obtain an advantage from the foreign procedure which he could not obtain in the English court.

CORPORATE INSOLVENCY

Re Bayoil SA CA

Digested at Vol.4, No.9. Now further reported at [1999] 1 All ER 374

In re Park Air Services plc HL

Digested at Vol.5, No.1. Now further reported at *The Independent*, 12 February 1999, [1999] EGCS 17, [1999] 2 WLR 396 and [1999] BCC 135.

[Richard Adkins QC]

Sea Voyager Maritime Inc v Bielecki Ch Div.

Digested at Vol.4, No.9. Now further reported at [1999] 1 All ER 628.

Secretary of State for Trade and Industry v Bottrill

The Times, 24 February 1999. *The Independent*, 17 February 1999. CA (Lord Woolf MR, Peter Gibson and Mantell LJ)

A controlling shareholder of a company could also be an employee of the company who was entitled under the Employment Rights Act 1996 to recover from the Secretary of State for Trade and Industry money owed by the company when it became insolvent.

Re Southern Equities Corporation Ltd *Unreported* 1 March 1999. Ch. Div (His Honour Judge Weeks QC)

- (1) In a case in which the court considers it appropriate to apply foreign insolvency law under s.426(5), the court has jurisdiction to order a witness to be examined by a foreign judge, sitting in that capacity in the United Kingdom and applying foreign law.
- (2) Whether there is sufficient ground for refusing a letter of request under s.426 for a private examination, must be decided according to English concepts of fairness and oppression; following the decision of Evans Lombe J in *Re J N Taylor Finance Ltd*. It would be wrong to use the extended jurisdiction under s.426 to make orders which the English court could have made, but would not have made, because it thought them unfair.

[Gabriel Moss QC]

Case Note: *Re Park Air Services*, Company Law Newsletter, Issue 25 February 1999.

Dawson: "The Extra-Territoriality of the Insolvency Act 1986 and Foreign Directors", [1999] 2 Insolvency Lawyer

Ferris J: "Insolvency Remuneration-Translating Adjectives into Action", [1999] 2 Insolvency Lawyer

COSTS

Globe Equities Ltd v Globe Legal Services
Unreported, 5 March 1999. CA (Butler-Sloss, Morritt, Sedley LJ)

The judge was entitled to exercise his discretion to make a costs order against the firm of solicitors acting for the defendants under section 51(1) and (3) of the Supreme Court Act 1981 (an *Aiden Shipping* order), as opposed to a wasted costs order or under inherent jurisdictions. It was not a precondition to the exercise of the discretion that there be exceptional circumstances, although on the facts there were such circumstances. It was necessary that the conduct of the non-party must have been a cause of the applicant incurring the costs in question, but not necessary that the costs be caused by all of the factors which render the case exceptional.

[Gabriel Moss QC, Roxanne Ismail]

Mainwaring v Goldtech Investments Ltd (No 2) CA
Digested at Vol.4, No.10. Now further reported at [1999] 1 All ER 456.

Practice Direction (Supreme Court: Costs Summary Assessment)

Digested at Vol.5, No.1. Now further reported at [1999] 1 WLR 420 and [1999] 1 All ER 670.

RTZ Pension Property Trust Ltd v ARC Property Developments Ltd CA

Digested at Vol.4, No.10. Now further reported at [1999] 1 All ER 532.

Bacon: "Costs Update", Sol. Jo. Vol.143, No.7

Cohen: "Counterparty Risk-Termination of Contracts on Insolvency", [1999] 1 Insolvency Lawyer 26.

DAMAGES

Nationwide Building Society v Various Solicitors
The Times, 1 March 1999. Ch Div. (Blackburne J)

The correct approach to equitable compensation for breach of fiduciary duty, except where the fiduciary had acted in bad faith, was to assess what actual loss had resulted from the breach, having regard to the scope of the duty broken. The court could have regard to any inference which could properly be drawn as to what would have happened if the fiduciary had performed his duty. Failing any such evidence, the beneficiary was entitled to be placed in the position he was in before the breach occurred. Where, in order to establish a breach of fiduciary duty it was necessary to find that the fiduciary was consciously disloyal to the beneficiary, the fiduciary was disabled from asserting that the beneficiary contributed to the loss which he

suffered flowing from the breach.

Platform Home Loans Ltd v Oyston Shipways Ltd
The Times, 19 February 1999. HL (Lords Lloyd, Cooke, Hope, Hobhouse and Millett).

Where a mortgage lender which sued surveyors for negligently overvaluing property accepted as security for a mortgage loan was found to be liable for a percentage of the loss arising then, on the application of section 1(1) of the Law Reform (Contributory Negligence) Act 1945, the percentage reduction for contributory negligence should be applied to the lender's basic loss as calculated before making any further deduction from the damages recoverable pursuant to the principle laid down in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191.

DIRECTORS & DISQUALIFICATION

Re Barings plc, Secretary of State for Trade and Industry v. Baker (No. 2) CA

Digested at Vol. 4, No. 7. Now further reported at [1999] 1 All ER 311.

Re Barings plc, Secretary of State for Trade and Industry v. Baker (No.3) [1999] BCC 146. Ch Div.

(Evans-Lombe J)

Exceptions to the rule against the admissibility of hearsay could apply to section 6 of the Directors Disqualification Act. There was no rule that only evidence gathered pursuant to relevant statutory powers was capable of being given in the affidavit sworn by the provider of the information to the Secretary of State.

Official Receiver v. Cooper Ch Div.

Digested at Vol. 4, No.3. Now further reported at [1999] BCC 115.

Official Receiver v Keam *The Independent*, 1 February 1999. Ch Div. (Jonathon Parker J)

On the true construction of section 16(1) of the Directors Disqualification Act 1986, there was no reason in principle why a person intending to apply for the making of a disqualification order could name only one company as the lead company.

Secretary of State for Trade and Industry v. James Ch Div.

Digested at Vol.3, No.9. Now further reported at [1999] BCC 121.

[Richard Sheldon QC, Felicity Toube]

Shuttleworth v Secretary of State for Trade and Industry *The Times*, 9 February 1999. Ch Div. (Scott V-C)

On an application under section 17 of the Directors Disqualification Act 1986 for leave to act as a director during the currency of a disqualification, the discretion of the court was unfettered. The fact that the applicant's need was personal and not a business interest was no reason to shackle the court's discretion by the creation of conditions not in the legislation where, on the facts, the balance between the importance of protecting the public from the conduct which led to the disqualification and the need that the applicant should be able to act as a director of a particular company, was in favour of granting leave.

Re SIG Security Services Ltd [1998] BCC 978, Ch Div. (Evans Lombe J)

Where an agreed statement of facts and suggested period of disqualification was given under the *Carecraft* procedure, the trial judge had erred in seeking to extend the agreed period by referring to facts outside the agreed statement.

Parry: "Delegation of directors' duties after *Re Barings plc*", CCH Company Newsletter Issue 25, February 1999.

EUROPEAN COMMUNITIES

Passmore v Morland *The Times*, 11 February 1999. *The Independent*, 5 February 1999, [1999] NPC 14 and [1999] EGCS 14. CA (Beldam, Potter and Chadwick LJJ)

A beer supply agreement which, as between the original parties, was prohibited by Article 85(1) of the EEC Treaty and so automatically void under the provisions of Article 85(2) was, nevertheless, enforceable by an assignee from one party in circumstances in which, if an agreement in identical terms had been entered into by the assignee and the other party at the time of the assignment, that agreement would not have been prohibited.

Practice Direction (Supreme Court: References to the Court of Justice of the European Community) Digested at Vol.5, No.1. Now further reported at [1999] 1 WLR 260.

R. v Secretary of State for Employment, ex parte Seymour-Smith *The Times*, 25 February 1999. ECJ.

A judicial award of compensation for breach of the right not to be unfairly dismissed was "pay" under Article 119 of the EC Treaty.

FINANCIAL SERVICES

M&G Securities Ltd v Inland Revenue Commissioners *The Times*, 2 February 1999. Ch Div. (Park J)

Managers of unit trusts were entitled to repayments of stamp duty by virtue of section 54(4) of the Financial Services Act 1946 in circumstances where a holder of units in the trust instead of selling them for cash, exercised his right to request that in return for cancellation of the units he receive a transfer of investments and cash out of the underlying portfolio of the trust.

INSURANCE

Printpak (a firm) v AGF Insurance Ltd *The Times*, 3 February 1999. CA (Hirst, Aldous and Waller LJJ)

Breach of a section warranty in a commercial inclusive insurance policy did not invalidate the insurance cover under the other sections of the policy. The terms of the policy were such as to exclude section 33(3) of the Marine Insurance Act 1906, which discharged an insurer from liability where a warranty was not complied with.

Structural Polymer Systems Ltd v Brown (Syndicate 702 at Lloyd's) CCH Commercial Law Newsletter Report 14, February 1999. (Moore-Bick J)

The plaintiffs' settlement of actions against them were binding on their professional indemnity insurers and the plaintiffs were entitled to summary judgment, as the plaintiffs' evidence showed that they were liable in the settled proceedings and there was no reason to think that the settlement payment was more than the full amount of the plaintiffs' liability. The defendants were not entitled to leave to defend in order to investigate the underlying merits of the claims against the plaintiffs.

Mitchell: "Restitutionary Recovery of Prevention Costs by an Insured?", [1999] LMCLQ 30

INTERNATIONAL INSOLVENCY

Cannane v J Cannane Pty Ltd (1998) 27 ACSR 603. HCAus

The Court was to take a narrow construction of the phrase "with intent to defraud creditors" in section 121 of the Bankruptcy Act 1966.

Omar: "Cross-Border Co-operation in Australian Corporate Insolvency Law", [1999] 2 Insolvency Lawyer 69.

Smart: "Cross-Border Insolvency and Judicial Discretion", [1999] 1 Insolvency Lawyer 12.

LIMITATION

Bacon v Howard Kennedy (a firm) [1999] PNLR 1. Ch Div. (Judge Bromley QC)

A cause of action for professional negligence accrued at the time when the claimant suffered appreciable loss as a result of the defendant's fault; and although the defendants' negligence in 1986 and 1987 had in theory deprived the plaintiff of a saleable expectancy of receiving something under H's will, in substance his loss had arisen on H's death in 1995 and no earlier.

Paragon Finance plc v. Thakerar & Co (a firm) CA Digested at Vol.4, No.7. Now further reported at [1999] 1 All ER 400.

Perry v Movsey [1998] PNLR 657 (Judge Jack QC) Knowledge of the potential impact of section 311 of the Companies Act 1985 was a question of fact and therefore time only ran for limitation purposes when the plaintiff became aware of the impact of the provision.

PARTNERSHIP

Hurst v. Bryk CA Digested at Vol.3, No.2. Now further reported at [1999] Ch 1.

PENSIONS

Jefferies v Meyers *The Times*, 25 February 1999. CA (Nourse, Schiemann and Brooke LJJ).

In the event of an actuarial surplus arising in the Electricity Supply Pension Scheme, an approved occupational scheme, the employers' obligations to make specified contributions had to be honoured. Express provisions in the scheme requiring the employers to "make arrangements" to deal with such a surplus did not entitle the employers unilaterally to forgive themselves their existing liabilities without there being an amendment to the scheme and without the agreement of the trustees.

PROCEDURE

Abbey National plc v Frost (Stephen Leonard), Solicitors' Indemnity Fund Ltd intervening *The Times*, 5 February 1999, *The Independent*, 10 February 1999 and [1999] EGCS 16. CA (Nourse, Henry and Robert Walker LJJ)

The court had the power to order substituted service of a writ under RSC Ord.65 r.4 on the Solicitors' Indemnity Fund where a defendant solicitor indemnified by the fund had defaulted, even if there was no likelihood that such service would bring the proceedings to the defendant's notice.

Bird v Hadkinson *Unreported*, 4 March 1999, Ch Div. (Neuberger J)

The approach of the HL in *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456, though not considering the CA decision in *Irtelli v Squatriti* [1993] QB 83, was to be preferred over the latter case in applying the traditional approach to mens rea in civil contempt cases. There was therefore no need to demonstrate that parties held liable in contempt carried out the acts complained of with any necessary intention to act in contempt of court.

[David Marks]

Bolkiah v. KPMG HL Digested at Vol.5, No.1. Now further reported at [1999] 1 All ER 517.

Bullen (Syndicates 255/258 at Lloyd's) v Manufacturers Mutual Insurance Ltd CCH Commercial Law Newsletter Report 14, February 1999. (Moore-Bick J)

A plaintiff was not entitled to amend to correct the name of the defendant under RSC Ord.20 r.5(3) where he had intended to sue the wrong person rather than simply mistaken the name of the defendant.

Camelot Group plc v. Centaur Communications Ltd CA

Digested at Vol.3, No.7. Now further reported at [1999] QB 124.

Commissioners of Customs and Excise v Anchor Foods Limited *Unreported*, 26 February 1999. (Neuberger J)

A Mareva injunction was granted to restrain the sale of AFL's business to a new company formed for the purpose, leaving behind in AFL the debt claimed by the Commissioners. The sale was being effected because of the existence of the Commissioners' claim and had not been tested in the open market. However, the proposed sale was bona fide and for a proper motive, and at a price verified by independent expert accountants and had been the subject of real discussion between AFL and the Commissioners. In relation to the Commissioners' concerns as to the proposed sale

price, the Judge did not reach a final view on the expert valuation evidence and held that section 238 and 423 of the Insolvency Act 1986 were relevant to the exercise of his discretion but did not go to the issue of jurisdiction. The question of the giving of a cross-undertaking in damages by the Commissioners was held to be relevant to the balancing exercise performed by the Court. In his discretion, given his finding that the arguments were finally balanced, the Judge required such a cross-undertaking to be provided.
[Sandra Bristol]

Flannery v Halifax Estate Agencies Ltd *The Independent*, 26 February 1999. CA (Henry and Laws LJ, Hidden J)

The duty of a professional judge to give reasons was a function of due process, and therefore justice. The judge had to explain why he had reached his decision. On the application for leave, if a "no reasons" point was being taken, the judge should be invited to give his reasons, and his explanation for not having set them out in the judgment, in an affidavit for use at the hearing if leave be granted.

Grupo Torras SA v Fahad Mohammed Al Sabah *The Independent*, 25 February 1999. CA (Woolf MR, Aldous and Sedley LJ)

A judge had a discretion to allow a party in contempt to adduce additional evidence, and, if he did so, the witness should be called by the contemnor if acting in person, or by an advocate instructed on his behalf. The discretion was required to be exercised in a way which would be in the best interests of achieving justice in the particular case, while at the same time recognising the importance of upholding the proper administration of justice generally.

JFS (UK) Ltd v Dwr Cymru Cyf. CA
Digested at Vol.4, No.9. Now further reported at [1999] 1 WLR 231.

Kemmings v Sandwell Metropolitan Borough Council *The Independent*, 8 February 1999. CA (Evans LJ, Wilson J)

The right of a plaintiff under Ord 21, r2(2) CCR to be non-suited ceased at such time as the judge decided that his claim was bound to fail, and accordingly a judge was entitled to exercise his discretion to give judgment following a submission of no case to answer.

Milne v Kennedy *The Times*, 11 February 1999. CA (Aldous and Waller LJ)

In the absence of exceptional circumstances lay persons should not be permitted under section 28 of the Courts and Legal Services Act 1990 to represent litigants in the county court.

Nationwide Building Society v Various Solicitors Ch Div.

Digested at Vol.4, No.5. Now further reported at [1999] PNLR 52.

Realkredit Danmark A/S v York Montague Ltd CA
Digested at Vol.4, No.10. Now further reported at *The Times*, 1 February 1999.

R. v Bow Street Metropolitan Stipendary Magistrate, ex parte Pinochet Urgarte HL
Digested at Vol.5, No.1. Now further reported at [1999] 2 WLR 272 and [1999] 1 All ER 577.

Robin Ellis Ltd v Malwright Ltd *Unreported*, CCH Commercial Law Newsletter Report 14, February 1999. (Peter Bowsher QC)

A joint statement signed by experts was not privileged, even though it was said to be interim. The discussions and the correspondence between the experts were and remained privileged. The joint statement was not binding on the parties in the same way as a contract would be binding, but was an open document and as such admissible.

Sithole v Thor Chemicals Holdings *The Times* 15 February 1999. CA (Judge and Tuckey LJ)

A defendant who was appealing against refusal of his application to stay proceedings on the ground of forum non conveniens and who wished to protect himself against judgment being entered in default of a notice of intention to defend those proceedings had to apply either (a) for a stay of proceedings pending the appeal or (b) make an application to extend time for acknowledgement of service of the writ and by doing so could not be said to be submitting to the jurisdiction.

Southwark London Borough Council v Nejad CA
Digested at Vol.5, No.1. Now further reported at *The Independent*, 1 February 1999.

Sphere Drake Insurance plc v Orion Insurance Co plc *Unreported*, CCH Commercial Law Newsletter Report 14, February 1999.

A judgment obtained by perjury was liable to be set aside as a judgment obtained by fraud but only where the perjury was known to the successful party and procured by that party to deceive the Court or relied upon by that party to that end and where there was credible evidence of the fraud or perjury which was not available at the trial and which entirely changed the aspect of the case in the sense that it was likely to be decisive of the outcome of the case.

Stanton v. Callaghan CA
Digested at Vol.4, No.7. Now further reported at [1999] PNLR 116.

Woodford & Ackroyd (a firm) v Burgess *The Times*, 1 February 1999. *The Independent*, 1 February 1999. CA (Stuart-Smith, Schiemann and Clarke LJ)

On a pre-trial review of an action, a High Court judge had an inherent jurisdiction to rule upon the admissibility of expert evidence on application by a party to the action. Moreover, the question of admissibility of expert evidence was a "question arising in a cause or matter" within Order 33, rule 3 RSC and the High Court therefore had power to order that such a question should be tried as a preliminary issue before trial and, if appropriate, by a judge other than the trial judge.

Griffiths-Baker: "Further cracks in Chinese walls", NLJ Vol.149, 5 February 1999, 162.

Williams: "An End to Chinese Walls", Commercial Lawyer Issue 30, 78

PROPERTY

Bank of Cyprus (London) Ltd v Markou *The Independent*, 8 February 1999, [1999] EGCS 13. Ch Div. (John Jarvis QC)

Where it was alleged that a lender had constructive notice of a husband's undue influence over his wife, and the lender, pointing to the wife's equal shareholding in a loss making family company, denied that the transaction was manifestly disadvantageous to the wife, the fact that the lender knew that the business was run by the husband with little involvement from the wife put it on enquiry.

Bettison v Langton [1999] NPC 20. CA (Simon Brown, Ward and Robert Walker LJJ)

A profit a prendre appurtenant to land can be severed and become a profit in gross.

Ingram v. IRC HL
Digested at Vol.5, No.1. Now further reported at [1999] 1 All ER 297

Kinch v Bullard Ch Div.
Digested at Vol.4, No.8. Now further reported at [1999] 1 WLR 423

Prudential Assurance Co Ltd v Waterloo Real Estate Inc *The Times*, 8 February 1999 and [1999] EGCS 10. CA (Peter Gibson, Robert Walker and Tuckey LJJ)

For a claimant to establish the necessary intention to possess land by his conduct, that conduct had to be unequivocal in the sense that his intention to possess had been made plain to the world.

Southwark London Borough Council v Mills CA.
Digested at Vol.4, No.7. Now further reported at [1999] 2 WLR 409

RECEIVERS

Bawejem v. MC Fabrications Ltd CA
Digested at Vol.5, No.1. Now further reported at [1999] BCC 157
[Simon Mortimore QC]

RESTITUTION

Kleinwort Benson Ltd v Lincoln City Council HL
Digested at Vol.4, No.9. Now further reported at [1999] CLC 332.

Nurdin and Peacock plc v DB Ramsden and Co Ltd *The Times*, 18 February 1999, [1999] NPC 17, [1999] EGCS 19. Ch Div. (Neuberger J)

Where a plaintiff made an overpayment following a mistake of law, recovery did not depend upon whether he made the payment under the mistaken belief that he was liable to do so. It was sufficient to ground recovery that the plaintiff's mistake caused him to make the overpayment.

Halliwell: "The relationship between unjust enrichment and subrogation: *Banque Financiere De La Cite v Parc (Battersea) Limited*", [1999] 2 Insolvency Lawyer.

SOLICITORS

Al-Sabah v. Ali Ch Div.
Digested at Vol.5, No.1. Now further reported at [1999] EGCS 11

Christie v. Wilson CA
Digested at Vol.4, No.7. Now further reported at [1999] 1 All ER 545.

Green v Turner [1999] PNLR 28. Ch Div. (HHJ Hegarty QC)

Where a solicitor imparted wrong information his duty of care was constrained by the specific purpose for which the information was provided and accepted, and did not extend to the consequences of any choices or decisions made in reliance on the information.

Gregory v Shepherds (a firm) *The Times*, 18 February 1999. *The Independent*, 22 February 1999. Ch Div. (HHJ Behrens QC)

Where a solicitor instructed a foreign lawyer on behalf of a client to perform conveyancing in the foreign lawyer's home jurisdiction, then the foreign lawyer was not the solicitor's agent but an independent expert. Consequently, the solicitor was not

responsible for any loss occasioned by negligence on the part of the foreign lawyer.

Midland Bank plc v Cox McQueen (a firm) CA
Digested at Vol.5, No.1. Now further reported at *The Times*, 2 February 1999, [1999] EGCS 12 and [1999] NPC 11.

Mercantile Credit Co Ltd v Fenwick *The Times*, 23 February 1999, [1999] EGCS 22. CA (Kennedy, Chadwick and Laws LJ)

A solicitor retained by a bank to procure the execution of a legal charge over property jointly owned by a husband and wife to secure a debt incurred solely by the husband or a company he controlled was under a duty to conduct the transaction applying the usual conveyancing procedures and the appropriate standards of skill and care. However, in the absence of specific instructions the solicitor was not under a duty to obtain written confirmation signed by the borrower's solicitor that that solicitor acted for both husband and wife or if not, that the wife had been advised to take separate independent advice.

Nationwide Building Society v Balmer Radmore [1999] NPC 15, [1999] EGCS 15. Ch Div. (Blackburne J)

In deciding whether a solicitor is under a *Bowerman* type duty to report matters to its client one has to examine the terms of the retainer and then consider what implied obligations, if any, are to accompany the express ones. Even so the duty to report information relevant to the transaction is a species of obligation which the courts will normally imply.

TORT

Generale Bank Nederland NV (formerly Credit Lyonnais Bank Nederland NV) v Export Credits Guarantee Department *The Times*, 19 February 1999. *The Independent*, 23 February 1999. HL (Lords Slynn, Woolf MR, Steyn, Clyde and Millett).

An employer was not vicariously liable where an employee had done acts in the course of his employment which did not themselves amount to a tort and only became a tort because they had been done to assist the fraudulent acts of another which, had they been done by the employee would have been outside the course of his employment. Before there could be vicarious liability, all the features of the wrong which were necessary to make the employee liable had to have occurred in the course of his employment.

Western Trust and Savings Ltd v Strutt & Parker CA.

Digested at Vol.4, No.8. Now further reported at [1999] PNLR 154.

TRUSTS

Don King Productions Inc v Warren *The Times*, 9 February 1999. CA (Morritt, Aldous and Hutchinson LJ).

A partnership agreement to assign each partner's contracts to the partnership, which was ineffective because the contracts were for personal services and contained terms expressly forbidding assignment, constituted each partner a trustee of the non-assignable contracts for the benefit of the partnership. The benefit to which the partnership was entitled did not terminate on or by reason of the dissolution of the partnership but continued until the contract expired or was properly disposed of in the winding up of the partnership's affairs.

Murphy v Murphy Ch Div.

Digested at Vol.4, No.4. Now further reported at [1999] 1 WLR 282

McCormack: "Conflicts of interest and the investment management function", *The Company Lawyer* Vol.20, No.1 January 1999.

Sir Robert Walker: "Trusts, Pensions and Insolvency", [1999] 1 *Insolvency Lawyer* 3.

VOLUNTARY ARRANGEMENTS

In re M (a debtor) (488-IO-of 1996) *The Times*, 10 February 1999. Ch Div. (Vinelott J)

A wife who had obtained a lump sum order in ancillary proceedings was bound to accept a dividend under an individual voluntary arrangement. However, in order to prevent unfair prejudice to the wife, her special position as a creditor within section 281(5) of the Insolvency Act 1986 had to be recognised.

3-4 LECTURE WATCH

Marion Simmons QC spoke on the "Relevance of Human Rights to Disciplinary Proceedings" at the 1999 Disciplinary Conference on 5 February.

Robin Knowles spoke on the new Civil Procedure rules at the Commercial Bar Association and the Chancery Bar Association.

Glen Davis spoke on the 'Woolfification of the Insolvency Rules' at the annual conference of the Insolvency Association in Bath on 27 February 1999.

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