

3~4 Digest

A Monthly Review of Relevant News, Cases and Articles

Volume 6 Number 6

June 2000

The test for knowing receipt has been radically recast. In BCCI v Akindele the Court of Appeal held that the test for knowing receipt was whether the recipient's state of knowledge made it unconscionable for him to retain the benefit of the receipt. Gabriel Moss QC and David Marks appeared for the Respondent and Richard Sheldon QC and Fidelis Oditah appeared for BCCI.

Meanwhile one of the world's largest re-organisations has taken place. The re-organisation of ICO is interesting because the Bermudan and Cayman Courts allowed the US to take the lead with Chapter 11 proceedings even though the companies were registered in the Caymans and Bermuda. Gabriel Moss QC advised the provisional liquidators and Mark Phillips QC and Jeremy Goldring advised the companies.

We are delighted to announce that Tom Smith will join Chambers as a tenant from 1 October 2000, following the successful completion of his pupillage. This month's Digest has been compiled by Daniel Bayfield and digests material up to 31 May 2000.

Lucy Frazer

GENERAL NEWS

First Quarter Insolvency Figures.

There were 3,408 compulsory and creditors' voluntary liquidations in the first quarter of 2000. The figure compares with 3,464 in the previous quarter and 3,684 in the first quarter of 1999 (a decrease of 7.5%). There were 89 administration orders made in the first quarter of 2000 and 124 CVAs entered into.

Law Society comments on electronic communications for companies.

The Law Society in April published its comments on the DTI's proposed statutory instrument intended to facilitate electronic communications by companies and their members (see 3~4 Digest Vol. 6, No. 4). The Electronic Communications Bill is currently before Parliament. The Law Society agrees with the DTI that electronic communications should be voluntary. The Law Society does not expect the Bill, once enacted, to result in significant cost reduction. (See also: *The Company Lawyer*, Vol. 21, No. 5 (May 2000), page 153.)

LSE and Deutsche Borse to merge.

The London Stock Exchange and the Deutsche Borse in Frankfurt announced (on 3 May 2000) their plans to merge to form a single company to be called "iX". On the same day, it was announced that iX had signed a memorandum of understanding with Nasdaq to create a pan-European high growth market. iX will be the largest European stock market.

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 BCLC 593. [Felicity Toubel]

Mark One (Oxford Street) Plc Ch. Div. (Jacob J). Digested at Vol. 4, No. 6. Now reported at [2000] 1 BCLC 462. [Gabriel Moss QC]

Re Maxwell Fleet and Facilities Management Ltd Ch. Div. (Jules Sher QC). Digested at Vol. 6, No. 3. Now further reported at [2000] BPIR 294.

In re Norditrack (UK) Ltd Ch. Div. (Arden J). Digested at Vol. 6, No. 3. Now further reported at [2000] 1 BCLC 467.

In Re T & D Industries plc Ch. Div. (Neuberger J). Digested at Vol. 6, No. 1. Now further reported at [2000] 1 BCLC 471. [Richard Adkins QC]

ARBITRATION

AT&T Corporation v Saudi Cable Co. *The Times*, 23 May 2000. CA (Lord Woolf MR, Potter and May LJ).

The test for apparent or unconscious bias in an arbitrator conducting an international arbitration governed by English law was identical to that which applied to all those who made judicial decisions, namely whether there was any real danger that he was biased.

Danae Air Transport SA v Air Canada CA (Kennedy, Ward and Tuckey LJ). Digested at Vol. 5, No. 5. Now further reported at [2000] 2 All ER 649.

Harbour and General Works Ltd v Environmental Agency CA (Waller and Tuckey LJ). Digested at Vol.5, No.5. Now further reported at [2000] 1 WLR 950.

Inco Europe Ltd v First Choice Distribution (a firm) HL (Lords Nicholls, Jauncey, Steyn, Clyde and Millett).

Digested at Vol. 6, No. 4. Now further reported at [2000] 1 All ER (Comm) 674.

Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co. Ltd *The Times*, 16 May 2000. QBD (Thomas J).

When the proposed first defendants denied being a party to a contract with the claimants, an arbitration claim form seeking a declaration whether they had been party to such a contract raised a question as to the contractual power under which the arbitration was sought. The High Court, therefore, had no jurisdiction either: (i) as an arbitration exception to the Lugano Convention, (ii) under Practice Direction – Arbitrations, or (iii) under the Arbitration Act 1996, to give permission to serve the claim form on the second defendants, the brokers in Norway through whom the contract was said to have been made, since the appropriate forum to bring an action against them was Norway.

BANKING

Barings plc v Coopers & Lybrand CA. (Lord Woolf MR, Robert Walker LJ and Smith J).

Digested at Vol. 6, No. 5. Now reported in *The Independent*, 10 May 2000 and *The Times*, 17 May 2000.

[Mark Phillips QC, Jeremy Goldring]

Barclays Bank plc v Coleman [2000] Lloyd's Rep Bank 67. CA (Nourse, Pill and Mummery LJ).

Although the HL had put a serious question mark over the future of the requirement of manifest disadvantage in cases of presumed undue influence, and had signalled that it might not continue to be a necessary ingredient indefinitely, at present manifest disadvantage remained a necessary ingredient in a case of presumed undue influence. "Manifest" meant clear and obvious, but there was no requirement as to the scale of the manifest disadvantage except that it be more than de minimis. In determining whether a transaction was manifestly disadvantageous, an objective view had to be taken of the transaction as at the date it was entered into.

Director General of Fair Trading v First National Bank plc CA (Peter Gibson, Waller and Buxton LJ). Digested at Vol. 6, No. 4. Now further reported at [2000] Lloyd's Rep Bank 130.

Christofi v Barclays Bank plc CA (Stuart-Smith and Chadwick LJJ).

Digested at Vol. 5, No. 5. Now further reported at [2000] 1 WLR 937.

Director General of Fair Trading v First National Bank plc CA (Peter Gibson, Waller and Buxton LJJ).

Digested at Vol. 6, No. 4. Now further reported at [2000] 2 All ER 759.

Three Rivers District Council v Governor and Company of the Bank of England (No. 3) HL (Lords Steyn, Hope, Hutton, Hobhouse and Millett).

Digested at Vol. 6, No. 5. Now reported in *The Times*, 19 May 2000.

[Richard Sheldon QC, Mark Phillips QC, Robin Dicker (now) QC, Ben Valentin]

Middleburgh: "The Bank Account and Winding Up: Good News for Banks?" [2000] JIBL 115.

BANKRUPTCY

Re Awan [2000] BPIR 241. Ch. Div (Judge Boggis QC).

Where a bankruptcy order had been annulled and should never have been made, there having been no affidavit of service before the district judge, a defect which should not be waived, the petitioning creditor was not entitled to his costs.

Re Burfoot and Haynes (Bankrupts) *Unreported* 27 June 2000 Ch Div (Jacob J)

Where a factor takes both an unregistered general assignment of book debts and then specific assignments over the same debts, the specific assignments are valid and effective and can be relied on by the factor in the event that the Trustee obtains a declaration that the general assignment is void under s.344 of the Insolvency Act 1986.

[Gabriel Moss QC]

Choudhury v The Commissioners of Inland Revenue [2000] BPIR 246. CA (Aldous LJ).

A bankruptcy petition does not lapse when an annulment order is made and the petition may be re-listed.

Cozens v HM Commissioners of Customs & Excise [2000] BPIR 252. CA (Kennedy, Mummery and Mantell LJJ).

An appeal to the judge from the decision of a district judge was in the nature of a true appeal and not a re-hearing or review so that the judge should not have taken into account matters which occurred after the decision of the district judge had been made.

Dacorum Borough Council v Horne *Newlawonline* (200059502) 26 May 2000. CA (Morritt and

Chadwick LJJ and Charles J).

(1) The effect of the County Courts Act 1984 and the County Court Rules 1981 was that an order for the payment of a judgment by instalments had the effect of staying the issue of execution on the judgment so long as the instalment payments were maintained in accordance with the order, but did not stay or suspend the judgment itself. If there was default in the payment of an instalment the whole balance of the judgment debt was immediately payable. Also if the instalments ordered were insufficient to satisfy the whole debt by the expiry of the specified period, the balance of the debt was payable on the expiry of that period in the absence of a further order.

(2) Rule 6.1(1) of the Insolvency Rules 1986 required a statutory demand to be signed by the creditor or by a person stating himself to be authorised to make the demand on the creditor's behalf. A person sufficiently signed a document if it was signed in his name and with his authority by somebody else. Therefore the person who stated himself to be authorised to make the demand on the creditor's behalf did not have to sign the demand in his own hand.

[Felicity Toube]

Masters v Leaver CA (Morritt and Thorpe LJJ and Sir Oliver Popplewell).

Digested at Vol. 5, No. 5. Now further reported at [2000] BPIR 284.

Oben v Blackman [2000] BPIR 302. Ch. Div. (Stanley Burnton QC (sitting as a deputy judge of the High Court)).

Normally and in the absence of a defect in the petition, the petitioning creditor would be entitled to his costs of the petition where the petition debt was paid after presentation. In normal circumstances, avoidable defects in the petition resulting in the debtor having incurred unnecessary costs would entitle the debtor to such costs.

Pollard v Ashurst Ch. Div. (Jacob J).

Digested at Vol. 6, No. 4. Now further reported at [2000] 2 All ER 772 and [2000] BPIR 347.

Re Ross (a bankrupt) (No. 2) *The Times*, 10 May 2000. CA (Nourse and Mantell LJJ).

On an application for the dismissal of a bankruptcy petition, a district judge erred in principle by failing to consider in any effective way whether the facts of what was an unusual case ought to have attracted the exercise of his discretionary power under section 266(3) of the Insolvency Act 1986. The only appropriate outcome was for the petition to be dismissed.

[Felicity Toube]

COMPANY

Re Advantage Healthcare Ch. Div. (Lightman J).
Digested at Vol. 6, No. 1. Now further reported as
Grove v Advantage Healthcare (T10) Ltd at [2000]
1 BCLC 661.

[Fidelis Oditah]

Bairstow v Queens Moat Houses plc [2000] 1 BCLC
549. QBD (Nelson J).

A director who authorised the payment of an unlawful dividend in breach of his duty as a quasi trustee would be liable to repay such a dividend: if he knew that the dividend was unlawful, whether or not that actual knowledge amounted to fraud; or if he knew the facts that established the impropriety of the payment, even though he was unaware that such impropriety rendered the payment unlawful; or if he must be taken in all the circumstances to have known all the facts which rendered the payments unlawful; or if he ought to have known, as a reasonably competent and diligent director, that the payments were unlawful. If the payment of the unlawful dividends was made in circumstances which amounted to breach of the director's fiduciary duty or of his duty of skill and care under his employment contract, and it was established that such breach was a cause of the dividends being paid and of loss to the company, such dividends could be recovered from the directors.

Re Brumark Investments Ltd New Zealand CA
(Elias CJ, Gault and Anderson JJ).
Digested at Vol. 6, No. 4. Now reported at [2000] 1
BCLC 353.

Regentcrest plc v Cohen *Newlawonline* (200059601)
26 May 2000. Ch. Div. (Jonathan Parker J).
Whether a company director was in breach of his
fiduciary duty to act in the best interests of the
company was to be judged on a subjective basis. If he
honestly believed that he was acting in the best
interests of the company he was not in breach.

Richards v Lundy Ch. Div. (Nicholas Strauss QC
(sitting as a deputy judge of the High Court)).
Digested at Vol. 6, No. 1. Now reported at [2000] 1
BCLC 376.

Armour: "Share Capital and Creditor Protection:
Efficient Rules for a Modern Company Law". [2000]
MLR 355.

Armstrong: "Return to First Principles" in New
Zealand: Charges over book debts are fixed – but the
future's not". *Insolvency Lawyer* [2000] Issue 3 (May)
102.

Dignam, "Company law and the Human Rights Act
1998: Interesting times". *The Company Lawyer*, Vol.
21, No. 5 (May 2000), page 151.

Esen: "Shareholder Advisory Committees: Giving
Back Power to Members". *Business Law Review*,
April 2000, page 83.

Freedman: "Limited Liability: Large Company Theory
and Small Firms". [2000] MLR 317.

Lower: "Good faith and the partly-owned subsidiary".
[2000] JBL 232.

Reed: "Derivative Claims". *The Company Lawyer*,
Vol. 21, No. 5 (May 2000), page 156.

Sealy: "Thumbs down for New Bullas 'down under'".
CCH Company Law Newsletter, Issue 53 (9 May
2000).

CONFLICT OF LAWS

Agnew v Lansforsakringsbolagens AB HL (Lords
Nicholls, Woolf, Cooke, Hope and Millett).
Digested at Vol. 6, No. 3. Now further reported at
[2000] Lloyd's Rep IR 317.

**AIG Group (UK) Ltd v Anonymous Greek
Insurance Company of General Insurances, The
Ethniki** CA (Evans and Thorpe LJJ and Jonathan
Parker J).
Digested at Vol. 6, No. 3. Now further reported at
[2000] 2 All ER 566 and [2000] Lloyd's Rep IR 343.

Berezovsky v Forbes Inc. *The Times*, 16 May 2000
and *The Independent*, 18 May 2000. HL (Lords Steyn,
Nolan, Hoffmann (dissenting), Hope (dissenting) and
Hobhouse).

A claim for defamation by two Russian businessmen
in respect of the damage to their reputations in
England, with which they had significant connection,
caused by an article in an American magazine alleging
corrupt activities by them in Russia was properly to be
tried in England.

**Chailease Finance Corporation v Credit Agricole
Indosuez** [2000] Lloyd's Rep Bank 119. CA (Potter
LJ and Ferris J).

Where a claim was based upon failure to pay money,
the obligation in question was the obligation to pay the
money, and the place of payment was the place of
performance for the purposes of Art 5(1) of the
Brussels Convention.

Donohue v Armco Inc. [2000] 1 All ER (Comm) 641.
CA (Stuart-Smith, Brooke and Sedley LJJ).
On an application to restrain foreign proceedings,
where there was a valid English exclusive jurisdiction

clause, the court would give effect to it by granting an anti-suit injunction or stay of domestic proceedings unless strong cause or strong reasons were shown that it should not. In answering the question whether strong reasons existed, many factors which might have an important bearing on an alternative forum case would be of little weight, either because they were irrelevant or because the parties had to be deemed to have taken them into account where they had deliberately chosen a forum.

Marlwood v Kozeny *Unreported* 7 June 2000, Morison J

The Court rejected an application to set aside fraud proceedings in the Commercial Court on the ground that the Claimants had also brought proceedings in Colorado in order to freeze Defendant's assets there. The Claimants sought a stay of the Colorado proceedings. The Court held that England was the appropriate forum for the fraud claims because they related to English law contracts.

[Simon Mortimore QC]

Regle Nationale des Usines Renault SA v Maxicar SpA *The Times*, 23 May 2000. ECJ.

A court in a Brussels Convention contracting state which considered that Community Law was misapplied in a judgment given in another contracting state was not entitled to refuse recognition of the judgment, as being contrary to public policy.

Sinochem International Oil (London) Ltd v Mobil Sales and Supply Corp. Ltd [2000] 1 All ER (Comm) 758. QBD (Rix J).

The test for distinguishing an exclusive from a non-exclusive jurisdiction clause was whether on its proper construction the clause obliged the parties to resort to the relevant jurisdiction, irrespective of whether the word "exclusive" was used.

UBS AG v Omni Holding AG Ch. Div. (Rimer J). Digested at Vol. 6, No. 3. Now reported at [2000] 1 WLR 916.

CONTRACT

Bank of Credit and Commerce International SA v Ali *The Times*, 10 May 2000. CA (Sir Richard Scott V-C, Chadwick and Buxton LJJ).

Although an agreement under which a former employee agreed to release all claims under statute, common law or equity that existed or might exist could operate so as to bar him from bringing actions the existence of which he was unaware at the time the agreement was executed, equity would intervene in certain circumstances to prevent the beneficiary of such a release who had acted unconscionably from relying on a strict construction of the document.

Phelps v Spon-Smith & Co (a firm) *Newlawonline*

(200058301) 10 May 2000. Ch. Div. (Mr P Whiteman QC (sitting as a Deputy High Court Judge)).

It was not necessary for an equitable assignment to follow any particular form but it was necessary for there to be an intention to assign, for the subject-matter of the assignment to be identified and for there to be some act by the assignor showing that he was transferring the chose in action to the assignee.

Zoan v Rouamba CA (Henry, Chadwick and May LJJ).

Digested at Vol. 6, No. 4. Now further reported at [2000] 2 All ER 620.

Adams: "Basis of the Contract Clauses and the Consumer". [2000] JBL 203.

CORPORATE INSOLVENCY

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

Digested in Vol. 6 No. 1. Now reported at [2000] 1 WLR 906.

Deloitte and Touche AG v Johnson PC (Lords Slynn, Hope, Hobhouse and Millett and Sir John Balcombe).

Digested at Vol. 5, No. 4. Now further reported at [2000] 1 BCLC 485.

Re FJL Realisations Ltd (formerly Farmers Jeans)

Unreported, CA (Scott V-C, Alsous and Sedley LJJ) 10 July 2000

Sums that are or ought to be deducted by way of PAYE and NIC from the pay of employees employed under new or adopted contracts of employment have the same super-priority under s.19(5) and (6) of the Insolvency Act 1986 as the net wages themselves, and in particular rank ahead of ordinary expenses in s.19(4) including the administrators remuneration.

[Gabriel Moss QC, Glen Davis]

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

Digested at Vol.6, No.1. Now further reported at [2000] 1 WLR 895.

[David Marks]

Official Receiver v Environment Agency CA (Roch and Morritt LJJ, Rattee J).

Digested at Vol. 5, No. 5. Now further reported as **Re Celtic Extraction Ltd / Re Bluestone Chemicals Ltd** at [2000] 2 WLR 991.

Souster v Carman Construction Co. Ltd [2000] BPIR 371. Ch. Div. (P.W. Smith QC (sitting as a deputy judge of the High Court)).

On the supervisor's petition in respect of a failed CVA, a winding-up order was made although the members

and creditors had approved the company's resolution to go into voluntary liquidation, because the CVA creditors had a legitimate expectation that this would be the appropriate exit if the CVA failed.

Middleburgh: "The Bank Account and Winding Up: Good News for Banks?" [2000] JIBL 115.

Milman: "The Liquidation Expenses Principle". *Insolvency Lawyer* [2000] Issue 3 (May) 126.

Milman: "Subrogation claims on Insolvency". *Insolvency Lawyer* [2000] Issue 3 (May) 130.

Yates: "Winding up Charitable Companies – Special Cases?" *Insolvency Lawyer* [2000] Issue 3 (May) 120.

COSTS

Burridge v Stafford CA (Lord Woolf MR, Robert Walker and Butler-Sloss LJ).
Digested at Vol. 5, No. 5. Now reported at [2000] 1 WLR 927.

Fryer v Royal Institute of Chartered Surveyors *The Times*, 16 May 2000. CA (Peter Gibson, Henry and Clarke LJ).

A barrister was not expected to assess the chance of success of particular points in a claim in percentage terms when giving advice to the Legal Aid Board. Nor was a barrister required to suggest or formulate a limitation as to what particular points should be argued.

Legal Services Commission (formerly Legal Aid Board) v Trans-Atlantic Securities Ltd *Newlawonline* (200059001) 19 May 2000. Ch. Div. (Rattee J).

This case related to whether a debtor could set off sums owed to it by a successful legally assisted person against costs owed to the Legal Services Commission awarded in respect of that person. It was decided that where costs were payable to the Legal Services Commission by virtue of s 16(5) of the Legal Aid Act 1988 there could be no set-off as against those costs of any liability of the legally assisted person himself. The costs were not payable to the legally assisted person and there was, therefore, no mutuality to support a set-off.

Mirror Group Newspapers plc v Maxwell *The Times*, 22 May 2000. Ch. Div. (Ferris J).

The assessment of the remuneration of a court-appointed receiver, pursuant to Order 30, rule 3(2)(b) of the Rules of the Supreme Court, did not involve the assessment of costs in the Chancery Division, with the result that no fee was payable under item 29(d) of the Schedule to the Supreme Court Fees Order.

DAMAGES

Arab Bank plc v John D Wood Commercial Ltd CA (Nourse, Mantell and Mance LJ).
Digested at Vol. 6, No. 1. Now reported at [2000] 1 WLR 857.

Eyffes Group Ltd v Templeman *Newlawonline* (2000610101) 22 May 2000. QBD (Commercial Court) (Toulson J).

As a matter of damages for tort or equitable compensation for dishonest assistance, the claimant had to show that it had suffered loss as a result of the secret commissions over and above the amount of the commissions themselves. The parties were agreed that the proper method of determining the amount of any loss was whether an honest and prudent negotiator would have obtained better terms than the person bribed. An account of profits should be available against the briber of an agent who could be required to account to the principal for benefits obtained from the corruption of the agent.

DIRECTORS AND DISQUALIFICATION

Re Barings plc (No. 5), S/S for Trade and Industry v Baker [2000] 1 BCLC 523. CA (Morritt, Waller, Mummery LJ).

The standard of competence to be shown by a person as a director was (1) a question of law, and (2) not to be equated with the test properly considered in a professional negligence claim. Whether the respondent failed to achieve that standard was a question for the court on which only exceptionally could the evidence of an expert be admissible.

Re Cubelock Ltd *Newlawonline* (200059103) 22 May 2000. Ch. Div. (Park J).

Procedural fairness required that the directors knew the charges they had to face. The court would not disqualify a director on grounds of which he did not have adequate notice before trial and which he did not have a fair opportunity to respond to at trial.

Secretary of State for Trade and Industry v Deverell CA (Morritt and Potter LJ and Morison J).
Digested at Vol. 6, No. 2. Now further reported at [2000] 2 WLR 907.

Walters: "Directors' duties: the impact of the Company Directors Disqualification Act 1986". *The Company Lawyer*, Vol. 21, No. 4 (April 2000), page 110.

INSURANCE

See Agnew v Lansforsakringsbolagens AB and AIG Group (UK) Ltd v Anonymous Greek Insurance Company of General Insurances, The Ethniki above under the heading Conflict of Laws.

INTERNATIONAL INSOLVENCY

Re Southern Equities Corp Ltd, England v Smith CA (Morritt and Laws LJ and Jonathan Parker J). Digested at Vol.6, No.3. Now further reported at [2000] 2 WLR 1141. [Gabriel Moss QC]

LIMITATION

Corbin v Penfold Metallising Co. Ltd *The Times*, 2 May 2000. CA (Buxton and Hale LJ).

Where a claimant promptly instructed solicitors after he became aware that his medical condition might be attributable to an industrial injury, delay by his solicitors in issuing a writ in a personal injury action after the three-year limitation period had expired could not be visited on the claimant as a matter of law.

Raja v Lloyds TSB Bank plc Ch. Div. (Michael Tugendhat QC (sitting as a deputy Chancery Division Judge)).

Digested at Vol. 6, No. 5. Now further reported in *The Times*, 16 May 2000.

PARTNERSHIP

Don King Productions Inc v. Warren CA (Morritt, Aldous and Hutchison LJ). Digested at Vol. 5, No. 3. Now reported at [2000] 1 BCLC 607.

White v Minnis *The Times*, 10 May 2000. CA (Peter Gibson, Chadwick and Mance LJ).

Where following the death of a partner the assets of a partnership fell to be distributed according to the terms of the partnership agreement, there was no presumption, at least in the context of a family partnership, that the deceased partner's share in those assets was to be calculated by reference to their true current market value and not to their historic cost.

Payne: "The Limited Liability Partnerships Bill". *The Company Lawyer*, Vol. 21, No. 4 (April 2000), page 133.

Wooldridge: "International Developments: A new German Partnership form for liberal professions". *Insolvency Lawyer* [2000] Issue 3 (May) 133.

PENSIONS

Preston v Wolverhampton Healthcare NHS Trust *The Times*, 19 May 2000. ECJ.

A national rule that a claim to membership of an occupational pension scheme was time-barred if it was brought later than six months after the end of employment was not contrary to Community law, but a rule that pensionable service could be calculated only by reference to service after a date no earlier than two years before the date of the claim was so contrary.

Westminster City Council v Haywood (No. 2) Ch. Div. (Lightman J).

Digested at Vol. 6, No. 2. Now further reported at [2000] 2 All ER 634.

PROCEDURE

Barings plc v Coopers & Lybrand CA. (Lord Woolf MR, Robert Walker LJ and Smith J).

Digested at Vol. 6, No. 5. Now further reported in *The Times*, 17 May 2000.

[Mark Phillips QC, Jeremy Goldring]

Daniels v Walker *The Times*, 17 May 2000. CA (Lord Woolf MR and Latham LJ).

It was essential that counsel, took a responsible attitude as to when it was right to raise arguments based on the Human Rights Act 1998 and judges should be robust in resisting inappropriate attempts to introduce such arguments.

A party who had agreed to instruct jointly a single expert but who, for reasons which were not fanciful, was unhappy with that expert's report should, subject to the court's discretion, be allowed to obtain and, if appropriate, rely on a report from another expert.

Foley v A-G CA (Peter Gibson and Schiemann LJ, Wilson J).

Digested at Vol. 6, No. 4. Now further reported at [2000] 2 All ER 609.

Locabail (UK) Ltd v Bayfield Properties Ltd CA (Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C).

Digested at Vol. 6, No. 2. Now further reported at [2000] 2 WLR 870.

Memory Corporation plc v Sidhu Ch. Div. (Arden

J).
Digested at Vol. 6, No. 1. Now further reported at [2000] 2 WLR 1106. (See also the later CA decision, digested at Vol. 6, Nos. 2 and 3.)

Pirelli Cables Ltd v United Thai Shipping Corporation Ltd *The Times*, 12 May 2000. QBD (Langley J).

The court would apply the principles of the old Rules of the Supreme Court to consider the merit of an application made under the new Civil Procedure Rules for the renewal of a concurrent writ issued under the old rules and marked "not for service out of the jurisdiction". Accordingly the time for the service of the concurrent writ was four months and not six months from the date of issue.

Prudential Assurance Co Ltd v McBains Cooper (a firm) *Newlawonline* (200059301) 23 May 2000. CA (Peter Gibson, Brooke and Robert Walker LJJ).

A judge was entitled to hand down a judgment if he was of the opinion that there was a public interest in so doing notwithstanding that the parties had settled the dispute after reading the draft copy of the judgment.

Reichhold Norway ASA v Goldman Sachs International CA (Lord Bingham LCJ, Otton and Robert Walker LJJ).

Digested at Vol. 5, No. 5. Now further reported at [2000] 2 All ER 679.

Stewart v Engel *The Times*, 26 May 2000. CA (Roch and Clarke LJJ and Sir Christopher Slade).

Despite having delivered a final judgment and made an order dismissing an action, a judge still had power to reopen the issue by giving permission to the claimant to amend her pleading. However, the discretion to do so was stringently limited, both under the old Rules of the Supreme Court and under the new Civil Procedure Rules, since there was a fundamental difference in the principles applicable when argument before the judge was still open and those which applied once judgment had actually been delivered.

Tanfern Ltd v Cameron-Macdonald *The Independent*, 16 May 2000 and *The Times*, 17 May 2000; [2000] 2 All ER 801. CA (Lord Woolf MR, Peter Gibson and Brooke LJJ).

As from 2 May 2000 major changes to arrangements for appeals in civil courts came into force. The Court of Appeal gave detailed guidance as to their effect, particularly in relation to appeals in civil proceedings in private law matters.

TSB Bank plc v Robert Irving & Burns (a firm) [2000] 2 All ER 826. CA (Morritt and Tuckey LJJ).

The waiver of privilege implied at the outset of a joint retainer was limited so as to exclude communications made after the emergence of an actual conflict of

interest. A conclusion to the contrary was unacceptable since the concept of an automatic discharge was inconsistent with the general rule for the discharge of contracts, which conferred an option on the innocent party to accept the repudiation constituted by the deception or to affirm the contract notwithstanding the other party's breach. Moreover, the waiver of privilege implied from the existence of the joint retainer was based on the normal rules for the implication of contractual terms, and none of those could justify the implication of a waiver extending to communications made by one client to the common solicitor after an actual conflict of interest had emerged but in ignorance of it.

PROPERTY

Banque Nationale de Paris plc v Montman [2000] 1 BCLC 576. Ch. Div. (Hazel Williams QC (sitting as a deputy judge of the High Court)).

Where the Charging Orders Act 1979 referred to "the debtor or any person interested in any property to which the order relates", the statute was looking at a person who could be said to have some form of interest in the property which was either a proprietary interest or an interest akin thereto, in the sense that they were a person who at least had some interest such that their legal rights or liabilities were directly affected by the charging order.

[Adam Goodison, Hilary Stonefrost]

Skipton Building Society v Bratley and Stott CA (Evans, Potter LJJ, Alliot J).

Digested at Vol. 6, No. 4. Now further reported at [2000] 2 All ER 779.

RECEIVERS

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

Digested at Vol. 6, No. 4. Now further reported at [2000] 1 All ER (Comm) 737 and *The Independent*, 12 May 2000.

[Simon Mortimore QC]

Frisby: "Making a Silk Purse out of a Pig's Ear – *Medforth v Blake & Ors*". [2000] MLR 413.

TORT

Holbeck Hall Hotel Ltd v Scarborough Borough Council CA (Stuart-Smith, Schiemann and Tuckey LJJ).

Digested at Vol. 6, No. 4. Now further reported at [2000] 2 All ER 705.

Jolley v Sutton LBC *The Times*, 24 May 2000. HL (Lords Browne-Wilkinson, Mackay, Steyn, Hoffmann and Hobhouse).

When a local council allowed an abandoned boat in a rotten condition to remain on its land and it was reasonably foreseeable that children would play on it and be injured, the Council was liable even if the child had meddled with the boat in an unusual way and thereby sustained injuries which were more serious than might normally have been anticipated. The ingenuity of children in finding unexpected ways of doing mischief to themselves and others should not be underestimated.

Kuwait Oil Tanker Company SAK v Al Bader *The Times*, 30 May 2000. CA (Nourse, Potter and Clarke LJJ).

A civil action for conspiracy to injure by unlawful means required proper proof of the nature of the agreement, the unlawful means alleged, each unlawful act relied on as causing loss and that each was carried out pursuant to the conspiracy. Intention to injure the claimant did not have to be the defendant's predominant purpose or intention and was something that could be inferred from the facts. Moreover, where the unlawful acts relied on amounted to individual torts committed by joint tortfeasors, there was no doctrine of "merger" to restrict the claimant from bringing an action for the conspiracy.

Smeaton v Butcher *The Times*, 17 May 2000. CA (Clarke and Latham LJJ).

Defamatory statements about a litigant, made by a witness in an affidavit prepared for use in court proceedings commenced by that litigant, could attract absolute privilege not only in respect of those proceedings but also in respect of other proceedings, brought by the same litigant against another party, in which the maker of the statement was or might also be a witness. In both cases the test was whether the statements were made with reference to the subject matter of the inquiry in the proceedings concerned.

TRUSTS

Bank of Credit and Commerce International (Overseas) Ltd v Akindele Unreported. CA (Nourse, Ward and Sedley LJJ).

A claim brought under the knowing receipt head of constructive trust did not require proof of the recipient's dishonesty. A single test of knowledge was applicable: was the recipient's state of knowledge such as to make it unconscionable for him to retain the benefit of the receipt?

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

Foskett v McKeown *The Times*, 24 May 2000. HL (Lords Browne-Wilkinson, Steyn, Hoffmann, Hope and Millett).

When a trustee dishonestly appropriated money from the trust fund and used it to pay some of the premiums on a life insurance policy in favour of his children, the beneficiaries under a trust were entitled to trace their money through the policy into the amount paid out by the insurers after the trustee's death and to claim a proportionate share of it from his children.

Houghton v Favers [2000] 1 BCLC 511 and [2000] Lloyd's Rep Bank 145. CA (Nourse, Buxton LJJ and Ferris J).

There were three elements to a claim for knowing receipt; (i) disposal of assets in breach of fiduciary duty; (ii) beneficial receipt by the defendant of assets which were traceable as representing the assets of the claimant; and (iii) knowledge on the part of the defendant that the assets received were traceable to a breach of fiduciary duty. Dishonesty was not, however, a necessary element to the claim for knowing receipt. It was enough to establish that the recipient either knew or ought to have known that the money was being paid in breach of fiduciary duty.

R. v Common Professional Examination Board, ex parte Mealing-McCleod *The Times*, 2 May 2000. CA (Roch LJ and Sir Christopher Slade).

Where a litigant, having been ordered to pay money into court as security for the costs of an appeal, obtained a bank loan for that specific purpose and on terms that she was to become a trustee of the money lent and that it would not become part of her general assets, then the court was not entitled, if the money was not required for that purpose, to order it to be paid out to another party to the litigation in satisfaction of costs orders previously made in different proceedings between the same parties.

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

Digested in Vol. 5, No. 5. Now further reported at [2000] Ch. 162.

SEMINARS

Glen Davis delivered a seminar entitled "E-commerce and Insolvency" at a CLT conference on "Critical Issues in Profitable Insolvency Practice" at the Cafe Royale on 15 May 2000.

[Glen Davis]

William Trower, Antony Zaccaroli and Sandra Bristoll gave a talk to Osborne Clarke on 19 May 2000 on "Securities and Priorities".

**[William Trower, Antony Zacaroli, Sandra
Bristoll]**

Gabriel Moss QC addressed the International Association of Insurance Receivers on developments in insurance insolvency law at the offices of DLA on 25 May 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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