

# 3~4 Digest

A Monthly Review of Relevant News, Cases and Articles

Volume 5 Number 5

November 1999

**THIS** month sees the announcement in the Queen's speech of proposals to reform the Insolvency legislation. A number of members of Chambers have been actively involved in the consultation process. It remains to be seen whether the Government will bite the bullet and abolish the floating charge and what difference it will make to the lending practices of bankers if they do.

In the meantime the Court of Appeal held in England v. Smith on 24 November 1999 that when considering a letter of request from an Australian court under section 426 of the Insolvency Act 1986 the court should have regard to the principles applied by the courts of Australia under section 596B Corporations Law (Aust) and not the principles applied by the English court on an application under section 236 of the Insolvency Act 1986. Gabriel Moss QC appeared for Brian Smith and is currently drafting a petition for leave to appeal to the House of Lords.

For technical reasons this November edition of the digest is delayed. It contains cases reported up to 30 September 1999 and is compiled by David Allison. A further digest compiling cases up until 30 November 1999 will be released shortly.

**Lucy Frazer**

## GENERAL NEWS

### **Insolvency Statistics for second quarter of 1999**

There were 3, 708 compulsory and creditors' voluntary liquidations, representing an increase of 11% on the corresponding period in 1998, but a fall of 0.3% from the first quarter of 1999.

### **ICAEW issues draft guidance on distributable profits**

On 31 August 1999 the ICAEW published, for comment, draft guidance on principles to be applied for the determination of what are distributable profits for the purposes of the Companies Act 1985.

### **Interim report on corporate rescue**

On 20 September the Treasury and the DTI published for comment an interim report intended to help promote the company rescue culture.

### **Insolvency Service 1998-1999 annual report**

The annual report shows that there was a 12.8% increase from 1998, in the number of disqualification orders made against directors for periods of six years or more.

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## CPR WATCH

**General Mediterranean Holdings SA v Patel** *The Times*, 12 August 1999; [1999] 3 All ER 673. QB (Com Ct) (Toulson J)

The language and structure of the Civil Procedure Act 1997 did not confer a general power to the rule making body to abrogate or limit a person's right to legal confidentiality. It followed that CPR rule 48.7(3), made under that Act, which dealt with the disclosure of privileged documents in relation to wasted costs orders was ultra vires and invalid.

**Mars UK Ltd v Teknowledge Ltd (No. 2)** *The Times*, 8 July 1999. Ch Div. (Jacob J)

Although the CPR gave no guidance on an amount of costs to be paid to a successful party prior to an assessment being made the court should normally order an interim payment of an amount that a party would almost certainly collect. The only reason why a successful party who had won on costs, did not straightaway get his money was the need to await a detailed assessment: to make an interim award for a lesser amount, which he would almost certainly collect, was a closer approximation to justice. In general an interim order should be made. In exercising its discretion, however, the Court had to take into account all the circumstances, one of which might be an unsuccessful party's wish to appeal, others could be the relative financial position of each party, the pre-action conduct of each party, and the Court's overriding objective to deal with cases justly.

**Mealey Horgan plc v Horgan** *The Times*, 6 July 1999. QBD (Buckley J)

Where a party had failed to serve its witness statements on time a court would use its powers to exclude that party from adducing evidence at trial only in very extreme circumstances (CPR 3.1(2)(a) and CPR 32.10). While the Court had jurisdiction to make that party make a payment into court, it should do so only where that party had repeatedly breached the rules or was not bona fide, and the other side needed to be protected.

**Stephenson (SBJ) Ltd v Mandy** *The Times*, 21 July 1999. CA (Nourse, Swinton-Thomas and Mummery LJ)

It would be quite wrong and contrary to the objectives of the CPR for the Court of Appeal to go into the merits of an interim order restraining the defendant against breaching restrictive covenants relating to confidential information in his contract of employment when a date for the trial of the issues to be heard was fixed for some two weeks time.

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## ADMINISTRATION

**Mark One (Oxford Street) Plc** Ch Div.

Digested at Vol.5, No.3. Now further reported at [1999] 1 WLR 1445.

**Re Douai School Limited** *unreported*, 20 August 1999. Ch Div. (Neuberger J)

The contracts of teachers of a school had been adopted by the Administrators. All of the employees were entitled to their contracts to be paid during term time and that payment was to continue during the school holidays. The Court held that the liability for pay for the period of the summer holidays was a qualifying liability under section 19(7), either because (a) it was a liability to pay salary in respect of services rendered after the adoption of the contract, namely during term time; or (b) it was a sum payable in lieu of holiday pay in respect of services rendered after the adoption of the contracts of employment. In addition, the Administrator was not entitled to set off any wages which she paid to the teaching staff in respect of holiday prior to the summer term. Liability for payment for that period had accrued during the previous term, prior to the adoption of the contract by the Administrator. However, no set off was permitted, having regard to the provisions of the Employment Rights Act 1996, which prevented unlawful deductions from wages of employees.

[Felicity Toube]

**Re Richmond FC Ltd (in administration)**

*unreported*, 26 July 1999. Ch Div. (Jacob J)

Rule 2.18(2) of the IR 1986 allows the Court to waive the advertisement requirement retrospectively, ie after the creditors' meeting pursuant to section 23(1) of the IA 1986, as well as prospectively.

[Roxanne Ismail]

Shaw: "Administration-Peaceable Re-entry by a Landlord Revisited", [1999] *Insolvency Lawyer*, Issue 6, 254

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## ARBITRATION

**Azov Shipping Co v. Baltic Shipping Co (No 2)** QB (Com Ct)

Digested at Vol.5, No.3. Now further reported at [1999] 2 Lloyd's Rep. 39

**Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd** QB (Com Ct)

Digested at Vol.5, No.4. Now further reported at [1999] 2 Lloyd's Rep. 187

**Danae Air Transport SA v Air Canada** *The Times*, 5 August 1999; [1999] 2 Lloyd's Rep. 105. CA (Kennedy, Ward and Tuckey LJJ)

A final costs award made by arbitrators as a result of their belief that Danae had not beaten a without prejudice settlement offer, and therefore leading to a simple mathematical error neither accidental nor admitted, either by the arbitrators or the party benefiting from the error came within the jurisdiction of the court to remit to arbitrators conferred by section 22 of the Arbitration Act 1950.

**Federal Insurance Co v Transamerica Occidental Life Assurance Co** [1999] 2 All ER (Comm) 138. QB (Com Ct) (Rix J)

Where section 16 of the Arbitration Act 1996 had to be resorted to, the parties' agreement on the procedure for appointment of arbitrators should be applied as far as possible to the filling of a vacancy. Hence, although the trigger of a written request was derived from section 16(5)(a), that was to be read into the parties agreement which showed a clear intention to allow 30 days for an appointment once the party concerned was put on notice of the need for the appointment. Such a result was in keeping with the policy of the Act as set out in section 1 which was to promote party autonomy and which required that the provisions of Part I of the Act be construed accordingly.

**Laker Airways Inc v FLS Aerospace Ltd** QB (Com Ct)

Digested at Vol.5, No.4. Now further reported at [1999] CLC 1124; [1999] 2 Lloyd's Rep. 45

**Omnium de Traitement et de Valorisation SA v Hilmarton Ltd** QB (Com Ct)

Digested at Vol.5, No.4. Now further reported at [1999] 2 All ER (Comm) 146.

**Patel v. Patel** CA

Digested at Vol.5, No.3. Now further reported at [1999] 3 WLR 322.

**Soleimany v Soleimany** CA

Digested at Vol.4, No.3. Now further reported at [1999] 3 All ER 847.

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## BANKING

**Christofi v Barclays Bank plc** *The Times*, 1 July 1999. CA (Stuart-Smith and Chadwick LJJ)

In the absence of an express agreement between a bank and its customer, the law imposed no implied duty upon the bank not to disclose to a person making a claim against the customer's property over which the bank itself had security the fact that the claim was not protected by the entry of a caution on the Land Register.

**Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd** QB (Com Ct)

Digested at Vol.5, No.4. Now further reported at [1999] CLC 1148.

**Kredietbank Antwerp v Midland Bank plc** CA

Digested at Vol.5, No.4. Now further reported at [1999] CLC 1108.

**Yorkshire Bank plc v Lloyds Bank plc** QBD

Digested at Vol.5, No.4. Now further reported at [1999] 2 All ER (Comm) 153.

Johnson: "Jurisdiction and choice of law in claims for restitution: some lessons for bankers and banking lawyers", [1999] JIBL 253

Curtis: "A practical guide to the new FSA rules for securitisations and loan transfers", [1999] JIBL 260

Johnson: "Letters of credit and original documents-Again", [1999] JIBL 287

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## BANKRUPTCY

**Commissioners of Inland Revenue v Robinson** [BPIR] 329. Ch Div. (Whiteman QC)

The jurisdiction under section 375 of the IA 1986 was to be used sparingly, and should not be used by a bankrupt to circumvent the strict conditions required for an annulment under section 282.

[Lloyd Tamlin]

**Re a debtor (No SD 27 of 1998)** Ch Div.

Digested at Vol.5, No.3. Now further reported at [1999] 2 BCLC 336.

**Masters v Leaver** *The Times*, 5 August 1999. CA (Morritt and Thorpe LJJ, Sir Oliver Popplewell).

A default judgment obtained against a bankrupt in a foreign court on a cause of action based upon fraud was insufficient of itself to establish that the underlying debt was "incurred in respect of...any fraud or fraudulent breach of trust to which he was a party" within the meaning of section 281(3) of the Insolvency Act 1986 so as to preclude the bankrupt from being released when discharged from bankruptcy.

**Official Receiver v Milborn** *The Independent*, 26 July 1999. Ch Div. (Judge Rich QC)

When considering whether to exercise the power under section 279 IA 1986 to suspend the discharge of a bankrupt, the Court had to be satisfied of the bankrupt's non-compliance with his obligations under the Act. Reasonable suspicion of non-compliance was not sufficient.

**Re a Debtor (No.544/SD/98)** Ch Div  
Digested at Vol. 5, No.4 as **Re Garrow**. Now further reported in *The Independent*, 5 July 1999.  
[Lexa Hillard]

**Rooney v Cardona** CA  
Digested at Vol.5, No.3. Now further reported at [1999] 1 WLR 1388.

Griffiths and Parry: "Personal Insolvency as a Restriction on Involvement in Company Management", [1999] *Insolvency Lawyer*, Issue 5, 199

Abbot: "**Mond v Hyde**: Negligence Immunity for the Official Receiver?", [1999] *Insolvency Lawyer*, Issue 5, 206

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## CHAMPERTY

**Stocznia Gdanska SA v. Latvian Shipping Co (No. 2)** [1999] 3 All ER 822. QB (Com Ct) (Toulson J)  
Where an agreement to fund litigation involved a significant profit element for the funder if the litigation were successful, it would not necessarily be an abuse of the process of the court to prosecute the litigation. The court had to consider the mischief, if any, which the agreement was likely to cause and the circumstances of the individual case.

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## COMPANY

**Regina v Broadcasting Standards Commission, ex parte British Broadcasting Corporation** *The Times*, 14 September 1999. QB (Forbes J)  
A company or body corporate did not enjoy a right to privacy.

**In re Duckwari Plc** CA  
Digested at Vol.4, No.9. Now further reported at [1999] Ch 253.

**Duckwari plc. v. Offerventure Ltd (No. 2)** CA  
Digested at Vol.5, No.1. Now further reported at [1999] Ch 268.

**Re Hoicrest Ltd** [1999] 2 WLR 336. CA (Peter Gibson and Brooke LJ)  
As section 359 of the Companies Act 1985 could operate where questions arose between member or alleged members without involving a question between such members and the company, it appeared at least provisionally that it was not necessary that there should be a failure by the company to register a transfer delivered to it for the section to operate.

**Re an Inquiry into Mirror Group Newspapers plc** Ch Div.  
Digested at Vol.5, No.3. Now further reported at [1999] 3 WLR 583.

**Satnam Investments Ltd v Dunlop Heywood & Co Ltd** CA  
Digested at Vol.5, No.2. Now further reported at [1999] 3 All ER 652.

Proctor: "Fiduciary duties and unfair prejudice-further developments", CCH Company Law Newsletter, Issue 38, p6.

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## CONFLICTS

**Amoco (UK) Exploration Co v British American Offshore Ltd** [1999] 2 All ER (Comm) 201. QB (Com Ct) (Langley J)  
In order to obtain leave to serve out of the jurisdiction, the claimants had to show a good arguable case that the case was clearly within one or more of the subparagraphs of Ord. 11 r.1. In the instant case the relief sought was to restrain the second defendant from pursuing the Texan proceedings in Texas, and also from pursuing the claims it sought to make in the Texan proceedings anywhere other than England. None of these claims could be brought within Ord.11 r.1(1)(b). Furthermore, because no "person" has been duly served with the originating summons at the time leave was granted, there had been no jurisdiction to grant leave under Ord. 11 r.1(1)(c).

**Glencore International AG v Shell International Trading & Shipping Co Ltd** *unreported*, CCH Commercial Law Cases Newsletter, Report 21, September 1999. QB (Com Ct) (Rix J)  
Proceedings in France did not involve the same cause of action as English interpleader proceedings for the purposes of Article 21.

**Glencore International AG v Metro Trading International Inc & Others, Banque Trad-Credit Lyonnais (France) SA Third Party; Metro v Itochu, Bank Trad, Third Party**, *unreported*, 30 July 1999. QB (Com Ct) (Moore-Bick)  
The Judge determined forum issues under the articles 17, 21 and 22 of the Brussels Convention as between proceedings in England and France, arising out of the insolvency and English court receivership of Metro. In England, Glencore brought proceedings against Metro and two Singapore purchasers for conversion of its oil and Metro brought proceedings against one of the Singapore purchasers for payment of the price. Bank Trad was joined as a third party. In France, Bank Trad brought proceedings against the two Singaporean purchasers, claiming that it was entitled to payment of the price. Metro and Glencore were joined in the French proceedings. It was held that for

the purposes of Article 21 the French court was first seized of proceedings between the same pairs of parties involving the same cause of action. It was the case, however, that following *Continental Bank v Aekos*, Article 17 trumped Article 21, the sale contracts between Metro and the Singaporean purchasers conferring exclusive jurisdiction on the English court. There was a good arguable case that Bank Trad claimed under the contracts, and was therefore bound by Article 17, even though it might not have known of the exclusive jurisdiction clause. In one of the case Article 17 could not be relied upon, but the English court was first seized of a related action for the purposes of Article 22. Article 22, however, must yield to Article 21, and the proceedings in England should be stayed pending a decision by the French court as to the exercise of its own jurisdiction.

[Simon Mortimore QC]

**Jordan Grand Prix Ltd. v. Baltic Insurance Group**  
HL

Digested at Vol.5, No.1. Now further reported at [1999] 2 AC 127.

**National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer" (No. 2))** *unreported*, CCH Commercial Cases Newsletter, Report 20, August 1999.

A claim for a non-party to pay costs under section 51 of the Supreme Court Act 1981 was not a claim within the Brussels Convention, which was only concerned with substantive causes of action. Under the CPR there had to be permission to join the non-party (CPR 48.2(1)), and where necessary, permission to serve out of the jurisdiction.

**QRS I Aps v Frandsen** CA

Digested at Vol.5, No.4. Now further reported at [1999] 3 All ER 289.

**RPS Prodotti Siderurgici SRL v Owners and/or Demise Charterers of the ship or vessel "Sea Maas"**

*The Independent*, 7 July 1999; [1999] 2 Lloyd's Rep. 281. QB (Admiralty Ct) (Rix J)

Where a charterer claimed for damage to cargo and the fundamental complaint was that a seaworthy vessel had never been provided by the shipowner, the place of performance of the "obligation in question" within the terms of Article 5(1) of the Brussels Convention was the port of loading.

**Turner v Grovit** CA

Digested at Vol.5, No.4. Now further reported at [1999] 3 All ER 577.

**Viskase Ltd v Paul Kiefel GmbH** CA

Digested at Vol.5, No.3. Now further reported at [1999] CLC 957; [1999] 3 All ER 362.

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## CONTRACT

**AMB Imballaggi Plastici SRL v Pacflex Ltd** *The Times*, 8 July 1999. CA (Peter Gibson, Judge and Waller LJ)

A person who bought and sold as a principal and therefore acted on his own behalf and not on behalf of another could not be a commercial agent within the Commercial Agents (Council Directive) Regulations (SI 1993 No. 3053)

**Director General of Fair Trading v First National Bank plc** *The Times*, 30 July 1999. Ch Div. (Evans-Lombe J)

A term in loan agreement which made interest payable at the contractual rate even after a court had extended time for repayment by making an instalment order was not unfair for the purposes of the Unfair Terms in Consumer Contracts Regulations (SI 1994 No. 3159)

**Manatee Towing Co v. Oceanbulk Maritime SA**

[1999] 2 All ER (Comm) 306. QB (Com Ct) (Cresswell J)

In determining whether the parties had concluded a contract, the court had to review what they had said and done and from that material to infer whether their objective intentions as expressed to each other were to enter into a mutually binding contract. Where agreement had not been reached on terms which the parties regarded as essential to a binding agreement, there could be no binding agreement until they did agree on such terms.

**Mohamed v Alaga & Co (a firm)** *The Times*, 28 July 1999; [1999] 3 All ER 699. CA (Lord Bingham LCJ, Otton and Robert Walker LJ)

An agreement by a solicitor to share his fees with another person contrary to rule 7 of the Solicitors' Practice Rules 1990 was an illegal contract and would not be enforced by the court. Although the prohibition on such agreements was imposed in terms only on solicitors and they alone were liable to a professional penalty for breach, the public interest which rule 7 existed to promote would be defeated if a non-solicitor could enlist the court's aid to enforce an agreement which the solicitor was prohibited from making. It followed that the non-solicitor was not entitled to recover under the alleged contract. However, the non-solicitor's alternative claim was not to be viewed as one for the recovery of consideration under the unlawful contract, but simply as a reasonable reward for professional services rendered.

**Stevenson v. Rogers** CA

Digested at Vol.5, No.3. Now further reported at [1999] QB 1028.

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## CORPORATE INSOLVENCY

### **Deloitte and Touche AG v Johnson** PC

Digested at Vol.5, No.4. Now further reported at [1999] 1 WLR 1605.

### **Neville Barry Khan v Inland Revenue Commissioners** *unreported*, 30 July 1999. Ch Div. (Evans-Lombe J)

Toshoku Finance Ltd ("the Company") had loaned substantial sums to its sister company which was substantially insolvent. The Company received a payment of certain sums upon which notional interest was regarded as being due, by virtue of tax legislation. The Company was liable for tax charged on notional interest. The Judge held that r 4.218 IR 1986 was to be construed as only including so much of any charge to corporation tax as was referable to a sale of the Company's assets under r 4.218(p). Corporation tax on interest received by a company in liquidation was not a necessary disbursement which the liquidator was bound to pay in full out of the assets of the Company (*Re Mesc Properties* (1980) 1 WLR 96 distinguished). [Mark Phillips QC]

### **Official Receiver v Environment Agency** *The Times*, 5 August 1999. CA (Roch and Morritt LJJ, Rattee J)

A waste management licence was property within the meaning of section 436 of the Insolvency Act 1986, and constituted onerous property for the purposes of section 178(3). The liquidator of a company holding a waste management licence was entitled to disclaim the licence pursuant to section 178(4) and in so doing did not commit an offence under section 33 or a breach of duty under section 34 of the Environmental Protection Act 1990.

**Re Dicksmith (Manufacturing) Ltd (in liquidation)** *The Times*, 7 July 1999. Ch Div. (Judge Howarth QC)  
The Court's power to stay proceedings under section 112 IA 1986, which allowed the liquidator in a voluntary liquidation to apply for authorisation to exercise any of the powers available to a liquidator appointed by the Court, was not confined to cases in which the proposed litigation posed a threat to the assets of the company or threatened the distribution of the assets of the company among its creditors on a pari passu basis.

Elwes: "Waste Management licences and insolvency", IL&P, Vol.15, No.5, 1999

Finch: "Security, Insolvency and Risk: Who Pays the Price?", (1999) 62 MLR 633

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## COSTS

### **Baron v Lovell** *The Times*, 14 September 1999. CA (Lord Woolf MR, Brooke and Robert Walker LJJ)

If a litigant or, in an appropriate case, his insurer, acted unreasonably by not attending or sending a representative with appropriate authority to attend a pre-trial review in breach of a direction of the court, the court could make an order for indemnity costs against him or exercise its power to award interest on damages at a much higher rate than usual.

### **Burridge v Stafford** *The Times*, 14 September 1999. CA (Lord Woolf MR, Robert Walker and Butler-Sloss LJJ)

A person ceased to be a "legally assisted person" for the purposes of section 2 of the Legal Aid Act 1988 when he started to act in person and therefore, from that date, his liability for costs was not limited by section 17 and the Legal Aid Board was not liable for his costs under section 18 of that Act.

### **Commissioners of Customs and Excise v Anchor Foods Ltd (No. 2)** *The Times*, 28 September 1999. Ch Div. (Neuberger J)

Notwithstanding CPR rule 44.3 which allowed the court a wide discretion as to costs, once a costs order had been made it was not generally open to the court to revisit it.

### **In re Harry Jagdev & Co (Wasted Costs Order) (No 2 of 1999)** *The Times*, 12 August 1999. CA (Otton LJ, Dyson J, Judge Fawcus)

Where a wasted costs order was fatally flawed because the amount awarded was not specified it was not possible to vary or amend the order by adding a figure at a later date.

### **Nordstern Allgemeine Versicherungs AG v Internav Ltd** [1999] 2 Lloyd's Rep. 139. CA (Kennedy, Otton and Waller LJJ).

When exercising the discretion under section 51 SCA 1981 to make a costs order against a non-party where the non-party had funded the litigation, if the agreement to fund fell within the definition of champertous then that would form a very firm basis for exercising the jurisdiction under section 51. The fact that an agreement might not fall within the strict definition of champerty, however, would not lead to the conclusion that the jurisdiction should not be exercised under section 51. The non-party had a financial interest in the result of the litigation, and this would be an important factor under section 51.

### **Spath Holme Ltd v Chairman of the Greater Manchester and Lancashire Rent Assessment Committee** QBD

Digested at Vol.4, No.8. Now further reported at [1999] 1 WLR 1623.

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## DAMAGES

**Lunnun v Singh** *The Times*, 19 July 1999; *The Independent*, 26 July 1999. CA (Peter Gibson and Clarke LJJ, Jonathan Parker J)

On an assessment of damages, any point going to quantification of damage could be raised by a defendant provided it was not inconsistent with any issue settled by the judgment on liability.

**Total Liban SA v Vitol Energy SA** [1999] 2 All ER (Comm) 65. QB (Com Ct) (Peter Gross QC)

There was no rule of law that liability without payment did not constitute a recoverable loss. Thus, where a seller of goods breached its contract with a buyer, so as to result in the buyer being liable to a third party to whom it had contracted to sell the goods, the buyer had a claim for substantial damages against the seller prior to discharging its liability to the third party by payment. Any question of uncertainty as to the extent of damage or of prevention of windfall gains could be dealt with by resort to the range of techniques already available to courts and tribunals, the technique to be used in a given case depending on the court's ability to assess, on the available evidence, the existence and extent of the liability in question.

McLauchlan: "Contributory Negligence and the SAAMCO principle", [1999] LMCLQ 355

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## DIRECTORS DISQUALIFICATION

**Re Kaytech International plc** CA

Digested at Vol.5, No.3. Now further reported at [1999] 2 BCLC 351.

**North Holdings Ltd v Southern Tropics Ltd** CA

Digested at Vol.5, No.4. Now further reported at *The Independent*, 12 July 1999; [1999] BCC

**Re Barings plc (No. 4)** [1999] BCC 639. CA (Chadwick, Swinton Thomas and Waller LJJ)

The relevant question for disqualification proceedings was whether the director's acts or omissions fell so far short of the competence required of a director of Barings that the court ought to conclude that he was unfit to be concerned in company management. That was not the same question as that which the SFA tribunals had to consider, namely whether the director was a fit and proper person to remain on the register. This test was materially different and it would not bring the administration of justice into disrepute to allow the disqualification proceedings to continue when the SFA proceedings had been dismissed against him.

**Re Surrey Leisure Ltd** *The Times*, 28 July 1999. CA (Morritt and Thorpe LJJ, Sir Oliver Popplewell)

In proceedings brought under section 6 of the CDDA 1986, it was permissible for the applicant for a disqualification order to nominate more than one lead company on the originating application.

Hicks: "Director disqualification-the National Audit Office follows up" IL&P No.15, Vol.4, 1999

**Practice Direction: Directors Disqualification Proceedings** [1999] BCC 717

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## EUROPEAN COMMUNITIES

**Passmore v Morland** CA

Digested at Vol.5, No.2. Now further reported at [1999] 3 All ER 1005

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## FINANCIAL SERVICES

**Conroy v Kenny** [1999] 1 WLR 1340. CA (Kennedy and Schiemann LJJ, Sir Patrick Russell)

A person was in the business of moneylending within section 6 of the Moneylenders Act 1990 if at the relevant date his business was moneylending, whether or not he carried on other businesses as well, provided the transaction in question constituted moneylending. Section 6 did not require evidence of a number of loans at interest to other borrowers in order to show that the business of moneylending was being carried on.

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## GUARANTEES

**Raiffeisen Zentralbank Osterreich AG v. Crossseas Shipping Ltd** QB (Com Ct)

Digested at Vol.5, No.3. Now further reported at [1999] CLC 973.

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## INSURANCE

**FNCB Ltd v Barnet Devanney and Co Ltd** *The Times*, 28 September 1999. CA (Morritt and Sedley LJJ, Lindsay J)

It was not the function of an insurance broker to resolve undetermined points of law but to protect his clients so far as possible from unnecessary risks including the risk of litigation. Where, therefore, an insurance broker failed to include a mortgagee

protection clause or a non-invalidity clause in an insurance policy for his mortgagee client on the grounds that, as a matter of law, under such a composite policy the claim of one co-insured was not barred by the act or omission of the other insured where that had not been conclusively established on the authorities and, as a matter of fact, his client was already protected by a contingency policy, he broke the contractual and tortious duties he owed to his client.

**In re Friends' Provident Life Office** *The Times*, 26 July 1999. CA (Simon Brown and Chadwick LJJ, Rattee J)

A scheme which involved a reinsurer transferring its entire reinsurance business, comprised in one policy, to the reinsured, thus merging all rights and liabilities under the policy in one corporate person was, despite the resultant extinguishing of the policy, a transfer of long term business for the purposes of Part 1 of Schedule 2C to the Insurance Companies Act 1982, so that the Court had jurisdiction to sanction the scheme. It was not the transfer itself which discharged the policy; rather, the policy was discharged by operation of law if, following the transfer there was a merger of rights and liabilities in the same person. There was a distinction between a transfer of the insurer's liabilities and a surrender of the insured's rights.

**Society of Lloyds' v. Robinson** HL  
Digested at Vol.5, No.2. Now further reported at [1999] CLC 987.

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## INTERNATIONAL INSOLVENCY

**Re Hopewell International Insurance Ltd** Southern District of the New York Bankruptcy Court (Chief Judge Brozman)

The decision comprehensively analyses section 304 of the US Bankruptcy Code. The decision is of particular importance as it relates to a scheme under Bermudian statutory provisions which contain provisions very similar to those set out in section 425 CA 1985. Gabriel Moss QC appeared as an expert witness.  
[Gabriel Moss QC]

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## LIMITATION

**Cia de Seguros Imperio (a body corporate) v Heath (REBX) Ltd (formerly CE Heath & Co (North America) Ltd)** QB (Com Ct)

Digested at Vol.5, No.2. Now further reported at [1999] CLC 997.

**Securum Finance Ltd v Ashton** [1999] 2 All ER (Comm) 331. Ch Div. (Ian Hunter QC)

Where a bank had separate causes of action on a guarantee and under a mortgage, section 8(2) of the Limitation Act 1980 did not have the effect of replacing the 12 year limitation period for an action on a specialty under section 8(1) with the 6 year period for an action on a contract debt under section 5.

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## PARTNERSHIP

**Hirst v Etherington** *The Times*, 20 July 1999. CA (Stuart-Smith, Pill and Thorpe LJJ)

A bare assurance by a borrower's solicitor to a lender that his undertaking guaranteeing a loan was given in the normal course of business was not of itself sufficient to confer upon him authority, which he in fact lacked, so as to bind his partner under section 5 Partnership Act 1890. In determining whether the undertaking guaranteeing the loan bound the partnership under section 5, the question was whether a reasonably careful and competent lender would have concluded that there was an underlying transaction of a kind which was part of the usual business of a solicitor.

**Morris v Wentworth Stanley** CA  
Digested at Vol.4, No.9. Now further reported at [1999] QB 1004.

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## PROCEDURE

**Adam Phones Ltd v Goldschmidt** *The Independent*, 22 July 1999. Ch Div. (Jacob J)

Where an application for committal for contempt of court was a wholly disproportionate response to a trivial or blameless breach of a court order, the Court should dismiss the application with costs.

**Bevan Ashford v. Geoff Yeandle (Contractors) Ltd** Ch Div.

Digested at Vol.4, No.4. Now further reported at [1999] Ch 239.

**Bourns Inc v Raychem Corporation** CA  
Digested at Vol.5, No.4. Now further reported at [1999] CLC 1029.

**Bradford & Bingley Building Society v. Seddon** CA

Digested at Vol.5, No.3. Now further reported at [1999] 1 WLR 1482.

**Breeze v John Stacy & Sons Ltd** CA  
Digested at Vol.5, No.4. Now further reported at *The Times*, 8 July 1999.

**C v. S** CA

Digested at Vol.5, No.3. Now further reported at [1999] 1 WLR 1551.

**Commissioners of Customs and Excise v Anchor Foods Limited** Ch Div.

Digested at Vol.5, No.2. Now further reported at [1999] 3 All ER 268.

**Ebert v. Birch** CA

Digested at Vol.5, No.3. Now further reported at [1999] 3 WLR 670.

**Greenwich Ltd v. National Westminster Bank plc** Ch Div.

Digested at Vol.5, No.3. Now further reported at [1999] 2 Lloyd's Rep. 308

**Grobbelaar v Sun Newspapers** *The Times*, 12 August 1999. CA (Henry, Potter and Mummery LJJ). Given the provisions of CPR rule 32.1, it could no longer be argued that the civil court had no jurisdiction to exclude relevant evidence.

**Heaton v Axa Equity and Law Life Assurance Society Plc** *The Times*, 19 July 1999. Ch Div. (Laddie J)

Where a claimant who had linked claims against two or more defendants arrived at a settlement with one of them, the courts would, if necessary, examine all the circumstances so as to ascertain whether or not he intended to settle his whole claim, thereby releasing the other defendants. If he intended to persist in a further claim against the other defendant, he had to make it clear to all concerned.

**Lancashire Fires Ltd v SA Lyons and Co Ltd** *The Times*, 24 July 1999. CA (Nourse, Swinton-Thomas and Mummery LJJ)

Although ideally an application to the Court of Appeal under section 18 of the Legal Aid Act 1988 for an award of costs against the Legal Aid Board by a successful unassisted party should be made at the conclusion of the judgment, it could properly be made at a later date after the applicant had failed in his efforts to recover his costs.

**Manatee Towing Co v. Oceanbulk Maritime SA** QB (Com Ct)

Digested at Vol.5, No.3. Now further reported at [1999] CLC 1197.

**Manson v Vooght and Others** CA

Digested at Vol.4, No.10. Now further reported at [1999] BPIR 376.

**Matthews v Tarmac Brick and Tiles Ltd** CA

Digested at Vol.5, No.4. Now further reported at *The Times*, 1 July 1999.

**Norglen Ltd (in liq) v Reeds Rains Prudential Ltd** HL

Digested at Vol.3, No.9. Now further reported at [1999] 2 AC 1

**R. v. Legal Aid Board ex parte Kaim Todner (a firm)** CA

Digested at Vol.4, No.7. Now further reported at [1999] QB 966.

**Reichhold Norway ASA v Goldman Sachs International** *The Times*, 20 July 1999; [1999] 2 All ER (Comm) 174. CA (Lord Bingham LCJ, Otton and Robert Walker LJJ)

Having regard to the fact that forensic practice was changing and developing towards greater control by the courts over the conduct of proceedings, the Court of Appeal would be very slow to interfere with procedural directions of a judge unless those directions were vitiated by error of law or manifest error.

**Saab v Saudi American Bank** *The Times*, 29 July 1999. CA (Beldam, Robert Walker and Clarke LJJ)

For a claim form to be validly served on an overseas company at its London branch, pursuant to section 694A CA 1985 (as amended by regulation 3 of the Oversea Companies and Credit and Financial Institutions (Branch Disclosure) Regulations 1992 (SI 1992 No 3179)), it was not necessary that the action should be wholly or even substantially "in respect of the carrying on of the business of" the London branch, so long as it was at least partly in respect of that business.

**Securum Finance Ltd v Ashton** [1999] 2 All ER (Comm) 331. Ch Div. (Ian Hunter QC)

A dismissal for want of prosecution did not involve an adjudication on the merits, such an adjudication was necessary to give rise to cause of action or issue estoppel. Moreover, where a bank brought proceedings for a simple contract debt under a guarantee, it was not obliged to rely at the same time on all of its rights under against the guarantor under a mortgage. It was perfectly proper for the bank to confine itself to a claim under the guarantee in the first action and subsequently to rely on its rights under the mortgage.

**Shell UK Ltd v Enterprise Oil plc** Ch Div.

Digested at Vol.5, No.4. Now further reported at [1999] 2 All ER (Comm) 87.

**SmithKline Beecham Biologicals SA v Connaught Laboratories Inc** *The Times*, 13 July 1999; *The Independent*, 15 July 1999. CA (Lord Bingham LCJ, Otton and Robert Walker LJJ)

Whether a document disclosed in civil litigation had passed into the public domain, by virtue of its having been read to or by the Court, or referred to in open court, was to be judged in the new context whereby the

judge was invited to read material out of court to which, in open court, economical reference was then made. Where, therefore, at the outset of the patent revocation proceedings in open court the judge, who had read the relevant material out of court before the hearing, revoked the patent without opposition from the patent holder, documents on which his decision was based and to which he had referred compendiously in his judgment fell within Order 24, rule 14A RSC and might be disclosed by the petitioners outside the revocation proceedings if they wished to do so.

**Unilever v Procter & Gamble** Ch Div.

Digested at Vol.5, No.4. Now further reported at [1999] 1 WLR 1630.

**Worldwide Corporation Ltd v Marconi Communications Ltd** *The Times*, 7 July 1999. CA (Waller and Mance LJ)

The rule that clients were ordinarily bound by assurances given in open court by counsel applied even where a claim in negligence might lie against counsel in respect of his conduct of the case for which he might be able to claim immunity.

**Young and others v Robson Rhodes (a Firm)** Ch Div.

Digested at Vol.5, No.4. Now further reported at [1999] 3 All ER 524.

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## PROPERTY

**Bater v Greenwich London Borough Council** *The Times*, 28 September 1999. CA (Lord Lloyd, Roch and Thorpe LJ)

Since a notice to terminate a joint secure tenancy was not a disposition of property for the purposes of section 37(2)(b) of the Matrimonial Causes Act 1973, the court had no jurisdiction to set it aside even where it had been unilaterally served thereby extinguishing the other joint secure tenant's right to buy, and where that right to buy had been exercised but the sale not yet been completed.

**Re Lomax Leisure Ltd (1999)** Ch Div.

Digested at Vol.5, No.3. Now further reported at [1999] 3 WLR 652

**Manchester Airport plc v Dutton and Others** CA

Digested at Vol.5, No.3. Now further reported at [1999] 3 WLR 524.

**Starling v Lloyds TSB Bank Plc** *unreported* 29 October 1999. CA (Peter Gibson and Mance LJ, Moore-Bick J)

In circumstances where the power of a mortgagor in possession to grant a lease in respect of mortgaged

property has been modified pursuant to section 99(13) LPA 1925, so as to necessitate the consent of the mortgagee to the grant of a lease by the mortgagor, there is no general duty on the mortgagee to consider properly the request of the mortgagor. In relation to a possible duty of good faith, the Court approved the dicta of Scott V-C in *Medforth v Blake* [1999] BCC 771, that the concept of good faith should not be diluted by treating it as capable of being breached by conduct which is not dishonest or otherwise tainted by bad faith.

[Mark Phillips QC]

**Woolwich plc v Gomm** *The Times*, 21 September 1999. CA (Peter Gibson, Ward and Clarke LJ)

The standard to be applied in ascertaining whether a building society providing a mortgage loan was fixed with notice under section 199(1)(ii)(b) of the Law of Property Act 1925 was objective and could not depend upon the particular instructions given by the building society to its solicitors.

**Yaxley v Gotts** *The Times*, 8 July 1999; *The Independent*, 6 July 1999. CA (Beldam, Robert Walker and Clarke LJ)

An oral agreement whereby the purchaser of a house promised to grant another, in exchange for materials and services supplied, an interest in the property, although void and unenforceable under section 2 Law of Property (Miscellaneous Provisions) Act 1989, was still enforceable on the basis of a constructive trust in circumstances where, previously, the doctrines of part performance or proprietary estoppel might have been relied upon.

Gardner: "The Remedial Discretion in Proprietary Estoppel", (1999) 15 LQR 438.

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## RECEIVERS

**Medforth v Blake** CA

Digested at Vol.5, No.4. Now further reported at [1999] BCC 771.

**Re Andrews** [1999] 2 BCLC 442. CA (Aldous, Hirst and Ward LJ)

A receiver's remuneration and expenses did not form part of the costs "of and incidental to" the action in which he was appointed and therefore could not be recovered under section 51(1) of the Supreme Court Act 1981 by a party who successfully applied for the discharge of the receivership order. The receiver's remuneration and charges were expenses of the receivership and once he had properly recouped his properly incurred costs from an asset he had properly received, the costs of the receivership lay where they fell.

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## RESTITUTION

Evans: "Rethinking Tracing and the Law of Restitution", (1999) 15 LQR 469.

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## SOLICITORS

### **A & J Fabrications (Batley) Ltd v Grant Thornton**

*The Times*, 5 August 1999. Ch Div. (Astill J)

Absent special circumstances, a solicitor advising a liquidator owed no duty of care to the creditors of company in liquidation.

### **Pillbrow v Pearless De Rougemont & Co.** [1999] 3

All ER 355. CA (Butler-Sloss and Schiemann LJJ)

Where a firm of solicitors was asked by a client to provide the services of a solicitor, it was not entitled to recover its costs if it provided an adviser who was not a solicitor and failed to inform the client of that fact. Such a situation was not to be characterised as defective performance of a contract for legal services with a term that those should be performed by a solicitor, but rather as non-performance of a contract to provide legal services by a solicitor.

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## TORT

### **County NatWest Bank Ltd v Barton** *The Times*, 29

July 1999. CA (Roch and Morritt LJJ, Lindsay J)

Where a fraudulent misrepresentation had been made, the presumption arose that if the false statement was likely to play a part in the decision of a reasonable person it would be presumed that it did unless the representor satisfied the Court to the contrary. There was no good ground for limiting the facts sufficient to rebut that presumption. Nor did the presumption cease to have any force simply because the representee gave evidence. Reliance on the representation could be established by demonstrating that the false statement induced the representee to persevere in a decision already reached.

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## TRUSTS

### **Abrahams v Trustee in bankruptcy of Abrahams**

*The Times*, 26 July 1999. Ch Div. (Lindsay J)

Where a person paid money to a lottery syndicate she gained the right to have any winnings received duly administered in accordance with whatever rules of the syndicate then applied. That right was property which was capable of being held on resulting trust.

### **BCCI (Overseas) Ltd v. Akindele** Ch Div.

Digested at Vol.5, No.1. Now further reported at [1999] BCC 669.

[**Gabriel Moss QC, Richard Sheldon QC, David Marks, Fidelis Oditah**]

**Burton v FX Music Ltd** *The Times*, 8 July 1999. Ch Div. (Nicholas Warren QC)

In determining whether a party had made itself the trustee of a promise made to it for the benefit of another, the promiser must have had the intention to create such a trust. Powerful evidence of such an intention could be inferred where the trustee had positively directed the sums due under the trust to be paid directly to those beneficially entitled, especially where the person so directed also had the power to suspend making payments pending the resolution of any dispute between trustee and beneficiary as to their respective entitlements, as the latter evidenced an intention to treat the beneficiaries' entitlement as an equitable interest rather than a mere contractual claim.

**Kane v. Radley-Kane** Ch Div.

Digested at Vol.4, No.7. Now further reported at [1999] Ch 274.

**Don King Productions Inc v Warren** CA

Digested at Vol.5, No.2. Now further reported at [1999] 3 WLR 276.

**Heinl v Jyske Bank (Gibraltar) Ltd** *The Times*, 28 September 1999. CA (Nourse and Sedley LJJ, Colman J)

To establish a claim in equity to make good a loss against a person as a constructive trustee for dishonestly assisting breaches of fiduciary duty by a bank employee, the standard of proof of dishonesty, although not as high as the criminal standard, had to involve a high level of probability. An objective test of whether the person ought, as a reasonable businessman, to have appreciated that the bank's funds were being fraudulently procured was not sufficient.

**James v Williams** CA

Digested at Vol.5, No.3. Now further reported at [1999] 3 WLR 451; [1999] 3 All ER 309.

McGrath: "Knowing Receipt and Dishonest Assistance: a Wrong Turn", [1999] LMCLQ 343

Tetterborn: "Trusts and Unassignable Agreements-Again", [1999] LMCLQ 353

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## VOLUNTARY ARRANGEMENTS

**Inland Revenue Commissioners v Adam and Partners Ltd** *The Times*, 2 August 1999. Ch Div. (Nicholas Warren QC)

There was no need to restrict unnecessarily the type of arrangement creditors might approve, provided it was reasonably capable of being described as a composition or a scheme of arrangement. That was so even where such an arrangement offered no realistic prospect of any dividend being paid to unsecured creditors.

**Raja v Rubin** CA

Digested at Vol.5, No.3. Now further reported at [1999] 3 WLR 606.

Berry and Pey Kan Su: "Voluntary arrangements-a question of variation", IL&P Vol.15, No.4, 1999

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## SEMINARS

Marion Simmons QC gave a talk in Latvia on the Brussels and Lugano Conventions at a seminar for Latvian judges organised by the European Commission in September 1999.

*The Digest is a collation of references to reported and unreported cases and other items of relevance to the professional practices of the Barristers at 3-4 South Square, Gray's Inn, London WC1R 5HP. It is not intended to constitute legal advice, and the content should not be relied upon without checking the original text of any authority or periodical cited. No duty of care is hereby assumed to any person, and no liability is accepted for the content.*

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