

# 3~4 Digest

A Monthly Review of Relevant News, Cases and Articles

Volume 6 Number 4

April 2000

**AS International stock markets become nervous about the valuations of technology stocks will the real question be what happens when banks who have funded dot-com start-ups and technology funds start asking how they will be repaid?**

**Meanwhile the Court of Appeal has provided some food for thought in their decision in Toshoku Finance, in which Mark Phillips QC and Felicity Toubé appeared. The judgment has the effect that all statutory liabilities which are payable by a company in liquidation should be paid as an expense of the liquidation. This has a potentially very wide effect in all liquidations.**

**This edition of the Digest is compiled by Daniel Bayfield and digests material up until 31 March 2000.**

**Lucy Frazer**

## GENERAL NEWS

### **Bankruptcy discharge rules to change?**

A consultation paper has been published, with the backing of Stephen Byers and Gordon Brown, recommending that "honest" bankrupts (those who became insolvent for reasons beyond their control and despite their best efforts) should obtain their discharge after 6 months, whilst bankrupts who deliberately set out to mislead and deceive will not be discharged for up to 15 years. The Government's purpose is to encourage "responsible risk-taking".

### **Directors disqualification orders at all time high**

Almost 1,500 directors were disqualified for unfitness in 1999. This represents an increase of 10% on the 1998 figure. Over the two years 1998 and 1999, of the 2,800 or so disqualification orders made, approximately 60% were for 2-5 years, whereas only 2.5% were for 11-15 years.

### **Individual insolvency register**

The DTI has announced the setting up of an individual insolvency register. The register will be divided so as to contain a bankruptcy register and an IVA register. Searches can be requested (a) in person at any OR's office; (b) by faxing the DTI on 0121 698 4406 or (c) by post (5<sup>th</sup> floor, West Wing, Ladywood House, 45-46 Stephenson Street, Birmingham B2 4UZ). Telephone requests will not be accepted.

### **Shareholder e-greements**

On 16 February 2000 the DTI began a consultation exercise containing proposals intended to allow companies to communicate electronically with their members. The proposals are set out in the draft Companies Act 1985 (Electronic Communications) Order 2000. If the draft Order is enacted, shareholders will be able to access company accounts and reports on a website, rather than receiving hard copies through the post. Proxies could be appointed and votes cast by e-mail.

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## ADMINISTRATION

**Re Douai School Limited** Ch. Div. (Neuberger J).  
Digested at Vol. 5, No. 5. Now reported as **Re a Company No. 005174 of 1999** [2000] 1 WLR 502.  
[Felicity Toube]

**Re FJL Realisations Ltd** *The Times*, 21 March 2000.  
Ch. Div. (Jules Sher QC (sitting as a deputy judge of the High Court)).

Statutory liability for PAYE and NIC relating to the administrators' employment of a company's employees enjoyed the special priority of the expenses of the administration provided for by section 19(5) and (6) of the Insolvency Act 1986, as amended by section 1 of the Insolvency Act 1994, over the general priority of the expenses of the administration.

[Gabriel Moss QC, Glen Davis]

**Re Rhondda Waste Disposal Co. Ltd** *The Times*, 2 March 2000. CA (Henry, Robert Walker LJ, Scott Baker J).

The provision in section 10 of the Insolvency Act 1986 that proceedings could not be brought without leave against a company in administration, applied to criminal as well as civil proceedings. Administration was intended to provide a breathing space while the company sought to achieve certain statutory objectives. That purpose would be hindered if it could be prosecuted without restraint. In the instant case, however, the judge had been wrong to refuse leave for the proposed prosecution.

**Re T & D Industries PLC** Ch Div

Digested at Vol. 6, No. 1. Now further reported at [2000] 1 WLR 646. *Insolvency Intelligence*, Vol. 13, No. 3, March 2000 (page 22)

Skene & Enoch: "Petitions for Administration Orders where there is a need for interim measures: a comparative study of the approach of the courts in Scotland and in England and Wales", [2000] JBL 103.

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## ARBITRATION

**Al-Naimi v Islamic Press Agency Inc** *The Times*, 16 March 2000. CA (Waller, Chadwick LJ).

A court which was not satisfied that the subject matter of an action was covered by an arbitration agreement and should be stayed under section 9 of the Arbitration Act 1996 could still stay the proceedings under its inherent jurisdiction if good sense and litigation management made it desirable for the matter to be referred to arbitration.

**Inco Europe Ltd v First Choice Distribution (a firm)** *The Times*, 10 March 2000; *The Independent*,

15 March 2000; [2000] 1 WLR 586. HL (Lords Nicholls, Jauncey, Steyn, Clyde and Millett).

Since the draftsman of paragraph 37 of Schedule 3 to the Arbitration Act 1996 had not used language apt to achieve the intention of the legislature, it was permissible to read words into section 18(1)(g) of the Supreme Court Act 1981, as amended by section 107 of and Schedule 3 to the 1996 Act, to exclude only appeals to the Court of Appeal from decisions of the High Court under such sections of Part 1 of the 1996 Act as made provision regarding appeals from such decisions, which did not include section 9.

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## BANKING

**Barclays Bank plc v Boulter** HL (Lords Slynn, Nolan, Steyn, Hoffman and Hutton).

Digested at Vol. 6, No. 1. Now further reported at [2000] Lloyd's Rep Bank 29.

**Director General of Fair Trading v First National Bank plc** *The Times*, 14 March 2000; [2000] 1 All ER (Comm) 371. CA (Peter Gibson, Waller, Buxton LJ).

A term in the standard conditions of business on which a bank supplied credit which provided for payment of interest consequent on default was not a provision governing the adequacy of the price or remuneration for the goods or services sold or supplied under the agreement. It therefore fell outside regulation 3(2)(b) of the Unfair Terms in Consumer Contracts Regulations (SI 1994 No. 3159) and had to comply with the requirement of fairness in regulation 4. The term was unfair to the extent that it enabled the bank to obtain judgment against a debtor under a regulated agreement and an instalment order under section 71 of the County Court Act 1984 without the court considering whether to make a time order under section 129 of the Consumer Credit Act 1974, or if it made such an order, whether also to make an order under section 136 of that Act to reduce the contractual interest rate.

**Smith v Lloyds TSB Group plc** QBD (Blofeld J).

Digested at Vol. 6, No. 3. Now further reported at [2000] Lloyd's Rep Bank 58.

[Marion Simmons QC]

Hooley: "Bankers' references and the bank's duty of confidentiality: when practice does not make perfect", [2000] CLJ 21.

Fox: "A bank's entitlement to recover the proceeds of a forged cheque", [2000] CLJ 28.

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## BANKRUPTCY

**Re a Debtor No. SD8/9 of 1998** [2000] BCC 36. Ch.

Div. (Nicholas Stewart QC (sitting as a deputy judge of the High Court)).

The principles propounded in Ladd v Marshall [1954] 1 WLR 1489 for admitting new evidence do not apply on an appeal from a refusal to set aside a statutory demand. However, that does not mean that fresh evidence will automatically be admitted. Having regard to the importance of the evidence and the fact that an explanation was given of why it had not been adduced before and the fact that its introduction on appeal would not prejudice the respondent in the sense of significantly disadvantaging the respondent in dealing with it, the further evidence would be allowed.

**Garrow v Society of Lloyd's** also reported as **Re a Debtor (No. 544/SD/98)** CA (Morritt, Brooke, Robert Walker LJJ).

Digested at Vol. 6, No. 3. Now further reported at [2000] 1 BCLC 103; [2000] Lloyd's Rep IR 38.

[Lexa Hilliard]

**Glenister v Rowe** CA (Butler-Sloss, Thorpe, Mummery LJJ).

Digested at Vol.5, No.3. Now further reported at [2000] Ch. 76.

[Mark Arnold]

**Levy v Legal Aid Board** *The Times*, 16 March 2000; *The Independent*, 20 March 2000. Ch. Div. (Evans-Lombe J).

A debt arising from an order for costs in family proceedings did not come within the ambit of the exception to the definition of a "provable debt" created by r.12.3(2)(a) Insolvency Rules 1986 and therefore might form a valid petitioning debt.

**Mulkerrins v PriceWaterhouseCoopers (a firm)** *The Times*, 29 March 2000. Ch. Div. (Jules Sher QC (sitting as a deputy judge of the High Court)).

Where all or part of a claim vested in a trustee in bankruptcy was held upon trust for the bankrupt personally rather than for the benefit of the bankrupt's creditors, and the trustee in bankruptcy was unwilling or unable to pursue that claim then the bankrupt was entitled, like any other beneficiary, to join the trustee as a co-defendant and commence proceedings in his own name.

[John Briggs]

**Pollard v Ashurst** *The Times*, 16 March 2000. Ch. Div. (Jacob J).

The trustee in bankruptcy of an English Citizen who, at the date of his bankruptcy, had been a joint owner of real property elsewhere in the European Community, was entitled to obtain orders from an English court granting him both vacant possession of the property and the conduct of its sale.

**Regina v P** *The Times*, 29 March 2000. CA (Criminal Division) (Mance, Douglas Brown LJJ,

Sachs J).

A bankrupt would be guilty of an offence under section 362(1)(a) of the Insolvency Act 1986 if, in the two years before petition, he had materially contributed to, or increased the extent of, his insolvency by gambling or by rash and hazardous speculations.

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## COMPANY

**Brownlow v GH Marshall Ltd** *The Independent*, 20 March 2000. Ch. Div. (Richard McCombe QC (sitting as a deputy judge of the High Court)).

The concept of fairness was the criterion by which to judge whether majority shareholders should be ordered to purchase a minority shareholding under sections 459 to 461 of the Companies Act 1985, and conduct which was fair between competing businessmen might not always be fair between members of a family.

**Re Brumark Investments Ltd** *Insolvency Intelligence*, Vol. 13, No. 3, March 2000 (page 22). New Zealand Court of Appeal.

A debenture which was drafted in accordance with New Bullas [1994] 1 BCLC 485 providing for a fixed charge over book debts and a floating charge over the proceeds of book debts, subject to the prior right of the bank to require the proceeds for itself, was held to be a floating charge both over the book debts and their proceeds. New Bullas was distinguished on the basis that the debenture did not contain an express agreement that the fixed charge was released once the company had collected a debt.

**Conti v UeberseeBank AG** Court of Session (Inner House).

Digested at Vol. 4, No. 9. Now reported at *The Times*, 15 March 2000; [2000] BCC 172.

**Re an Inquiry into Mirror Group Newspapers plc** Ch Div. (Sir Richard Scott V-C).

Digested at Vol.5, No.3. Now further reported at [2000] BCC 217.

**Re Rotadata Ltd** [2000] 1 BCLC 122. Ch. Div. (Neuberger J).

The Civil Procedure Rules imposed a duty on the court to manage cases actively and a duty on the parties to agree as much as possible with a view to avoiding the necessity of going to court, or at least minimising the cost of so doing. Those duties were not inconsistent and had to be considered in relation to a section 459 (Companies Act 1985) petition.

**Secretary of State for Trade and Industry v Bottrill** CA (Lord Woolf MR, Peter Gibson, Mantell LJJ).

Digested at Vol.5, No.2. Now further reported at [2000] All ER 915.

**Sphere Drake Insurance plc v Orion Insurance Co plc** *The Independent*, 22 March 2000. CA (Nourse, Brook, Buxton LJJ).

For the purposes of the fraud of a party rule, perjured evidence could, in certain circumstances, be treated as that of a company, even if it had neither been procured or knowingly adopted by the company, nor given by someone who was part of the company's directing mind and will or a person to whom the conduct of the litigation had been delegated. In such a case the correct test was whether the natural person in question had the status and authority which, in law, made his acts in the matter under consideration the acts of the company, so that he was to be treated as the company itself.

Griffin: "Reforming the Constitutional Framework of Companies – The proposals of the Company Law Steering Group", *Palmer's In Company*, Issue 02/00.

Lowry & Edmunds: "The no conflict – no profit rules and the corporate fiduciary: challenging the orthodoxy of absolutism", [2000] JBL 122.

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## CONFLICT OF LAWS

**Afrika v Cape plc** [2000] CLC 45. CA (Pill, Aldous, Tuckey LJJ).

The Court would not refuse a stay (granted on the basis that a foreign court was clearly the more appropriate forum) on grounds that legal aid was not available in that foreign forum, where contingency fee agreements were legal in that forum and the court could not conclude that legal representation would not become available there.

**Agnew v Lansforsakringsbolagens AB** HL (Lords Nicholls, Woolf, Cooke, Hope and Millett).

Digested at Vol. 6, No. 3. Now further reported at [2000] 2 WLR 497; [2000] 1 All ER 737; [2000] 1 All ER (Comm) 321.

**Caltex Trading Pte Ltd v Metro Trading International Inc.** QBD (Comm Ct) (Rix J).

Digested at Vol. 6, No. 3. Now further reported at [2000] CLC 114.

**Credit Agricole Indosuez v Chalease Finance Corp.** CA (Potter LJ, Ferris J).

Digested at Vol. 6, No. 3. Now reported in *The Independent*, 27 March 2000.

**Messier-Dowty Ltd v Sabena SA** CA (Lord Woolf MR, Lord Mustill and Hale LJ).

Digested at Vol. 6, No. 4. Now further reported at *The Times*, 14 March 2000.

**Molins plc v GD SpA** *The Times*, 29 March 2000; *The Independent*, 23 March 2000. CA (Nourse,

Aldous, Potter LJJ).

To make an order for a stay of proceedings in favour of the court first seised of the proceedings under the Brussels Convention, a national court was not to be taken as seised of a cause of action until the proceedings were definitely pending before it. For such purposes, transmission of the writ by fax, permitted under Part 6 of the Civil Procedure Rules constituted good service only if the party to be served had indicated in writing a willingness to accept such service and the fax number to be used.

Fentiman: "Antisuit injunctions and the Brussels Convention", [2000] CLJ 45.

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## CONTRACT

**Close Asset Finance Ltd v Care Graphics Machinery Ltd** *The Times*, 21 March 2000. QBD (Buckley J).

A hire-purchase agreement which contained an option to buy, for a nominal fee, upon payment of the last instalment, was not an agreement to buy.

**Smith v Lindsay & Kirk** *The Times*, 16 March 2000. Court of Session (Lords Rodger, Milligan and Weir).

A stipulation that a contract was not to be enforceable after a certain period of time barred an action for damages for breach of contract and not merely an action for performance.

**Zoan v Rouamba** *The Times*, 7 March 2000. CA (Henry, Chadwick, May LJJ).

As a general rule a document would not be given the meaning for which one party contended merely because the other party knew or suspected at the time that that was what the first party intended the document to achieve.

Clarke: "Interpreting contracts – the price of perspective", [2000] CLJ 18.

Dean: "Removing a blot on the landscape – the reform of the doctrine of privity", [2000] JBL 143.

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## CORPORATE INSOLVENCY

**Re Bellmex International Ltd (in liquidation), Bellmex International Ltd (in liquidation) v British American Tobacco** *The Times*, 31 March 2000. Ch. Div. (Evans-Lombe J).

The court dismissed the liquidator's application for a private examination of the Respondent's regional manager and for delivery up of papers with indemnity costs. The court could imagine circumstances in

which a liquidator might wish to use section 236 of the Insolvency Act 1986 against the background of proofs of debt (for example multiple proofs). However, there was substantial authority under the predecessors of section 236 (namely section 25 of the Bankruptcy Act 1941 and section 268 of the Companies Act 1948) that such orders were on the extremity of the court's powers and should only be made when the liquidator had shown a clear necessity for the order. In the present case, the liquidator had failed to show any such necessity. At any stage after the Respondent had submitted its proof of debt, it was open to the liquidator to reject it. The burden would then have rested upon BAT to provide evidence to establish the existence of the debt. The application was not appropriate.

**[Robin Dicker]**

**Re a Company No. 007356/98** [2000] BCC 214. Ch. Div. (Hart J).

A person who claimed to be a creditor and who elected to pursue his claim by the machinery of a petition for the winding-up of the alleged debtor company rather than by issuing a writ (or claim form) ran the risk that in the course of that process the alleged debtor would be able to prove in a manner sufficient for the court that the procedure adopted was inappropriate because of the existence of a bona fide dispute as to the debt. Having embarked on the course of serving a statutory demand the respondent ran the risk of finding itself in a position where it wished to halt a train that it had put in motion itself. That could only be done by giving the appropriate undertaking and submitting to an order to pay the costs incurred by the applicant in making the application to restrain the respondent from advertising the petition.

**Re Continental Assurance Company of London plc.** Ch. Div. (Carnwath J).

Digested at Vol. 5, No. 1. Now reported at [2000] BCC 65.

**[Gabriel Moss QC, Stephen Atherton, Felicity Toube]**

**Coutts & Co. v Stock** Ch. Div. (Lightman J).

Digested in Vol. 6 No. 1. Now reported at [2000] BCC 247; [2000] Lloyd's Rep Bank 14.

**Re Equity Nominees** [2000] BCC 84. Ch. Div. (Neuberger J).

The Insolvency Rules provided a procedure by which a liquidator or trustee in bankruptcy could resign by calling a meeting of creditors at which he would account for his stewardship and it would then be for the creditors to decide whether to accept his resignation; if they resolved not to accept his resignation he could apply to the court for leave to resign. The courts at their discretion had been prepared to bypass these procedures and to make orders removing an insolvency practitioner from

multiple offices and appointing an appropriate replacement from the same firm in certain circumstances. Where the courts were satisfied that no useful purpose would be served by calling creditors' meetings under the Insolvency Rules, they had adopted the practical and sensible "short-cut procedure", avoiding the statutory resignation procedure. As a safeguard to the short-cut procedure, the court would make an order granting, in respect of each insolvency, liberty to apply within a specified period to the creditors to vary or discharge the order removing the relevant office-holder and replacing him with a named partner in his former firm.

**Hollicourt (Contracts Ltd) v Bank of Ireland** Ch. Div. (Blackburne J).

Digested at Vol.6, No.1. Now further reported at [2000] BCC 237; [2000] Lloyd's Rep Bank 21.

**[David Marks]**

**Re Latreefers Inc** CA (Morritt, May LJJ, Wall J). Digested at Vol. 6, No. 2. Now reported at *The Times*, 15 March 2000.

**[Gabriel Moss QC, Martin Pascoe]**

**Re Maple Environmental Services Ltd** [2000] BCC 93. Ch. Div. (Judge Boggis QC (sitting as a judge of the High Court)).

In a CVA a supervisor held the funds he received on trust for the bound creditors. Where the CVA was followed by a liquidation, the devolution of the funds held by the supervisor depended on whether the trust had come to an end. If the petition was brought by the supervisor, it necessarily followed that the scheme had come to an end. If the petition was brought by someone else and there was no breach of the scheme, the scheme continued and the trust was not broken. But, if the petition was brought by someone else and the scheme had been broken so that the supervisor might have brought the petition, it depended on the circumstances, the terms of the scheme, the conduct of the bound creditors and the legislation to decide what implications were to be drawn as to the state of the trust.

**Re Toshoku Finance UK plc, The Commissioners of Inland Revenue v Kahn** *The Times*, 29 March 2000. CA (Sir Richard Scott V-C, Chadwick, Buxton LJJ).

Corporation tax chargeable on a company's post liquidation profits, including income which it would never receive but which it was required by statute to bring into the computation, was payable by the liquidator out of the company's assets as an expense incurred in the winding-up and in priority to the claims of creditors. (*Re Kentish Homes Ltd* [1993] BCC 212 overruled.)

**[Mark Phillips QC, Felicity Toube]**

**Re TransTec Automotive (Campsie) Limited** unreported, 31 March 2000. Ch. Div. (Jacob J).

On an application for the appointment of a provisional liquidator of a company in receivership, where the receivers had threatened to shut down the company's business unless the applicant paid a large sum to the receivers based on the potential loss to the applicant as the sole customer of the company, the central question was whether the receivers' actions were legitimate. The receivers' actions were legitimate where what they were in effect seeking a high price from a purchaser whom they knew particularly wanted what they had to sell. Permission to appeal was given.

**[Gabriel Moss QC, Robin Dicker]**

Dawson: "Equity prevails – Re Southern Equities Corporation considered", *CCH Company Law Newsletter*, Issue 49, 7 March 2000.

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## COSTS

**BCCI SA (in liquidation) v Ali** *The Times*, 2 March 2000. Ch. Div. (Lightman J).

The relevant principles governing costs in the Civil Procedure Rules made it apparent that the overriding objective of the court was to make the order which justice required.

**[Richard Sheldon, Adam Goodison]**

**Cormack v Washbourne (a firm)** *The Times*, 30 March 2000; *The Independent*, 31 March 2000. CA (Nourse, Auld, Tuckey LJJ).

The discretion under section 51 of the Supreme Court Act 1981 to order a non-party to pay costs should only be exercised where the judge considered that the circumstances of the case were sufficiently exceptional to warrant it. In the absence of exceptional circumstances it could not be reasonable and just for a claimant who had succeeded in his negligence action to be awarded a non-party costs order against the Defendant's professional indemnity insurer in an amount that exceeded the financial limit of the indemnity.

**Ford v GKR Construction Ltd** [2000] 1 All ER 802. CA (Lord Woolf MR, Pill, Judge LJJ).

In exercising his discretion on costs, a judge was required to take into account all relevant aspects of the litigation, including late disclosure, late service of evidence or the development of unanticipated contentions, the stage in the litigation when such events had occurred, their nature and their effect on the outcome. He should consider whether or not the parties had conducted the litigation in accordance with a system of civil litigation which was designed to enable the parties to know where they stood at the earliest possible stage, and at the lowest practicable cost, so that they might make informed decisions about their prospects and the sensible conduct of their cases.

**Gardiner v FX Music Ltd** *New Law Online* (27 March 2000). Ch. Div. (Geoffrey Vos QC (sitting as a deputy judge of the High Court)).

Neither exceptional circumstances nor impropriety were a pre-condition to exercise of the section 51 (Supreme Court Act 1981) power. Where a sole or guiding director had the management of litigation for or against an insolvent company and acted improperly in conducting the litigation an order could be made under section 51. Sufficient impropriety would be shown if the director deliberately pursued a concocted claim or defence knowing it to be false, or swore false evidence in support of such a claim or defence.

**Gwembe Valley Development Co Ltd (in receivership) v Koshy (No. 2)** *The Times*, 30 March 2000. Ch. Div. (Rimer J).

The discretion of the court under the Civil Procedure Rules to make an order for costs other than one which followed the event was substantially the same as in *Re Elgindata (No. 2)* ([1992] 1 WLR 1207, 1214). The rules had merely been more specific as to the factors which the court ought to consider when contemplating making such an order.

**Levand v Barasch** *The Times*, 23 March 2000. Ch. Div. (Lightman J).

Security for costs could not be ordered as a matter of course against a claimant ordinarily resident out of the jurisdiction under rule 1(1) of Order 23 of the Rules of the Supreme Court in Schedule 1 to the Civil Procedure Rules. The existing case law on orders for security for costs was no longer applicable; the single criterion for ordering security was for the court to consider what was just in the circumstances of the case. The existence of assets within the jurisdiction was relevant as were the fixity and permanence of those assets.

**National Justice Compania Naviera SA v Prudential Assurance Co. Ltd ("The Ikarian Reefer") (No. 2)** CA (Simon Brown, Waller, Tuckey LJJ).

Digested at Vol.6, No.2. Now further reported at [2000] 1 WLR 603; [2000] Lloyd's Rep IR 230.

**Sony Music Entertainment Inc v Prestige Records Ltd** *The Times*, 2 March 2000. Ch. Div. (Lloyd J).

An appeal to a High Court judge from an order for costs made by the master was a rehearing at which the judge was free to exercise his own discretion *de novo*. Whether the costs claimed by a successful party were proportionate to the matters in dispute was, however, a question best reserved to the costs judge.

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## DAMAGES

**Alcoa Minerals of Jamaica Inc v Broderick** *The Times*, 22 March 2000. PC (Lords Slynn, Mackay,

Jauncey, Hope and Clyde).

Where a plaintiff was unable to pay to repair damage caused to his property by the defendant's nuisance and between the damage occurring and judgment the cost of repairs quadrupled because of inflation, the plaintiff was entitled to recover as damages the value of the cost of repair at the date of judgment.

**Kuddus v Chief Constable of Leicestershire** *The Times*, 16 March 2000. CA (Beldam, Auld LJ, Sir Christopher Staughton).

Misfeasance in public office was not a tort for which exemplary damages would have been awarded prior to 1964. Accordingly, it did not fall within the category of causes of action to which the House of Lords in Rookes v Barnard ([1964] AC 1129) had limited the award of exemplary damages.

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## DIRECTORS AND DISQUALIFICATION

**Re Barings plc (No. 4), S/S for Trade and Industry v Baker** *The Independent*, 9 March 2000. CA (Morritt, Waller, Mummery LJ).

The standard of competence to be shown by a person as a company director was a question of law on which evidence of an expert could only occasionally be admissible. Where the allegation was incompetence without dishonesty, the incompetence had to be demonstrated to a high degree. A finding of breach of duty was neither necessary nor of itself sufficient for a finding of unfitness.

**Re Deaduck Ltd (in liquidation), Baker v S/S for Trade and Industry** [2000] 1 BCLC 148. Ch. Div. (Neuberger J).

When considering whether the conduct of a director was such as to justify his disqualification, the court was limited to the conduct the subject of the charge. The registrar should not have taken into account a factor which had not been (1) fairly supported on the evidence and, (2) spelt out sufficiently specifically to afford the director a reasonable opportunity to deal with it. In considering disqualification applications under the 1986 Act where the director had not been guilty of dishonest or commercially flagrantly culpable behaviour, there were two competing factors to be balanced: (1) the protection of the public against someone who had been found liable in respect of a charge which constituted conduct as a director which made him unfit to be concerned in the management of a company and, (2) the fact that it would involve going further than the Company Directors Disqualification Act 1986 Act or relevant authorities contemplated, if every time a director was found to have failed in his duty, he was liable to be disqualified. [Lloyd Tamlyn]

**Re Launchexcept Ltd, S/S for Trade and Industry v Tillman** [2000] 1 BCLC 36. CA (Chadwick, Clarke LJ, Sir Iain Glidewell).

On a director's application to strike out disqualification proceedings on grounds of *res judicata*, in circumstances where an earlier application had been made to disqualify the director in relation to his conduct as director of a different company, the proper approach was to ask whether the course adopted by the Secretary of State in relation to the earlier proceedings was such that it would be manifestly unfair to the director to allow the instant proceedings to continue against him, or alternatively, whether a refusal to strike out or stay the instant proceedings would bring the administration of justice into disrepute amongst right thinking people.

**Official Receiver v Pafundo** CA (Simon Brown, Waite and Morritt LJ).

Digested at Vol. 3 No. 4. Now reported at [2000] BCC 164.

**Shuttleworth v S/S for Trade and Industry. Re Dawes and Henderson (Agencies) Ltd** [2000] BCC 204. Ch. Div. (Sir Richard Scott V-C).

On an application under section 17 of the Company Directors Disqualification Act 1986 for leave of the court for the applicant to act as a director of a company, the importance of protecting the public from the conduct which led to the disqualification and the applicant's need had to be balanced against each other. In a case where no need had been demonstrated on the company's part to have the applicant as its director or, from a business point of view, on the applicant's part to be a director, there would have to be only a very small risk to the public which the granting of the leave might produce to justify the refusal of the application.

Griffin: "Identifying the characteristics of a de facto director", *Butterworths Disqualification Newsletter*, Number 7, March 2000.

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## INSURANCE

**J W Bollom & Co. Ltd v Byas Mosley & Co. Ltd** [2000] Lloyd's Rep IR 136. QBD (Commercial Ct) (Moore-Bick J).

One of the duties of an insurance broker was to take reasonable steps to ensure that his client understood the basis on which the insurance was written and the consequences of under-insurance. However, brokers were not professional valuers and were not required to advise their clients what value should be placed on any particular item of property.

**Harding Maughan Hambly Ltd v Cie Europeenne de Courtage d'Assurance et de Reassurance SA** [2000] 1 All ER (Comm) 225. QBD (Rix J).

Where the court faced two rival claimants for the same

commission, it might have to determine which of the agents was the effective cause of the transaction because to hold that both were might lead to the client having to pay both agents a full commission. However, where numerous brokers are involved in a chain, as occurred frequently in insurance broking, the test could not be simply that of the effective cause, as such a rule could not do justice to the complexities of the situation.

**Virk v Gan Life Holdings plc** [2000] Lloyd's Rep IR 158. CA (Henry, Potter LJJ).

In a case concerning the commencement of the running of the limitation period in relation to a claim made under critical illness insurance, it was common ground that a contract of indemnity insurance was an agreement by the insurer to confer on an insured a contractual right to indemnity which on the face of it came into existence immediately when loss was suffered by the happening of the event insured against. The cause of action did not accrue under a liability policy until the liability of the insured had been established by judgment, arbitration or binding settlement. However, in respect of other types of insurance policy, including property, life, marine and other forms of insurance, the law has long been that, because an insurance policy was to be construed as insurance against the occurrence of an insured event, the occurrence of that event was treated as equivalent to a breach of contract by the insurer. Accordingly, in the absence of policy terms affecting the matter, the limitation period began to run as soon as the insured event occurred even though no claim had been made.

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## INTERNATIONAL INSOLVENCY

Segal: "Corporate recovery and rescue – Mastering the key strategies necessary for successful cross border workouts – Part1", *Insolvency Intelligence*, Vol. 13, No. 3, March 2000 (page 17).

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## LIMITATION

(See **Pye v Graham** below under the heading "Property".)

(See **Virk v Gan Life Holdings plc** above under the heading "Insurance".)

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## PARTNERSHIP

**Flynn v Robin Thompson & Partners (a firm)** *The Times*, 14 March 2000. CA (Kennedy, Thorpe,

Mance).

An assault alleged to have been carried out in the court precincts by a solicitor, a partner in his firm, on an opponent bringing an action against the firm, could not be said to be the act of a partner acting in the ordinary course of business of his firm or with the authority of his co-partners within section 10 of the Partnership Act 1890. A lesser assault alleged to have taken place in court as a result of which no loss was sustained might technically come within section 10 but it was not reasonable to allow that issue to go to trial, applying the principle of proportionality as required by paragraph 1.3.5 in *Civil Procedure*.

**Hurst v Bryk** *New Law Online*, 30 March 2000. HL (Lords Browne-Wilkinson, Nicholls, Hope, Clyde, Millett).

The decision of the courts below that the dissolution of the partnership was brought about by the Claimant's acceptance of his partners' repudiatory breach of contract, rather than by mutual agreement, was not challenged but was at least doubtful. It was strongly arguable that the doctrine of repudiatory breach could not bring about the automatic dissolution of the partnership relationship. Whatever the ground for dissolution, the claimant remained liable to contribute to the accrued and continuing liabilities of the firm pending the completion of the winding up of its affairs. His liability to contribute had accrued before any breach of the partnership agreement occurred and had not been caused by the partners' breach. The Claimant was entitled to damages if he could show that the dissolution of the firm had caused loss which he would not otherwise have sustained, but he could not avoid his joint liability to creditors of the firm arising from transactions entered into while he was a partner nor, without rescinding the partnership contract ab initio, throw his proportionate share of that liability onto his partners.

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## PROCEDURE

**Amerada Hess v Rome** *The Times*, 15 March 2000. QBD (Colman J).

Where a claimant had conscientiously tried to effect the service of a writ or claim form within the time limit but that service had been ineffective, the court would exercise its discretion to grant an extension of time for service.

**Annodeus Ltd v Gibson** *The Times*, 3 March 2000. Ch. Div. (Neuberger J).

Relevant factors to consider on a strike-out application (CPR 3.4(2)) include: the length of the delay; any excuses for the delay; the extent to which the claimant had complied with the rules and any orders of the court; the prejudice to the defendant; the effect on the trial; the effect on other litigants; the extent, if any, to which the defendant had contributed to the delay; the

conduct of the claimant and the defendant with regard to the litigation; and any other relevant factors.

**Attorney-General v Barker** *The Times*, 7 March 2000. CA (Lord Bingham CJ, Klevan J).

Before the court could make a vexatious litigant order it had to be satisfied that the statutory precondition was fulfilled: that the person against whom the order was sought had habitually and persistently and without any reasonable ground instituted vexatious civil proceedings or made such applications, whether in the High Court or any inferior court, and whether against the same or different persons. Where that condition was not satisfied the court had no discretion to make the order, under section 42(1) of the Supreme Court Act 1981; where it was satisfied the court had a discretion, but was not obliged to do so.

**Commissioners of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others** *The Times*, 7 March 2000. QBD (Lightman J).

The criterion for considering an application for the extension of time for service of a notice of appeal had fundamentally changed under the new Civil Procedure Rules. The application had to be viewed by reference to the underlying principle of fairness and justice. In applying the criterion of justice several factors had to be taken into account. Those factors include: the length of the delay; the explanation for the delay; the prejudice caused by the delay to the other party; the merits of the appeal; the effects of the delay on public administration; the importance of compliance with time limits bearing in mind that they are there to be observed; and the resources of the parties.

**DnB Mortgages Ltd v Bullock & Lees (a firm)** *The Times*, 24 March 2000. CA (Henry, Robert Walker LJ, Scott Baker J).

An application to raise a new point on appeal should not be entertained where it could not be established beyond doubt that the facts, if fully investigated, would be found to support the new point.

**Federal Bank of the Middle East v Hadkinson** *The Times*, 16 March 2000; *The Independent*, 14 March 2000. CA (Nourse, Pill, Mummery LJ).

A Mareva injunction in the standard form applied only to freeze assets belonging to a defendant and which were available to satisfy the claim made against him. Assets held by the defendant as a bare trustee and in which he had no beneficial interest did not come within the scope of such an order.

**Foley v A-G** *The Times*, 7 March 2000. CA (Peter Gibson, Schiemann LJ, Wilson J).

A contention that a vexatious litigant application (Supreme Court Act 1981, section 42) made by the Treasury Solicitor acting on behalf of the Attorney-General lacked authority was a preliminary point which should be taken by early interlocutory

application to stay the proceedings. It was for the person challenging the solicitor's authority to lead evidence to support that assertion.

**Jolly v Hull** *The Times*, 10 March 2000. CA (Peter Gibson LJ, Ferris J).

An order enforceable by committal should be endorsed with or incorporate a penal notice but a county court, as a matter of discretion, was empowered to proceed to consider a proper notice of application to commit notwithstanding the absence of a penal notice on the order.

**Morris and others v. Bank of America National Trust** CA (Morritt, Brooke, Sedley LJ).

Digested at Vol. 6, No. 1. Now reported at [2000] 1 All ER 954.

**[Richard Sheldon QC, Robin Dicker, Fidelis Oditah]**

**SEA Assets Ltd v PT Garuda Indonesia** *Unreported* (29 February 2000) Ch. Div. (Longmore J).

It does not follow that the effect of the Companies Act 1985 provisions dealing with overseas companies with a branch in England is that service can only be affected on such companies in accordance with section 694A. Rule 6.2(2) of the Civil Procedure Rules provides that a company may be served by any method permitted under Part 6 of the CPR as an alternative to that set out in section 694A. Rule 6.6 CPR distinguishes between a "company registered in England and Wales" and "any other company or corporation". An overseas company with a branch in England and Wales which complies with its obligations to submit particulars and documents to the registrar of companies remains an overseas company and is not a company "registered in England and Wales" for the purposes of rule 6.6 CPR.

**[Robin Dicker]**

**Smith v Probyn** *The Times*, 29 March 2000. QBD (Morland J).

Service of a claim form on solicitors in the mistaken belief that they were authorised to accept service would not justify an extension of time for service under rule 7.6(3)(b) of the Civil Procedure Rules where no written notification had been obtained from the solicitors as required for such service by rule 6.4(2) that they were so authorised and where there was nothing to prevent personal service on the defendant.

**Sweetman v Shepherd** *The Times*, 29 March 2000. CA (Kennedy, May LJ).

The rule in Henderson v Henderson ((1843) 3 Hare 100) which required a party to litigation to bring forward his whole case, should not be extended to prevent a defendant from bringing a subsequent action when he could have claimed indemnity or contribution in earlier proceedings in which he was sued with a co-

defendant.

**Trustor AB v Smallbone** [2000] 1 All ER 811. Ch. Div. (Rimer J).

When the court considered an application for a secret hearing or judgment, the guiding principle was whether secrecy was necessary to do justice in a particular case.

Jolowicz: "Practice Directions and the Civil Procedure Rules", [2000] CLJ 53.

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## PROPERTY

**Burton v Camden London Borough Council** HL (Lords Browne-Wilkinson, Nicholls, Steyn, Hobhouse and Millett).

Digested at Vol. 6, No. 3. Now further reported at [2000] 1 All ER 943.

**Mortgage Corporation v Shaire** *The Times*, 21 March 2000. Ch. Div. (Neuberger J).

Under section 15 of the Trusts of Land and Appointment of Trustees Act 1996, the court had a wider discretion than previously when deciding whether to order the sale of a home at the suit of a chargee. That increased flexibility was to the benefit of families and to the detriment of banks and other chargees.

**Pye v Graham** *The Times*, 14 March 2000. Ch. Div. (Neuberger J).

The fact that a squatter had orally communicated his preparedness to take a licence of the land he occupied did not necessarily prevent time running in his favour for the purposes of acquiring title by adverse possession. However, it was a factor which could be invoked by the owner to assist his contention that the squatter did not have the requisite intention to possess at and around the time the request was made.

**R v Caradon District Council, ex parte Knott** *The Times*, 3 March 2000. QBD (Sullivan J).

Where a planning authority had already issued rectification and discontinuance notices to a property owner for the dismantling of building works and there was no dispute about removal of the works, the further issue of an enforcement notice, in relation to which no compensation could be claimed, was decision without a proper planning purpose.

**Skipton Building Society v Bratley and Stott** [2000] 1 All ER (Comm) 257; [2000] Lloyd's Bank Rep 34. CA (Evans, Potter LJJ, Alliot J).

A guarantor might be discharged by a variation in the terms of the contract of guarantee made without his consent, but a creditor's failure to obtain the proper value of a security which he sold instead reduced pro tanto the amount for which the guarantor was liable.

The correct approach was to assess the market value and then to compare it with the amount recovered by the creditor. The assessment of the market value was an issue of historic fact which had to be established on the evidence by whichever party had the burden of proof.

Tee: "A merry-go-round for the Millennium", [2000] CLJ 23.

Dixon: "The non-proprietary lease: the rise of the feudal phoenix", [2000] CLJ 25.

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## RECEIVERS

**Medforth v Blake** CA (Sir Richard Scott V-C, Swinton Thomas, Tuckey LJJ).

Digested at Vol. 5, No. 4. Now further reported at [2000] Ch. 86.

**Triffit Nurseries v. Salads Etc. Limited** CA (Lord Woolf MR, Robert Walker LJ and Smith J)

The Court of Appeal affirmed Longmore J and rejected the growers' proprietary claim to the proceeds of sale of their produce sold by a marketing company which had gone into receivership

Longmore J's judgment is digested at Vol 5, No. 1.

[**Simon Mortimore QC**]

(See also *Re TransTec* above under the heading "Corporate Insolvency".)

Sealy: "Mortgages and receivers – a duty of care resurrected and extended", [2000] CLJ 31.

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## TORT

**Aneco Reinsurance Underwriting Ltd (in liquidation) v Johnson & Higgins Ltd** [2000] Lloyd's Rep IR 12. CA (Evans, Aldous, Ward LJJ).

In seeking damages for negligence, a claimant was required to satisfy two separate requirements; first to prove that he has suffered loss, and secondly, to prove that the loss fell within the scope of the duty he was owed. The fact that a claimant would not have entered into a contract if the information or advice he received from the defendant and acted upon had not been negligent, did not mean that the defendant was liable for the whole of the loss. He was liable only for that part which could be regarded as a consequence of the advice or information being wrong. There had to be a sufficient factual connection between the loss in question and the wrongfulness of the advice or information.

**Hamilton v Al Fayed** *The Times*, 28 March 2000. HL (Lords Browne-Wilkinson, Steyn, Cooke, Hope and

Clyde).

Section 13 of the Defamation Act 1996, in allowing a person whose conduct in proceedings in Parliament was in issue in defamation proceedings to waive the protection of parliamentary privilege so far as it concerned him, had the effect of allowing the challenging in the defamation proceedings of evidence given to parliamentary committees without it being regarded as infringing the autonomous jurisdiction of Parliament.

**Holbeck Hall Hotel Ltd v Scarborough Borough Council** *The Times*, 2 March 2000. CA (Stuart-Smith, Schieman, Tuckey LJJ).

The owner or occupier of land forming the lower part of a cliff owed a measured duty of care to prevent danger to higher land from lack of support due to erosion from natural causes, where the owner or occupier of the lower land knew, or was presumed to know of the defect or condition on his land giving rise to the danger, and where it was reasonably foreseeable that the defect or condition would, if not remedied, cause damage to the higher land. Only a patent defect gave rise to such liability. The landowner or occupier was not to be held liable for latent defects discoverable only upon further inspection.

**Regan v Taylor** *The Times*, 15 March 2000. CA (Henry, Chadwick, May LJJ).

A solicitor was covered by qualified privilege when he made statements to the press attacking a person who had attacked his client, even though his client had not expressly authorised him to do so.

**Sasea Finance Ltd v KPMG (a firm)** [2000] 1 All ER 676. CA (Kennedy, Aldous, Mantell LJJ).

Where a company's auditors discovered that a senior employee had been defrauding the company on a massive scale and that employee was in a position to continue doing so, the auditors would normally have a duty to report the discovery to the management immediately, not merely when rendering their report. Moreover, if the auditors suspected that the management might be involved in, or was condoning fraud or other irregularities, the duty to report overrode the duty of confidentiality and the auditors would have to report directly to a third party without the management's knowledge or consent.

**Standard Chartered Bank v Pakistan National Shipping Corporation** *The Times*, 15 March 2000, [2000] CLC 133; [2000] Lloyd's Rep Bank 40. CA (Evans, Aldous and Ward LJJ).

An action for deceit against the director of a company, on the basis of false representations made by him, required proof that he made the false statements and that the claimant relied on those statements as being made by him. Moreover, there had to be an assumption of responsibility such as to create a special relationship by the claimant with the director.

**Zanzibar v British Aerospace (Lancaster House) Ltd** *The Times*, 28 March 2000. QBD (Judge Jack QC (sitting as a deputy judge of the High Court)).

Where a right to rescission had been established, section 2(2) of the Misrepresentation Act 1967 gave the court a power to declare the contract subsisting and, if it was equitable to do so, to award damages.

O'Sullivan: "Nuisance, local authorities and neighbours from hell", [2000] CLJ 11.

Campbell: "Of coase and corn: a (sort of) defence of private nuisance", [2000] MLR 197.

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## TRUSTS

**Canary Wharf Contractors (DS6) Ltd v Niagara Mechanical Services International Ltd (in administration)** New Law Online, 28 March 2000.

Ch. Div. (Ferris J).

A debtor may make a payment to his creditor and impress the payment with a requirement that it be applied not in satisfaction of the indebtedness but for a particular purpose. The creditor will hold the payment on a Quistclose trust. The existence of the specific purpose will give rise to a fiduciary relationship which will prevent the pre-existing debt being set-off against the fiduciary obligation to repay.

[David Marks]

**Yaxley v Gotts** CA (Beldam, Robert Walker, Clarke LJJ).

Digested at Vol. 5, No. 5. Now further reported at [2000] 1 All ER 711.

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## VOLUNTARY ARRANGEMENTS

**Re Brelec Installations Ltd**, Ch Div (Blackburne J) *Unreported*, 11 April 2000

A proposal for a voluntary arrangement should be construed in a practical fashion. Whether trusts of a voluntary arrangement have failed depends on the terms of the particular arrangement. On the terms of this particular arrangement, the trusts had not failed.

[Glen Davis]

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## SEMINARS

John Briggs gave a talk on recovering the assets in bankruptcy at a seminar organised by Jordans at the Forte Posthouse, Regent's Park on 28 March 2000.

[John Briggs]

Mark Phillips QC gave a talk on Insolvency Law Reform at the Insolvency Lawyers Association weekend on 11 March 2000.

**[Mark Phillips QC]**

Gabriel Moss QC gave a talk about recent developments in English and cross-frontier insurance insolvency at Mealey's Insurance Insolvency Roundtable in Scottsdale, Arizona on 13 April 2000.

**[Gabriel Moss QC]**

*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. © 2000.*

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