

3~4 Digest

A Monthly Review of Relevant News, Cases and Articles

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It appears to be the time of year for BCCI applications. In December 1999 the Court of Appeal dismissed a strike out application made by the Bank of America against the BCCI Liquidators (represented by Richard Sheldon QC, Robin Dicker and Fidelis Oditah). Meanwhile this month sees the hearing of the appeal to the House of Lords in Three Rivers District Council v Bank of England, the case brought by the BCCI Liquidators against the Bank of England for misfeasance in public office. Mark Phillips QC and Ben Valentin are acting for the Bank and Richard Sheldon QC and Robin Dicker are acting for BCCI.

Chambers is sorry to see its senior clerk, Jason Pithers, leave Chambers to head off to the States after an admirable 15 year long career. We wish him all the best. We are very pleased to welcome Paul Cooklin from 3 Verulam Buildings as the new senior clerk. Chambers welcomes William Trower and Barry Isaacs back after 8 months in Bermuda on the Bermuda Fire and Marine case.

This digest has been compiled by Lucy Frazer and David Allison and digests material up until 31 December 1999.

Lucy Frazer

GENERAL NEWS

The Insolvency Bill

The House of Commons Trade and Industry Select Committee in its 1999-2000 Second Report, Draft Insolvency Bill, has been critical of the way in which the draft legislation has been handled and some of its content. The specific areas of concern included the proposed CVA moratorium, the proposed warning notice for the appointment of an administrative receiver, and the proposed method by which the Secretary of State accepts disqualification undertakings from a director equivalent to a disqualification imposed by the Court.

ICAEW asks for an end of Crown preference in insolvency

The ICAEW, in its comments on the DTI/Treasury interim report *A Review of Company Rescue and Business Reconstruction Mechanisms*, states that the removal of the Crown's preference in insolvency would encourage more company rescues.

Reformation of the process of merger decisions

The Government has issued a consultation document which contains proposals to minimise political involvement in merger decisions and clarify the decision-making process to the benefit of business and the consumer.

Proposed listing rule changes to encourage high growth companies

A new concessionary route to listing for innovative high growth companies, without the normal three year trading record is proposed by the London Stock Exchange in a recent consultation document.

ADMINISTRATION

Biosource Technologies Inc v Axis Genetics plc *The Times*, 25 November 1999. Ch Div (Ferris J).

There was no basis on which to restrict the application of section 11(3)(d) of the Insolvency Act 1986 which prohibited the prosecution of proceedings against a company in administration without the leave of the court, to actions brought by creditors of that company.

[Andreas Gledhill]

In Re T and D Industries plc *The Times*, 23 November 1999. Ch Div (Neuberger J).

An administrator appointed under section 8(3) of the Insolvency Act 1986 could dispose of any of the assets of a company without the leave of the court prior to the approval of his proposals by the company's creditors.

[Richard Adkins QC]

Elboz, "T & D Industries plc – the seven principles – new guidance for administrators in disposing of assets", *IL&P*, Vol.15, No.6, 183.

ARBITRATION

Allianz Versicherungs AG v Fortuna Co Inc QBD Digested at Vol.5, No.4. Now further reported at [1999] 1 WLR 2117.

Andrews v Bradshaw *The Times*, 11 October 1999. CA (Nourse, Mantell and Mance LJJ).

Irritation and lack of patience shown by an arbitrator appointed to resolve a building dispute that caused him to write ill-judged letters to one of the parties and to make an apparently misguided order against that party as to costs did not justify the arbitrator's removal for partiality under section 24(1) of the Arbitration Act 1996.

Harbour and General Works Ltd v Environmental Agency *The Times*, 22 October 1999. CA (Waller and Tuckey LJJ).

A party's failure properly to read a contractual provision relating to the time limit for commencing an arbitration was not a circumstance which triggered the court's power under section 12(3)(a) of the Arbitration Act 1996 to permit an extension of time for bringing arbitration proceedings.

Wealands v CLC Contractors *The Times*, 5 October 1999. CA (Nourse, Mantell and Mance LJJ).

Under the terms of an arbitration agreement in standard form between a contractor and a sub-contractor, the arbitrator had jurisdiction to make an award for contribution under the Civil Liability (Contribution) Act 1978.

BANKING

Barclays Bank plc v Boulter *The Times*, 26 October 1999; [1999] 4 All ER 513. HL (Lords Slynn, Nolan, Steyn, Hoffman and Hutton).

Where a person claimed to have been induced to execute an instrument in favour of a bank by the misrepresentations and undue influence of a third party, the burden was on the person making the claim to show that the bank had constructive notice of the misrepresentations and undue influence.

Barings plc v Coopers & Lybrand *Unreported*, 15 December 1999. Ch Div (Evans-Lombe J).

Information read by the Judge in the course of a trial of Company Directors Disqualification Act proceedings was 'available to the public' within the meaning of section 82 (2) of the Banking Act 1987 (applying *SmithKline Beecham Biologicals S.A v Connaught Laboratories Inc*. [1999] 4 All ER 498.)

[Mark Phillips QC, Jeremy Goldring]

Christofi v Barclays Bank plc CA

Digested at Vol. 5, No. 5. Now further reported at [1994] 4 All ER 437. CA

Stimpson v Smith CA

Digested at Vol. 5, No. 3. Now further reported at [1999] Ch 340.

BANKRUPTCY

Hofer v Strawson [1999] BPIR 501. Ch Div (Neuberger J).

For the purposes of rule 6.5(4) of the Insolvency Rules 1986 the defendant was entitled to seek to rely upon a counterclaim even though it would not provide a defence to an action on the cheque.

Jones v Patel and London Borough of Brent [1999] BPIR 509. Ch Div (Englehart QC)

By the time he was made bankrupt P had acquired pension rights (albeit that no payment of pension would be made until certain specified events) and those rights, including any discretionary payments by way of enhancement vested in J as his trustee in bankruptcy save to the extent that they comprised (a) the guaranteed minimum pension to which P would be entitled on reaching State pensionable age and (b) benefits attributable to P's post bankruptcy service.

Judd v Brown CA

Digested at Vol. 5, No. 1. Now further reported at [1999] BPIR 517.

[Richard Hacker QC, Barry Isaacs]

R v Lord Chancellor, ex p Lightfoot [1994] 4 All ER 583 CA (Simon Brown, Chadwick LJ and Rattee J).

Articles 8(1) and 9(b) of the Insolvency Fees Order 1986, which provided that a petition could only be presented on payment of a deposit of £250 as security against the fees which the official receiver would incur in examining the debtor's affairs and administering his assets, did not interfere with the right of access to the court. That deposit was not a fee for such access but rather one towards the costs of services provided by others for the debtor's benefit and which were essential to the fair working of the rehabilitation scheme by guarding the proper interests of creditors.

McAllister v The Society of Lloyds Ch Div

Digested at Vol. 5.1. Now further reported at [1999] BPIR 548.

[John Briggs]

Mond v Hyde CA

Digested at Vol. 4, No. 7. Now further reported at [1999] QB 1097.

Miller, "Applications by a trustee in bankruptcy for sale of the family home." IL&P Vol.15, No.6, 176

COMPANY

Re Advantage Healthcare *Unreported*, 19 November 1999 Ch Div (Lightman J).

The issue in this case was whether the identity of a company lies in its name or number and whether a registrable charge was void for non-registration where the charge was registered under the correct name but incorrect number. It was held that the charge was validly registered although a person misled by the incorrect number could sue the person responsible for the error.

[Fidelis Oditah]

In Re Blenheim Leisure (Restaurants) Ltd (No 2) *The Times*, 8 October 1999. Ch Div (Neuberger J).

Where the court was exercising its power under section 653 of the Companies Act 1985 to restore a company to the Companies' Register, the court had jurisdiction to impose certain requirements as a condition of restoration. In this case the Judge ordered restoration subject to the Applicants paying £180,000 to the Respondents.

Keene v Martin *The Times*, 11 November 1999. CA (Kennedy and Mummery LJ).

Section 359(1) of the Companies Act 1985 gave jurisdiction to rectify a company's register, whereas section 359(3) conferred a discretionary power to determine whether an applicant had title to shares.

Richards v Lundy [1999] BCC 786. Ch Div (Nicholas Strauss QC).

Unfair prejudice was found where A was unfairly excluded from the management of the company and from his position as a director. Even where this exclusion was reasonable it could be unfair for the very reason that no offer was made for the purchase of his shares. Further as it had been agreed that A's shares in the company should be regarded as his pension this gave rise to a legitimate expectation that when he left the company the value represented by his 10% shareholding should be released to him in some form; for the majority shareholders to exercise their powers under the Companies Act to dismiss A but then leave him locked into the company as a minority shareholder was, in the light of the conversations which had taken place, a further ground of unfairness.

Ferran: "Creditors' interest and "core" company law", *The Company Lawyer*, Vol.20, No.11, 314

Payne and Prentice: "Section 459 of the Companies Act 1985-The House of Lords' View", (1999) 115 LQR 587

CONFLICT OF LAWS

Glencore International AG v Shell International Trading & Shipping Co Ltd QBD (Com Ct)

Digested at Vol.5, No.5. Now further reported at [1999] 2 All ER (Comm) 899.

Glencore International AG v Metro Trading International Inc & Others, Banque Trad-Credit Lyonnais (France) SA Third Party; Metro v Itochu, Bank Trad, Third Party QB (Com Ct)

Digested at Vol.5, No.5. Now further reported at [1999] 2 All ER (Comm) 922.

[Simon Mortimore QC]

Leathertex Divisione Sintetici SpA v Bodetex BVBA *The Times*, 26 October 1999. ECJ.

A court seised of an action alleging breach of two contractual obligations of equal rank, one to be performed in the state of that court and the other in another contracting state, did not have jurisdiction, under Article 5(1) of the Brussels Convention in relation to the obligation to be performed elsewhere.

Lubbe v Cape plc *The Times*, 3 December 1999. CA (Pill, Aldous and Tuckey LJ)

Where a foreign forum was clearly the most appropriate for a group action of personal injury claims, the institution of the group action was a

sufficient change of circumstances to entitle the Court of Appeal to reconsider the position of five claimants not in the group action whose action had already been allowed to proceed to an earlier Court of Appeal decision. In all the circumstances the first action should be treated in the same way as the group action, and accordingly it was appropriate to stay both actions in this country.

Turner v Grovit CA.

Digested at Vol. 5, No. 4. Now further reported at [1999] 3 WLR 795.

Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line ECJ

Digested at Vol.4, No.10. Now further reported at [1999] QB 1225.

Harris: "Use and Abuse of the Brussels Convention", (1999) 115 LQR 576

CONTRACT

Tetterborn: "Principals, Sub-agents and Accountability", (1999) 115 LQR 655

CORPORATE INSOLVENCY

A&J Fabrications (Batley) Ltd v Grant Thornton

Ch Div

Digested at Vol. 4, No. 8. Now further reported at [1999] BCC 807.

Re Alt Landscapes Ltd [1999] BPIR 459. Ch Div (Lloyd J)

Trustees in bankruptcy could not resign from office unless circumstances made it impracticable for them to carry on within the meaning of the Insolvency Rules 1986, r6.126(3) and whilst it was inexpedient and undesirable for them to continue in office, 'impracticable' connoted something not far short of impossible. In the circumstances of this case the court exercised its discretion to replace the trustees.

Re Banco Nacional de Cuba *Unreported*, 9 November 1999. CA (Sir Richard Scott VC, Swinton Thomas and Robert Walker LJ).

The court will not exercise its winding up jurisdiction against a company which has not traded in this country for some time and has no assets in this country (even though there was the possibility of a section 423 claim in respect of assets transferred out of the country shortly before presentation of the petition). The jurisdiction will only be exercised in exceptional circumstances where the company continues to trade

in its country of incorporation. A foreign central bank cannot be wound up in this country by virtue of the immunities and protections conferred by the State Immunity Act 1978.

[Richard Sheldon QC]

Coutts & Co. v Stock *The Times*, 30 November 1999. Ch Div (Lightman J).

The underlying purpose of section 127 of the Insolvency Act 1986 was to prevent the directors of a company, when liquidation was imminent, from disposing of the company's assets to the prejudice of creditors. Although the effect of section 127 was to invalidate a disposition as between the company and the payee of the company's money, it did not do so as against the company's bank where the bank merely fulfilled an agency or intermediary role between the company and the payee. Where a guarantor had guaranteed the overdraft arising from the bank's continuing to honour the cheques of a company over the period between the date of presentation of a petition to wind up the company and the date of the subsequent winding-up order, the bank was entitled to enforce the guarantee.

Deloitte and Touche AG v Johnson PC

Digested at Vol.5, No.4. Now further reported at [1999] BCC 993.

Re Dicksmith (Manufacturing) Ltd (in liquidation)

Ch Div.

Digested at Vol.5, No.5. Now further reported at [1999] 2 BCLC 686.

Dora v Simper [1999] BCC 836. Ch Div (Buckley J)

The plaintiff brought a claim against a company in winding up that a transfer of the business of the company by its receivers to another company was a transaction at an undervalue in fraud of its creditors under section 423 of the Insolvency Act 1986 and a claim against the company, directors and receivers for conspiracy to defraud. The court struck out the section 423 claim and refused to grant retrospective leave for the section 423 proceedings holding that there had been material serious non-disclosure by the plaintiff. The conspiracy claim was also struck out, the judge holding that the purpose of the transaction had to be the purpose of the receiver and no allegation was made against him.

Re Floor Fourteen Ltd [1999] 2 BCLC 666. Ch Div. (David Donaldson QC)

The costs of bringing proceedings under s 239 IA 1986 and s 214 IA 1986, where there was no challenge to the propriety of the proceedings, were expenses within s 115 IA 1986, s 175 IA 1986 and r 12.2 IR 1986. The costs were, therefore, recoverable in priority to distribution to preferential creditors. In order to identify the order of priority, it had to be determined which paragraph of r 4.218(1) the costs fell within. There was no reason why the costs of successful s 239 or s 214 proceedings would not fall

within r 4.218(1)(a). The costs of unsuccessful proceedings under s 239 or s 214 would not be covered by r 4.218(1)(a). The costs of the proceedings would fall within r 4.218(1)(m) regardless of outcome, as they were necessary disbursements in the proper performance of the liquidator's duties.

Re Glen Express Ltd *Unreported*, 15 October 1999. Ch Div (Neuberger J).

The rule of double proof served to prevent a guarantor claiming proof of debt when he had not satisfied the guarantee *Re Fenton* [1931] 1 Ch 85. There was nothing in the judgment of Lord Hoffmann in *Stein v Blake* [1996] 1 AC 243 to lead to the conclusion that *Re Fenton* was not good law. The plaintiff also sought to show that Rule 4.86 of the Insolvency Rules 1986 applied to the bank's claim against P as guarantor. P claimed the debt owed to the bank should be scaled down as it did 'not bear a certain value'. That argument was unfounded. It did not give the rule its natural meaning and would involve a liquidator having to investigate all the property which was the subject of the security.

[Roxanne Ismail]

Hollicourt (Contracts) Ltd v Bank of Ireland *The Times*, 30 November 1999. Ch Div (Blackburne J).

Where a bank, in ignorance of proceedings to wind up a company which was its customer, continued to honour cheques drawn by the company on its accounts, which were in credit at the material times, those payments out were 'dispositions' of the company's property under section 127 of the Insolvency Act 1986.

[David Marks]

Re Grey Marlin Ltd Ch Div.

Digested at Vol.5, No.4. Now further reported at [1994] 4 All ER 429; [1999] 2 BCLC 658.

Jyske Bank (Gibraltar) Ltd v Spjeldnaes (No. 2) Ch Div (Evans-Lombe J).

Digested at Vol. 4, No. 9. Now further reported at [1999] BPIR 525.

Re ASRS Establishment Ltd *Unreported*, 11 November 1999 Ch Div (Park J)

A purported fixed charge was held on 'other debts and claims'. The issues in this case were whether escrow monies and terminal loss relief were 'other debts and claims' and whether control over proceeds was necessary to create a fixed charge on escrow monies and terminal loss relief. The court held that escrows monies and terminal loss relief were other debts and claims and control was necessary to create a fixed charge.

[Fidelis Oditah]

Neville Barry Khan v Inland Revenue Commissioners Ch Div.

Digested at Vol.5, No.5. Now further reported at [1999] 2 BCLC 777.

In Re Norditrack (UK) Ltd *The Times*, 11 November

1999. Ch Div (Neuberger J)

The presumption contained in section 86 of the Insolvency Act 1986 as to the time of commencement of a voluntary liquidation, namely at the time of the passing of the resolution for voluntary winding up, had the effect that there was no power to ensure that the liquidation occurred immediately on discharge of the administration by passing resolutions for voluntary liquidation conditionally on the court making the order for discharge.

Phillips v Brewin Dolphin Bell Lawrie Ltd [1999] 1 WLR 2052. CA (Lord Woolf MR, Morritt and Laws LJ).

For the purposes of section 238 of the Insolvency Act 1986 the relevant transaction had to be identified by reference to the person with whom it was entered into and only the elements of the transaction between the company and that person could be taken into account. A contract entered into at about the same time with another party was not relevant unless the contracts had been artificially divided.

Re R S & M Engineering Co. Ltd [1999] 2 BCLC 485. Ch Div (Chadwick LJ)

If a receiver successfully claimed against a liquidator of a company which was being wound up that moneys held by the liquidator were subject to the charge created by the debenture under which the receiver was appointed, the liquidator could not properly treat his costs in unsuccessfully challenging a receiver's claim as 'expenses of the winding up' within the meaning of section 175(2) of the Insolvency Act 1986 or as 'expenses of the liquidation' within the meaning of rule 4.218(1) of the Insolvency Rules.

Richbell Information Service Inc. v Atlantic General Investments Trust Ltd [1999] BCC 871.

Ch. Div (Carnwath J)

Where the Court is concerned with the interests of the creditors, and the petitioner is by far the most substantial creditor, it would be a wholly inappropriate exercise of the Court's discretion under section 127 of the Insolvency Act 1986 to sanction without the petitioner's consent an immediate transaction which is in direct conflict with its contractual right, at least in circumstances where there is no evidence before the Court as to the interests of other creditors.

[Simon Mortimore QC, Mark Arnold, Glen Davis]

Sea Voyager Maritime Inc v Bielecki [1999] BCC 924. Ch Div (Richard McCombe QC)

Digested at Vol. 4, No. 9. Now further reported at [1999] BCC 924.

Walters: "Round up: Corporate Finance and receivership", *The Company Lawyer*, Vol.20, No.11, 324

COSTS

Brian R Smith (a Lloyd's Syndicate) v UIC Insurance Company Ltd *Unreported*, 19 January 2000 Commercial Court (HH Judge Dean QC)

The Syndicate were Defendants in arbitration proceedings being pursued by UIC. UIC had been in provisional liquidation since August 1996, the main purpose of which was to propose a Scheme of Arrangement under section 425 of the Companies Act 1985. The Syndicate applied for an order for security for costs against UIC pursuant to section 726 of the Companies Act 1985, on the basis that there was reason to believe that UIC would be unable to pay its costs if unsuccessful in the arbitration. It was common ground that UIC was insolvent. UIC opposed the application on the basis that any order for costs made against it in the arbitration proceedings would be payable in full as an expense of the provisional liquidation and whilst UIC was insolvent in the sense that unsecured creditors would only receive a dividend there were ample funds to pay any costs order in full. The Judge dismissed the application for security.

[Lloyd Tamlyn]

Federal Bank of the Middle East Ltd v Hadkinson *The Times*, 7 December 1999. CA (Kennedy, Mummery and Mantell LJ)

The introduction of the Civil Procedure Rules by which permission was required in the case of all appeals, permission being granted only where there was a realistic prospect of success, did not alter the approach of the courts to applications for security for costs. It did not follow that because permission to appeal was granted and the appeal was meritorious, security for costs should not be ordered.

Johnston v WH Brown Construction (Dundee) Ltd *The Times*, 11 November 1999. Ct of Session (Outer House) (Lord Hamilton)

Where in preparing a schedule of defects the employer under a building contract incurred architect's costs and costs of taking legal advice and management costs, such costs were not properly characterised as consequential losses and were not recoverable as damages at common law.

National Justice Compania Naviera SA v Prudential Assurance Co. Ltd (No. 2) *The Times*, 12 October 1999. CA (Simon Brown, Waller and Tuckey LJ)

The English court had jurisdiction to decide whether a non-party who was domiciled outside the jurisdiction and who was alleged to be the alter ego of a party to proceedings in the English court, had such a connection with the proceedings that he should pay the costs under section 51 of the Supreme Court Act 1981.

Official Receiver v Brunt CA

Digested at Vol. 5, No. 3. Now further reported at [1999] 2 BCLC 766; [1999] BPIR 560.

Turner & Co (a firm) v O Palomo SA [1999] 4 All ER 353. CA (Evans, Schiemann LJ and Lindsay J)

Where a solicitor sued a client for the amount of his charges, the client was entitled to challenge the reasonableness of the sum claimed, notwithstanding that the period for invoking the taxation procedure under the 1974 Solicitors Act had expired. In the absence of an agreement between the solicitor and client that the fees were reasonable, a solicitor had to prove that his fees were reasonable, if they were challenged. Such a conclusion did not disadvantage a solicitor since he could himself claim an order for taxation under section 70(2) without any time limit, and could obtain a form of summary judgment when the taxation certificate was issued.

DAMAGES

Arab Bank plc v John D Wood Commercial Ltd *The Times*, 25 November 1999. CA (Nourse, Mantell and Mance LJ)

Consequent on default by a borrower in repaying a bank loan secured on property, the bank, recovering damages against professional surveyors for having given negligent advice as to the value of the property, did not have to give credit for insurance payments it received under a mortgage indemnity guarantee taken out by the borrower as a requirement of the loan.

Stapleton: "Risk Taking by Commercial Lenders", (1999) 115 LQR 655

Unberath: "Third Party Losses and Black Holes", (1999) 115 LQR 533

DIRECTORS AND DISQUALIFICATION

Re Galeforce Pleating Co Ltd [1999] 2 BCLC 704. Ch Div. (Elizabeth Gloster QC).

It was not a sufficient discharge of a director's responsibilities to maintain a negligible actual involvement in the affairs of a company. It was incumbent on a director to inform himself as to the financial affairs of the company. If a director was not prepared to discharge his responsibilities properly, the appropriate course was to resign. On a liquidation of a company it was incumbent on a director to volunteer such information that he had in relation to the records and transactions of the company. It was no defence to an allegation that inadequate accounting records had been kept for a director to claim that he had not been requested specifically to provide the information by the

liquidator.

North Holdings Ltd v Southern Tropics Ltd CA
Digested at Vol.5, No.4. Now further reported at
[1999] 2 BCLC 625.

R v Evans *The Times*, 16 November 1999. CA (Auld,
Wright LJJ and Mellor J)

The purpose of disqualification under section 1 of the
Company Directors Disqualification Act 1986 was not
merely punitive; it was primarily to protect the public
from those unfitted to take part in the direction of a
company. The length of the disqualification should
reflect the level of risk to the public.

Knight v Frost Ch Div.

Digested at Vol. 5. No. 3. Now further reported at
[1999] BCC 819.

Platt v Platt [1999] 2 BCLC 745. Ch Div. (David
Mackie QC)

The fact that the relationship between a director and
shareholder does not of itself give rise to a fiduciary
duty, does not prevent such an obligation arising when
the circumstances require it.

Secretary of State for Trade and Industry v Baker
(No. 2) CA

Digested at Vol. 4, No. 7. Now further reported at
[1999] 1 WLR 1985

Re Surrey Leisure CA

Digested at Vol. 5, No. 5. Now further reported at
[1999] BCC 847, [1999] 2 BCLC 457.

Hemsworth, "Insurance Policies and Directors'
Insolvency Act Liabilities", [1999] *Insolvency Lawyer*,
Issue 7, 288.

EUROPEAN COMMUNITY

R v Secretary of State for Transport ex parte
Factortame *The Times*, 3 November 1999; [1999] 4
All ER 906; [1999] 3 WLR 1062. HL (Lords Slynn,
Nicholls, Hoffman, Hope and Clyde).

The adoption of legislation which was discriminatory
on the ground of nationality in respect of the
registration of British fishing vessels in breach of clear
and unambiguous rules of European Community law
was sufficiently serious to give rise to liability in
damages to individuals who suffered loss as a
consequence.

[Lucy Frazer]

INTERNATIONAL INSOLVENCY

Grupo Mexicano de Desarrollo SA v Alliance Bond
Fund Inc 119 Sup. Ct. 1961 (1999). US Supreme
Court

The US Supreme Court decided, by a bare majority of
5 to 4, that Federal Courts have no power to grant the
equivalent of a freezing injunction pending the
determination of the action.

Nolan: "International Insolvency Assistance", *The*
Company Lawyer, Vol.20, No.11, 336.

LIMITATION

Mortgage Corporation v Lambert & Co *The Times*,
11 October 1999. Ch Div (David Oliver QC)

Estimates as to the value of a lender's security
submitted to the collections department of a
commercial lender by debt collection agencies were
insufficient evidence of possible inaccuracies in the
initial valuation of the lender's security to put the
lender on notice for the purposes of section 14A(10) of
the Limitation Act 1980 as inserted by section 1 of the
Latent Damage Act 1986.

PENSIONS

Bus Employees Pension Trustees Ltd v Harrod
Ch Div.

Digested at Vol.5, No.4. Now further reported at
[1999] 3 WLR 1260.

Edge v Pensions Ombudsman *The Times*, 19 October
1999. CA (Peter Gibson, Ward and Chadwick LJJ).

The Pensions Ombudsman had no power to set aside
decisions of pension trustees reached in the proper
exercise of their discretion on the ground that they
were unfair. The ombudsman had jurisdiction to
investigate a complaint of maladministration but he
should not exercise his discretion where issues were
such that no fair or effective remedy could be given; in
particular where there were persons who could not be
properly represented and who could not be bound by
his determination. The ombudsman had a right of
appeal against a High Court ruling setting aside his
determination, but only on a point of principle where
conflicting court rulings were making the exercise of
his statutory functions difficult.

Legal and General Assurance Society Ltd v

Pensions Ombudsman *The Times*, 7 December 1999.
Ch Div. (Lightman J)

The provision contained in section 151(4) of the

Pension Schemes Act 1993 for an appeal on a point of law to the High Court from a determination or direction of the Pensions Ombudsman was limited to appeals from final determinations and did not extend to appeals from interim determinations.

PROCEDURE

Adam Phones Ltd v Goldschmidt [1999] 4 All ER 486. Ch Div (Jacob J)

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

Arrow Nominees Inc v Blackledge *The Times*, 8 December 1999. Ch Div. (Evans-Lombe J) To strike out a claimant's case solely because he had been found to be in contumacious breach of the CPR or an order of the court was an improper exercise of the court's powers, and was likely to constitute a breach of Article 6 of the European Convention on Human Rights. This was so even where the claimant was guilty of conduct amounting to fraud on the court.

BCCI v Mahhan Jan *Unreported*, 17 November 1999. Ch Div (Jonathan Parker J). Where an employee had defrauded his employer this constituted a fraudulent breach of trust and accordingly section 21 of the Limitation Act 1980 applied so there was no limitation period applicable.

[Richard Sheldon QC, Adam Goodison]

Biguzzi v Rank Leisure plc *The Times*, 5 October 1999; [1999] 4 All ER 934; [1999] 1 WLR 1927 CA Lord Woolf MR, Brooke and Robert Walker LJ.

The court had broad powers to deal with non-compliance with time limits under the CPR and it could make orders which would, in many cases, deal with a claimant's default more appropriately and justly than by taking the draconian step of striking out his claim.

In Re Blenheim Leisure (Restaurants) Ltd (No. 3) *The Times*, 9 November 1999. Ch Div (Neuberger J).

Unless there were strong reasons for doing so, it was undesirable both in terms of the interests of finality and of court time for a judge to be asked to reconsider an earlier interlocutory decision.

R v Bow County Court, ex p Pelling [1999] 1 WLR 1807. CA (Lord Woolf MR, Brooke and Robert Walker LJ).

Assistance provided by a McKenzie friend was for the benefit of the litigant in person and whether or not he was being paid the McKenzie friend had no right to

provide his services. A litigant in person should normally be allowed to have the assistance of a McKenzie friend both in chambers and in open court unless the judge was satisfied that fairness and the interests of justice did not require him to have such assistance. Reasons should be given for the refusal to allow a litigant in person the assistance of a McKenzie friend.

Bradford & Bingley Building Society v Seddon CA Digested at Vol. 5, No. 3. Now further reported at [1999] 4 All ER 217.

Burridge v Stafford [1999] 4 All ER 660. CA (Lord Woolf MR, Butler-Sloss and Robert Walker LJ).

Where the nominated solicitor ceases to act for a legally assisted person, that person ceases to be a legally assisted person for the purposes of sections 17 and 18 of the Legal Aid Act 1988 from at least the date on which he starts to act in person, even though the legal aid certificate has not yet been discharged. From that date at least such a person no longer satisfies the definition of a legally assisted party in section 2(11) of the Act, namely a person who receives advice, assistance, mediation or representation under the Act, and accordingly (i) he loses the protection provided by section 17 in respect of his liability for costs and (ii) the Legal Aid Board ceases to be liable for him under section 18.

Charlesworth v Relay Roads Ltd (in liquidation) [1999] 4 All ER Ch. Div (Neuberger J)

The power of a judge to review his own judgment before the drawing up of the order includes a discretion to permit the amendment of pleadings, even if that involves the putting forward of a new argument or the adducing of further evidence. However unless there are exceptional circumstances, the court will generally not allow a post-judgment amendment, involving the adducing of further evidence, if the applicant is unable to satisfy the three requirements for allowing new evidence before the Court of Appeal, namely (i) that the evidence could not have been obtained with reasonable diligence for use at the trial (ii) that, if given, the evidence will probably have an important influence on the result of the case; and (iii) that the evidence is apparently credible.

Day v Royal Automobile Club Motoring Services Ltd CA.

Digested at Vol. 4, No. 10. Now further reported [1999] 1 WLR 2150.

Dubai Aluminium Co Ltd v Al Alawi [1999] 1 WLR 1964. QBC (Rix J)

The plaintiff obtained information concerning the defendants affairs in contravention of the Data Protection Act 1984 and Swiss banking laws. Where criminal or fraudulent conduct for the purposes of acquiring evidence in or for litigation fell into the

same category as advising on or setting up criminal or fraudulent transactions yet to be undertaken as distinct from the legitimate professional business of advising and assisting clients on their past conduct, any documents which were generated by or reported on such conduct and were relevant to the issues in the case were discoverable.

R v Faryab [1999] BPIR 569. CA (Mantell LJ, Gray J and His Honour Judge Denison QC).

The answers given by a defendant in the course of an interview under the Insolvency Act should not have been adduced in evidence at a criminal trial.

Gwynedd Council v Grunshaw [1999] 4 All ER 304. CA (Henry LJ and Holman J).

Where a document was delivered for filing at the county court under CCR Ord 2, r 4, the court manager had no power to refuse to accept that document on the grounds that it ought to have been filed at another county court. The failure of the court manager to accept a notice of appeal was an irregularity but it did not nullify the proceedings brought by G who had done all that was required of her by handing her notice of appeal to the proper officer at the Skegness County Court. She had therefore appealed to the county court within the time prescribed by section 269(1) of the 1985 Act

Johnson v Valks *The Times*, 23 November 1999. CA (Sir Richard Scott V-C, Swinton Thomas and Robert Walker LJ).

A substantive appeal to the Court of Appeal was either the institution of proceedings within paragraph (a) of the definition in section 42(1A) of the Supreme Court Act 1981, as amended or it was an application in existing proceedings within paragraph (c) of that section. Therefore, an order of a High Court judge giving permission to a vexatious litigant to institute legal proceedings did not contemplate, and did not give permission for, an appeal to the Court of Appeal from the judgment resulting from those proceedings.

MacDonald v Thorn *The Times*, 15 October 1999. CA (Brooke, Robert Walker LJ).

On an application to set aside a judgment in default for failure to serve a defence on time, a court was not entitled to take into account delay before the initiation of proceedings and consolidate such period with delay after proceedings were begun.

Memory Corporation plc v Sidhu *The Times*, 3 December 1999. Ch Div. (Arden J)

The privilege against self-incrimination could be claimed by a defendant who had been ordered to attend for cross-examination on affidavit in respect of the risk of contempt proceedings in the same action.

Morris and others v. Bank of America National

Trust *Unreported* 21 December 1999. CA (Morritt, Brooke and Sedley LJ)

The liquidators of BCCI brought proceedings against the respondents ("BOA") seeking declarations pursuant to s.213 Insolvency Act 1986 that BOA was knowingly party to the carrying on of the business of BCCI with intent to defraud its creditors, the creditors of other persons or for other fraudulent purposes. BOA sought to strike out those proceedings. Lloyd J dismissed the strike out application on the basis of a preliminary review only. The Court of Appeal held that Lloyd J was right to rely on *Frogmore Estates Plc v Berger* (1989) TLR 1 November 1989. The court would not entertain a strike out application which required a full hearing on the merits, unless BOA established that its application, if heard to a conclusion, had some prospect of success. BOA had failed to show that an inference of the relevant knowledge under s.213 IA 1986 could not be drawn from any one of the individual matters relied on by the Liquidators, or from any combination of any two or more of them. The fact that the Liquidators' case was pleaded by reference to documents disclosed by BOA pursuant to an order under s. 236 IA 1986 did not exclude the possibility of other evidence at the trial. BOA's attempt to persuade the court to strike out the claim on the basis of evidence was an extreme example of the abuse of the inherent jurisdiction referred to in *Wenlock v Maloney* (1965) 1 WLR 1238. The Court of Appeal also held that, in exceptional cases such as this, it was permissible for the Liquidators to plead by way of extensive quotation from documents, either to prove an admission by BOA or, in anticipation of an inevitable request, to provide particulars upon which it relied to provide the inference of knowledge by BOA.

[Richard Sheldon QC, Robin Dicker, Fidelis Oditah]

Morris v Banque Arabe et Internationale d'Investissement SA *The Times*, 23 December 1999. Ch Div (Neuberger J)

Where a litigant had established that compliance with an order for inspection of documents involved him breaching the law of the foreign jurisdiction in which he principally carried on business, that person could not, as of right, avoid the order for inspection. Whether inspection was ordered in those circumstances was in the court's discretion. The issue in this case was whether a party to English litigation could refuse inspection of documents on the grounds that inspection would involve commission of a crime under a foreign blocking statute.

[Richard Adkins QC, Richard Sheldon QC, Fidelis Oditah, Roxanne Ismail]

Prince Jefri Bolkiah v KPMG HL

Digested at Vol. 5, No. 1. Now further reported at [1999] 2 AC 223.

Phelps v Spon-Smith & Co (a Firm) *The Times*, 26 November 1999. Ch Div (Nicholas Strauss QC)

A writ could be amended out of time to add a new cause of action which had been pleaded within the time limits in the statement of claim but inadvertently omitted from the writ.

Saab v Saudi American Bank CA

Digested at Vol. 5, No. 5. Now further reported at [1999] 4 All ER 321, [1999] 1 WLR 1861, [1999] 2 BCLC 462.

SmithKline Beecham Biologicals SA v Connaught Laboratories Inc CA.

Digested at Vol. 5, No. 5. Now further reported at [1994] 4 All ER 498.

Stanway v A-G *The Times*, 25 November 1999. Ch Div (Lloyd J).

The rule by which it was an abuse of process to re-litigate issues which could and should have been raised in earlier proceedings, did not prevent a party who had made a counterclaim against his co-defendants, which he had restricted to the issues raised by the claimant in those proceedings, from bringing fresh proceedings setting out broader claims against those same defendants.

Stevens v Gullis *The Times*, 6 October 1999. CA (Lord Woolf MR, Brooke and Robert Walker LJJ)

Under the Civil Procedure Rules the overriding duty owed by an expert witness was to the court rather than to the party who had instructed him. Where an expert witness had failed to comply with Part 35 and had demonstrated that he had no conception of the requirements placed upon him by the Rules a judge had properly debarred him from giving evidence.

Swain v Hillman *The Times*, 4 November 1999. CA (Lord Woolf MR, Pill and Judge LJJ).

A judge could summarily dispose of a claim or defence under CPR Rule 24.2 if it did not have a realistic, as opposed to a fanciful, prospect of success. In deciding whether to exercise such a power a judge should not conduct a mini trial of issues which should be investigated at trial.

Sullivan v Blanning *The Times*, 27 October 1999. CA (Morritt, Thorpe and Chadwick LJJ).

The proper inference to be drawn from the court seal affixed to an application for a default judgment made in time but which was erroneously omitted from the court record was that the application was in fact made in time.

UCB Corporate Services Ltd (formerly UCB Bank plc) v Halifax (SW) Ltd *The Times*, 23 December 1999. CA (Ward LJ, Lord Lloyd)

Under the CPR, it was appropriate to strike out an action as an abuse of process where there was a

wholesale disregard of the rules and court orders, and it was just to do so. Lesser sanctions were available in less serious cases.

Unilever plc v Procter and Gamble Company *The Times*, 4 November 1999. CA (Simon Brown, Robert Walker and Wilson LJJ).

Where discussions had been conducted between two companies on a 'without prejudice' basis concerning a patent of which one of them was the proprietor, it was an abuse of process for the other to bring an action against the proprietor founded on those discussions.

PROPERTY

Broomleigh Housing Association Ltd v Hughes *The Times*, 26 November 1999. Ch Div (David Vaughan QC)

Section 148(1) of the Law of Property Act 1925 allowed a landlord to claim the full service charge due under the terms of the lease for works done on the exterior of the premises, even where a tenant had, in breach of covenant, later waived by the landlord, undertaken some of those works herself and where the landlord had made a deduction in the service charges payable by other tenants who had, with the landlord's prior written consent, undertaken similar works.

Fitzpatrick v Sterling Housing Association Ltd *The Times*, 2 November 1999. HL (Lords Slynn, Nicholls, Clyde, Hutton, Hobhouse).

A same sex partner of a tenant was capable, for the purposes of paragraph 3(1) of Schedule 1 to the Rent Act 1977, of being a member of the tenant's family so as to succeed to the tenancy on his death.

Lowson v Coombes CA

Digested at Vol.4, No.10. Now further reported at [1999] Ch 373.

Nutt v Read *The Times*, 3 December 1999. CA (Morritt, Thorpe and Chadwick LJJ)

An assured shorthold tenancy granted on the basis of a mistake, albeit innocent, common to both parties could be rescinded.

Ropaigealach v Barclays Bank plc [1999] 4 All ER 235. CA (Henry, Chadwick and Clarke LJJ).

Section 36 of the Administration of Justice Act 1970, which affords protection to mortgagors of dwelling houses in cases where the mortgagee seeks an order for possession from the court, has not abrogated the mortgagee's common law right to take possession by virtue of his estate. Accordingly, the mortgagee is entitled to exercise his common law right to possession by entering the mortgaged property without first obtaining an order of the court.

RECEIVERS

Medforth v Blake CA

Digested at Vol. 5, No. 4. Now further reported at [1999] 3 WLR 922.

Valorem Ltd v Rilett Unreported, 2 December 1999.

Ch Div (HH Judge Boggis QC)

Receivers have no power to convene a general meeting of a company. A special resolution altering the articles of the company passed at a meeting convened by receivers is a nullity. So too was a resolution for winding-up passed at a second general meeting convened pursuant to the altered articles.

[Simon Mortimore QC, Robin Knowles QC]

RESTITUTION

Kleinwort Benson Ltd v Lincoln City Council HL

Digested at Vol.4, No.9. Now further reported at [1999] 2 AC 349.

TORT

Law Society v KPMG Peat Marwick *The Times*, 11 November 1999. Ch Div (Sir Richard Scott V-C).

It was fair, just and reasonable that if a reporting accountant negligently prepared a report intended to assist the Law Society in deciding whether and when to exercise its powers of intervention in order, among other things, to protect the compensation fund, the reporting accountant should be held responsible for the loss to the fund caused by that negligence.

Sasea Finance Ltd v KPMG [1999] BCC 857. Ch Div (Collins J).

Where auditors in the course of an audit came across matters which satisfied them that unless the matters were disclosed e.g., to directors or even regulators,

the company would continue to suffer losses, it could not be said that the auditors had no duty to take any action until the audit was completed. An arguable case was established to show that the transactions causing loss may not have taken place had the auditors taken some sort of action to 'blow the whistle.'

TRUSTS

X v A *The Times*, 6 October 1999. Ch Div (Arden J)

A trustee's lien over a trust fund for proper costs and expenses extended to an indemnity against future liabilities and therefore included a possible liability for the clean up costs of contaminated land under Part IIA of the Environmental Protection Act 1990 as amended by the Environment Act 1995, although Part IIA was not in force.

Yaxley v Gotts CA

Digested at Vol. 5, No. 5. Now further reported at [1999] 3 WLR 1217

Critchley: "Instruments of Fraud, Testamentary Dispositions, and the Doctrine of Secret Trusts", (1999) 115 LQR 631

VOLUNTARY ARRANGEMENTS

Inland Revenue Commissioners v Adam and Partners Ltd Ch Div.

Digested at Vol.5, No.5. Now further reported at [1999] 2 BCLC 730.

Re a debtor (No 488 IO of 1996) Ch Div

Digested at Vol. 5, No. 1. Now further reported at [1999] 2 BCLC 57.

Raja v Rubin and Goodman CA

Digested at Vol. 5, No. 2. Now further reported at [1999] BPIR 575

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