

# 3~4 Digest

A Monthly Review of Relevant News, Cases and Articles

Volume 6 Number 5

May 2000

Four members of Chambers were involved in the latest round of the litigation between the Liquidators of BCCI and the Bank of England, in which the House of Lords has unanimously dismissed the claim brought against the Bank under the 1977 European Banking Directive. The decision in Three Rivers DC also represents the leading Commonwealth case on the tort of misfeasance in public office. Although both sides claimed victory at this stage the future progress of the long-running action will only be finally determined at a further hearing later in the year.

We are delighted to announce the arrival of Dr. Michael Peglow to Chambers. Michael, who was called to the German Bar in 1987 and the English Bar in 1993, has an international practice with a focus on Anglo-German dispute resolution (arbitration, litigation, mediation) in company and commercial law matters. Michael's arrival further expands our team of individuals who are able to speak German and advise in matters involving German documentation and who include Richard Hacker QC, Lexa Hilliard, Barry Isaacs and Samantha Knights. By joining Chambers, Michael is a welcome addition to both our European and domestic practice. For further information, please contact the Senior Practice Manager, Paul Cooklin.

Also on the international front, Stephen Atherton and Martin Pascoe have just returned from a trip to Brunei where they were representing the State of Brunei in litigation against the Sultan's brother, Prince Jefri, for the recovery of missing State funds.

This Digest includes material up until 30 April 2000.

Lucy Frazer.

## GENERAL NEWS

### Judicial Appointments

The Lord Chancellor has announced a number of changes to the senior judicial appointments. The changes were triggered by the retirement of Lord Browne-Wilkinson as senior law lord. He is to be replaced by Lord Bingham of Cornhill, the current

Lord Chief Justice, with effect from 6 June. Lord Woolf, the Master of the Rolls, becomes Lord Chief Justice from 6 June. In turn Lord Phillips of Worth Matravers is to move from the House of Lords to become Master of the Rolls and Head of Civil Justice with effect from 1 October (his appointment being delayed due to his work on the BSE inquiry). Lord Justice Nourse becomes vice-president of the Court of Appeal's civil division (a new post) from 6 June and

will take over the duties as Master of the Rolls pending Lord Phillips' appointment.

Other changes are that Sir Richard Scott, Vice-Chancellor, becomes a law lord from 1 October. Sir Andrew Morritt, a Court of Appeal judge, takes over as Vice-Chancellor. Finally, Lord Justice May becomes deputy head of civil justice (a new post) from 1 October.

### Company Law Review

The steering group responsible for the DTI's Company Law Review published its latest proposals for reform on 15 March 2000. The new consultation document makes proposals on key areas of corporate governance and in particular proposes to restate directors duties by reference to a number of general principles and to a new statutory duty of skill, care and diligence for directors. There are also proposals to reform the reporting and accounting regimes for small and private companies.

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## ADMINISTRATION

### A Straume (UK) Ltd v. Bradlor Developments Ltd Ch Div.

Digested at Vol.5, No.3. Now further reported at [2000] BCC 333.

[Adam Goodison]

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

Digested at Vol.5, No.3. Now further reported at [2000] BCC 352.

### Re T and D Industries plc Ch Div.

Digested at Vol.6, No.1. Now further reported at [2000] 1 WLR 646.

[Richard Adkins QC]

Moss: "Conditional Resolutions and Exit from Administration Orders" (2000) 13 *Insolvency Intelligence* 30.

[Gabriel Moss QC]

Roberts: "*T&D Industries plc* revisited: further guidance for administrators in disposing of assets" [2000] *Tolley's ILP* 61.

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## ARBITRATION

### Inco Europe Ltd v First Choice Distribution (a firm) HL.

Digested at Vol.6, No.4. Now further reported at [2000] 2 All ER 109.

### Marc Rich Agriculture Trading SA v Agrimex Ltd *The Times*, 26 April 2000. QBD. (Langley J)

The terms of an arbitration clause provided for a

notice of arbitration to be served within a 90 day period after the relevant dispute had arisen. However, the terms of the clause did not define when a dispute was to be considered as having arisen. The Court held that the dispute arose when the claim for the payment had been ignored by the buyers. That could have been before an invoice was sent or sometime thereafter depending on the circumstances of the case.

### Southesk Trust Co Ltd v Secretary of State for Scotland *The Times*, 26 April 2000. Court of Session Inner House (Lords Rodger of Eastferry, Kirkwood and Caplan)

It was alleged that an arbiter had been appointed by the Secretary of State for Scotland after the 4 month period following termination of the relevant lease which was the statutory period for his appointment had expired. The Court of Session held that the appointment was valid since it was for the arbiter, not the Secretary of State, to determine all issues relating to the claim including any issue as to the date of termination of the lease.

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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.

### Barings plc v Coopers & Lybrand *The Independent*, 10 May 2000. CA. (Lord Woolf MR, Robert Walker LJ and Smith J).

The Court of Appeal considered an appeal by the defendants against a decision that transcripts of interviews arising out of the Board of Banking Supervision inquiry into the collapse of Barings Bank should not be disclosed in proceedings brought against them by the liquidator of Barings plc. The Court of Appeal held that information received for dual purposes (one Banking Act and one non-Banking Act) would be subject to the restriction on disclosure contained in section 82(1) of the Banking Act 1987 unless the non-Banking Act purpose was dominant so that the Banking Act purpose could be ignored as being of no significance. (BCCI v Price Waterhouse [1998] Ch. 84 overruled.)

However, the Court of Appeal ordered the disclosure of the transcripts as in the circumstances of the case the documents were to be considered as having entered the public domain: see the report in **Procedure** below. Decision of Evans-Lombe J digested at Vol.6, No.1 reversed.

[Mark Phillips QC, Jeremy Goldring]

### Crantrave Ltd v Lloyds Bank plc *New Law Online*, 13 April 2000. CA. (Pill and May LJ)

In circumstances where a bank had wrongly paid money out of an account the onus was on the bank to

assert any equity to defeat the customer's claim for recovery of the money. In the absence of authorisation, actual or purported, or ratification, payment to a third party could not of itself defeat the customer's claim.

**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]

**Three Rivers DC & others v Governor and Company of the Bank of England** *The Times*, 18 May 2000. HL (Lords Steyn, Hope, Hutton, Hobhouse and Millet)

The first Council Banking Co-Ordination Directive of 1977 did not impose obligations on member states capable of giving rise to Community law rights for individuals which could be enforced in an action for damages. This was acte clair and it was therefore unnecessary to refer the case to the ECJ.

The House of Lords also laid down the requirements of the tort of misfeasance in public office, but deferred determination of how those requirements should be applied in the present case until a further hearing later in the year.

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

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## BANKRUPTCY

**Currys Group v Cervello** *Unreported* 16 May 2000 (Jacob J)

**Ladd v Marshall** does not apply to an appeal against a judgment on an application to set aside a statutory demand as a result of the repeal of RSC Order 59 r 10 and the introduction of CPR Part 52.11(2)

[Barry Isaacs]

**Krasner v Dennison, Lawrence v Lesser** *New Law Online*, 6 April 2000; *The Times*, 18 April 2000. CA. (Kennedy, Chadwick and May LJ)

The Court of Appeal held that benefits under retirement annuity contracts and personal pension schemes belonging to a bankrupt formed part of his estate under section 283(1) of the Insolvency Act 1986 and vested in the trustee in bankruptcy upon his appointment under section 306(1). In particular the Court held that:

(1) The restrictions on assignment in the pensions policies did not prevent this conclusion from being reached since there is a general rule of public policy that a restriction on alienation shall not be enforceable in a bankruptcy against creditors.

(2) The annuity rights were not caught by section 310 of the Act since that section has no application to property which the bankrupt was entitled to receive by virtue of some right to which he was entitled at the date of the bankruptcy order.

The decision of Ferris J in **In re Landau** [1998] Ch 223 digested at Vol.3, No.1 was upheld.

The Court noted that when it came into force section 11 of the Welfare Reform and Pensions Act 1999 would prevent personal pensions and retirement annuities held by a bankrupt from forming part of his estate in bankruptcy.

[Christopher Brougham QC, John Briggs]

**Lilley v American Express Europe Ltd** [2000] BPIR 70. Ch Div. (John Jarvis QC)

There was jurisdiction to make a bankruptcy order even in circumstances where the debtor had reduced the outstanding petition debt to a level below the bankruptcy level by the time of the hearing of the petition. However, it was unnecessary and indeed wrong to take into account the costs of the petition before the court so as to bring the "petition debt" above the bankruptcy level.

**Ord v Upton** CA.

Digested at Vol.6, No.2. Now further reported at [2000] BPIR 104; [2000] 2 WLR 755.

**R v Lord Chancellor ex parte Lightfoot** CA.

Digested at Vol.6, No.1. Now further reported at [2000] BPIR 120.

**Regional Collection Services Limited v Heald**

*Unreported*, 5 April 2000. CA. (Nourse and Mantell LJ and Holman J)

The test of whether a petitioning creditor has done all that is reasonable to bring a statutory demand to the notice of the debtor within the meaning of rule 6.3(2) of the Insolvency Rules 1986 is a high one. In this case the petitioning creditor had attended at the debtor's home address on nine separate occasions leaving letters for the attention of the debtor. However, the Court held that the judge was entitled to conclude that by not visiting the respondent's business premises and by not leaving or sending any communication there the petitioning creditor had not taken all such steps as were reasonable in the circumstances.

**Smith v Ian Simpson & Co** *New Law Online*, 12 April 2000; *The Independent*, 18 April 2000. CA. (Evans and Laws LJ and Jonathan Parker J)

Section 271 of the Insolvency Act 1986 only precluded a bankruptcy order being made where the petition debt was paid in full by a third party or out of the debtor's own property with the consent of the court, but not where the petition debt had been paid out of the debtor's own property without the consent of the court and was accordingly liable to be avoided under section 284(1). Further, it would be inconsistent with the scheme and policy of the Insolvency Act 1986 to allow a debtor to bring a bankruptcy petition to an end by paying the petition debt in circumstances where there were supporting creditors desirous of seeking a

bankruptcy order.

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## COMPANY

### Re Hoicrest Ltd CA.

Digested at Vol.6, No.3. Now further reported at [2000] 1 BCLC 194.

### Re Oriental Gas Co Ltd Ch Div.

Digested at Vol.4, No.2. Now further reported at [2000] 1 BCLC 209.

### Regina v Broadcasting Standards Commission ex parte British Broadcasting Corporation *New Law Online*, 6 April 2000; *The Times*, 12 April 2000; *The Independent*, 12 April 2000. CA. (Lord Woolf MR, Hale LJ and Lord Mustill)

A company or body corporate can make a complaint to the Broadcasting Standards Commission of unwarranted infringement of its privacy under sections 110 and 111 of the Broadcasting Act 1996. Further, on the facts of the present case the Commission was entitled to conclude that secret filming of transactions in the company's shops was an infringement of the company's privacy.

Dignam: "Exporting corporate governance: UK regulatory systems in a global economy" (2000) 21 *The Company Lawyer* 70.

McLauchlan: "*New Bullas* in New Zealand: Round Two" [2000] LQR 211.

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## CONFLICT OF LAWS

### Credit Agricole Indosuez v Chalease Finance Corp CA.

Digested at Vol.6, No.2. Now further reported at [2000] 1 All ER (Comm) 399; [2000] 1 Lloyd's Rep 348.

### Messier-Dowty Ltd v Sabena SA CA.

Digested at Vol. 6, No. 4. Now further reported at [2000] 1 Lloyd's Rep 428.

### Society of Lloyd's v White *The Times*, 14 April 2000. QBD (Cresswell J)

An English court would grant an injunction restraining defendants over whom it had personal jurisdiction from pursuing an action in an Australian court if they had brought the action under a contract containing an exclusive jurisdiction clause to refer disputes to English courts for decision according to English law. Accordingly an injunction would be granted in the present case. Further, the injunction would be granted despite the fact that the courts in Australia had refused to stay the defendants' action

since those courts did not appear to have considered several relevant court decisions and orders which had been made in relation to the litigation in England.

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## CONTRACT

### Avon Insurance plc v Swire Fraser Ltd [2000] 1 All ER (Comm) 573. QBD (Comm Ct). (Rix J)

On the law as it presently stood damages for any misrepresentation which induced a contract were to be assessed on the fraudulent basis. It followed that where there was room for the exercise of judgment by the court, a misrepresentation ought not to be too easily found.

### Clarion Ltd v National Provident Institution [2000] 2 All ER 265. Ch Div. (Rimer J)

Save for the special cases where equity might be prepared to relieve a party from an unconscionable bargain, it was ordinarily no part of equity's function to allow a party to escape from a bad bargain. Thus the jurisdiction of equity did not extend to relieving a party from his contract when the nature of his mistake went not to the contract's subject matter or terms, but only to its commercial consequences and effect.

### Society of Lloyd's v Twinn *The Times*, 4 April 2000. CA. (Scott V-C, Chadwick LJ and Buxton LJ)

There was no conceptual reason why an offeree could not validly accept an offer even though he indicated doubt in his ability to perform his part of the contract and asked the offeror for some indulgence. This followed from the distinction between two principles: (1) that an offeree who purported to accept an offer must accept unconditionally but (2) an offeree could accept an offer unconditionally and at the same time make a collateral offer to the original offer. The collateral offer might or might not be accepted but in either case the unconditional acceptance of the original offer would stand.

[John Briggs]

### Spice Girls Ltd v Aprilia World Service BV *The Times*, 5 April 2000. Ch Div. (Arden J)

The Spice Girls entered into a contract with an Italian motorbike company to promote its motorcycles. It was held that by their conduct the Spice Girls had represented an intention that the group would not break up during the term of the advertising contract. This was a continuing representation which the group had a duty to correct when it became untrue. Furthermore, this representation had induced the motorbike contract and accordingly the company was entitled to damages under section 2(1) of the Misrepresentation Act 1967.

### Weldon v GRE Linked Life Assurance Ltd *New Law Online*, 17 April 2000. QBD. (Nelson J)

A life assurance policy provided for the payment of

premiums by direct debit. However, the defendant insurer had failed to implement the direct debit correctly so that no premiums were ever paid. The question was whether the defendant could rely on non-payment of the premiums to render the policy void. The Court held that it was arguable that terms should be implied to the effect that the defendant would properly implement the mandate. It was further arguable that on the true construction of the policy the presentation of the mandate itself constituted payment or at least tender of due payment under the policy and therefore the defendant could not rely on its own failure to collect the premium as rendering the policy void. Furthermore, it was arguable that in any case the defendant owed the claimant a duty of care in tort to collect the payments.

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

Berg: "Excluding liability for loss of profit" [2000] LMCLQ 20.

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## CORPORATE INSOLVENCY

**A&J Fabrications (Batley) Ltd v Grant Thornton**  
Ch Div.

Digested at Vol.4, No.8. Now further reported at [2000] BPIR 1.

**Re Baron Investments (Holdings) Ltd** [2000] 1  
BCLC 272. Ch Div. (Pumfrey J)

The liquidator of the company employed the petitioning creditors' solicitors to act in the liquidation. The Court held that in deciding whether there was a conflict of interest it was necessary to analyse the facts of the case in order to identify the manner in which the conflict arising by dual employment was said to occur. For there to be a genuine dual employment there must be a reasonable apprehension of potential conflict and not a mere theoretical possibility. Where one was concerned with potential conflicts a pragmatic approach should be adopted but where an actual conflict arose it must be dealt with. In the present case the actual conflict had been dealt with and there was accordingly no reason to remove the solicitors.

**Bernasconi v Nicholas Bennett & Co** [2000] BPIR  
8. Ch Div. (Laddie J)

Dishonesty is an essential element of a claim of fraudulent trading contrary to section 213 of the Insolvency Act 1986. The required intent to defraud is subjective not objective and it is accordingly necessary to show that there was either an intent to defraud or a reckless indifference whether or not the creditors were defrauded. This is the crucial difference between a

claim under section 213 and a claim under section 214 in respect of wrongful trading.

[Marion Simmons QC]

**Biosource Technologies Inc v Axis Genetics plc** Ch  
Div.

Digested at Vol.6, No.1. Now further reported at [2000] 1 BCLC 286.

[Andreas Gledhill]

**Coutts & Co v Stock** Ch Div.

Digested in Vol.6, No.1. Now reported at [2000] 2 All ER 56; [2000] 1 BCLC 183.

**Fletcher v Royal Automobile Club Ltd** Ch Div.

Digested at Vol.5, No.3. Now further reported at [2000] 1 BCLC 331. Decision upheld by the Court of Appeal (Henry and Robert Walker LJ, Scott Baker J) (unreported).

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

Digested at Vol.6, No.1. Now further reported at [2000] 2 All ER 45; [2000] 1 BCLC 171.

[David Marks]

**Re Inside Sport Ltd** Ch Div.

Digested at Vol.4, No.10. Now further reported at [2000] BCLC 302.

[Hilary Stonefrost]

**Re Richbell Strategic Holdings Ltd** *New Law  
Online*, 4 April 2000. Ch Div. (Evans-Lombe J)

A creditor of the company applied for directions in relation to a future public examination of the respondent directors of the company under section 133 of the Insolvency Act 1986. The court held that at this stage it only had power to give guidance as to what questions were prima facie admissible and what questions were prima facie not admissible and no order could be made pre-empting the decisions of the presiding judge as to admissibility. However, the fact that a question might be connected with proceedings continuing in the United States was not by itself a reason for the respondent to decline to answer the question.

[Stephen Atherton]

**Re Thirty Eight Building Ltd** Ch Div.

Digested at Vol.4, No.10. Now further reported at [2000] BPIR 158.

[Adam Goodison]

Armour: "Who pays when polluters go bust?" [2000] LQR 200.

Havranek: "The Bank of England and bank failures" [2000] *Insolvency Lawyer* 73.

Hemsworth: "Voidable preference: desire and effect"

[2000] *Tolley's ILP* 54.

de Prez and Case: "The Power of Disclaimer and Environmental Licences" [2000] *Insolvency Lawyer* 87.

Rajani: "Enforceability of subordination of debt in a liquidation" [2000] *Tolley's ILP* 58.

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## DAMAGES

**Adcock v Co-operative Insurance Society Ltd** *New Law Online*, 7 April 2000; *The Times*, 26 April 2000. CA. (Waller LJ and Sir Christopher Slade)

Rule 40.8 of the Civil Procedure Rules 1998 gave no real guidance on rates of interest. Previously in commercial cases a rate of 1% over base rate had commonly been used unless for some reason that would be unfair to one party or another. There was no reason why that measure should not continue to be used. Further, in exercising its discretionary power to award interest on damages a court might reduce the rate or period in circumstances where a claimant was guilty of gross delay. However, it should not be forgotten that where a defendant was actually holding on to sums which he ought to have paid to the claimant, it was unlikely that the defendant would have been pressing on with the action himself.

**All-In-One Design and Build Ltd v Motcomb Estates Ltd** *The Times*, 4 April 2000. QBD. (Michael Black QC)

"Interest" within the meaning of rule 36.21 of the Civil Procedure Rules 1998 (which allows the court to award enhanced interest on damages in circumstances where a party failed to accept a reasonable offer of settlement) was not the same as "interest" within the meaning of section 35A of the Supreme Court Act 1981. Therefore the courts were not empowered to award interest under rule 36.21 by that Act. However, section 1(3) of the Civil Procedure Act 1997 empowered the courts to apply the Civil Procedure Rules to ensure that civil justice was accessible, fair and efficient. It followed that the courts were empowered to impose such interest by section 1(3) since rule 36.21 was in effect a power to sanction a party for unnecessarily prolonging litigation. Rules 36.21 was therefore not ultra vires the powers of the courts.

**Kuwait Airways Corp v Kuwait Insurance Co** *New Law Online*, 20 April 2000. QBD (Comm Ct). (Langley J)

In awarding interest on damages the fundamental principle was to award interest from the date of loss to compensate for the successful claimant being kept out of the money which the court adjudged should have been paid. Doubts as to the amount of loss or damages and as to the merits of the claim were generally

immaterial. Regarding the rate of interest, the well-established practice of the Commercial Court to award interest at base rate plus 1% accorded with principle and authority.

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## DIRECTORS AND DISQUALIFICATION

**In re Barings plc (No.3)** Ch Div.

Digested at Vol.4, No.9. Now further reported at [2000] 1 WLR 634.

**Secretary of State for Trade and Industry v Deverell** CA.

Digested at Vol.6, No.2. Now further reported at [2000] 2 All ER 365.

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## INSURANCE

**Alfred McAlpine plc v BAI (Run-Off) Ltd** [2000] 1 All ER (Comm) 545; [2000] 1 Lloyd's Rep 437 CA. (Peter Gibson, Waller and Buxton LJJ)

The prejudice suffered by an insurer as a result of negligence by the insured in supplying details of a claim could not turn a breach of a notification clause in a policy into a breach of the whole contract of insurance. However, there was no reason why such a clause should not be construed as an innominate term whereby the consequences of a breach might be so serious that it would entitle the insurer to reject the claim, even in circumstances where the breach was not so serious as to amount to a repudiation of the entire contract.

Decision of Colman J digested at Vol.5, No.1 upheld.

**Thornton Springer v NEM Insurance Co Ltd** [2000] 2 All ER 489; [2000] 1 All ER (Comm) 486. QBD (Comm Ct). (Colman J)

The essence of a professional indemnity policy was that the assured must prove a loss before he is able to recover from the insurers. It followed that the character of the loss insured against was the true liability of the assured rather than any alleged liability advanced by a claim. Thus the policy did not insure against the eventuality of a claim being made against the insured (and the costs caused by such a claim) but only against an actual breach of professional duty as ascertained by judgment, arbitration or settlement.

Parsons: "Directors' and officers' liability insurance: a target or a shield?" (2000) 21 *The Company Lawyer* 77.

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## INTERNATIONAL INSOLVENCY

### Re Southern Equities Corp Ltd, England v Smith CA.

Digested at Vol.6, No.3. Now further reported at [2000] BPIR 28.

[Gabriel Moss QC]

Dawson: "An Extraterritorial Dichotomy?" [2000] *Insolvency Lawyer* 81 (discussing the rule against the enforcement of foreign revenue debts in cases of insolvency)

Segal: "Corporate Recovery and Rescue – Mastering the Key Strategies Necessary for Cross Border Workouts – Part 2" (2000) 13 *Insolvency Intelligence* 27.

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## INTERNATIONAL LAW

### R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No.1) HL.

Digested at Vol.4, No.10. Now further reported at [2000] 1 AC 61.

### R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No.2) HL.

Digested at Vol.5, No.1. Now further reported at [2000] 1 AC 119.

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## LIMITATION

### Coulthard v Disco Mix Club Ltd Ch Div.

Digested at Vol.5, No.3. Now further reported at [2000] 1 WLR 707.

### Raja v Lloyds TSB Bank plc *New Law Online*, 20 April 2000. Ch Div. (M Tugendhat QC)

It is established that the duty imposed on a mortgagee to obtain a proper price for a property arose in equity. However, the claim for damages for breach of the duty in equity corresponded with the remedy for breach of a duty of care in tort. The court would therefore apply the six year limitation period in tort under section 2 of the Limitation Act 1980 by analogy pursuant to section 36 (Coulthard v Disco Mix Club Ltd followed).

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## PARTNERSHIP

### Hurst v Bryk HL

Digested at Vol.6, No.4. Now further reported at *The Times*, 4 April 2000; [2000] 2 All ER 193; [2000] 2 WLR 740.

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## PROCEDURE

### Barings plc v Coopers & Lybrand *The Independent*, 10 May 2000. CA. (Lord Woolf MR, Robert Walker LJ and Smith J).

The Court of Appeal held that documents put before the court for the purpose of being read in evidence, such as transcripts exhibited to an affidavit relied upon by the Secretary of State in company directors disqualification proceedings, entered the public domain unless it could be shown that it was not in the interests of justice that this should be the position. This raises difficulties in respect of the inspection and copying of documents but these difficulties did not require resolution in the instant case.

[Mark Phillips QC, Jeremy Goldring]

### Commercial Acceptances Ltd v Townsend Investments Inc *The Times*, 26 April 2000. CA. (Lord Woolf MR, Pill and May LJJ)

A party seeking to appeal from the court's judgment or order was required to place his whole case before the court on the hearing of the appeal. The fact that the rules of court permitted an appeal to be brought in respect of "any specified part of the judgment or order" under challenge did not mean that part might be appealed by one notice and, following its disposal, another part might be appealed by a subsequent notice.

### Ebert v Birch CA.

Digested at Vol.5, No.3. Now further reported at [2000] BPIR 14.

### Federal Bank of the Middle East v Hadkinson CA. Digested at Vol.6, No.4. Now further reported at [2000] 2 All ER 395; [2000] BPIR 44.

### Habib Bank Ltd v Jaffer *The Times*, 5 April 2000. CA. (Nourse, Ward and Hale LJJ)

Inordinate and inexcusable delay in conducting serious litigation by a claimant that, entirely because of its own fault, involved a wholesale disregard of the rules of court, was contumelious conduct amounting to an abuse of process. The only fair result was for the action to be struck out.

### Hamblin v Field *The Times*, 26 April 2000. CA. (Peter Gibson, Chadwick and Tuckey LJJ)

Excessive citation of authorities was to be deplored and in particular, the practice of referring courts to

summaries of cases which did not use the language used by the judge and where it was unclear whether the judgment had been summarised by a professional lawyer or member of the Bar should not be tolerated. The use of such summaries was not a satisfactory way to put judicial decisions before the court.

**HFC Bank plc v HSBC Bank plc** *The Times*, 26 April 2000. CA. (Nourse, Sedley and Judge LJ)

In a case where judgment had been reserved by the court, it was the duty of the parties and their professional advisers to inform the court immediately they became aware of any development which might make it unnecessary for judgment to be delivered.

**Morris v Bank of America National Trust** CA.

Digested at Vol.6, No.1. Now further reported at [2000] BPIR 83.

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

**SEA Assets Ltd v PT Garuda Indonesia** QBD (Comm Ct).

Digested at Vol.6, No.5. Now further reported at *CCH Commercial Law Cases*, Report 27.

[Robin Dicker QC]

**Somatra Ltd v Sinclair Roche & Temperley** [2000] 1 Lloyd's Rep 311. QBD (Comm Ct). (Timothy Walker J)

Legal professional privilege could be waived unilaterally but without prejudice privilege was effectively a joint privilege and as a matter of principle it could not be waived by one party alone. The test to be applied in determining whether to order the disclosure of without prejudice material was whether the justice of the case required it. In this case the without prejudice material had only been referred to in an affidavit by the defendant for the limited purpose of a *Mareva* application. In the circumstances it would be manifestly unjust to permit the claimant to take advantage of one paragraph of the affidavit so as to enable it to rely at the trial on the without prejudice material referred to therein.

Gearty: "Insolvency ... and human rights" [2000] *Insolvency Lawyer* 68.

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## PROPERTY

**Croydon (Unique) Ltd v Wright** [2000] 2 WLR 683. CA. (Butler-Sloss and Pill LJ and Sir Christopher Staughton)

Creditors obtained a charging order nisi on a tenant's lease to secure payments owed to them which was registered as a caution at the Land Registry. However, the tenant fell into arrears with his rent and the landlord obtained a possession order. The creditors had not had notice of the application or the order and

applied to have it set aside. Held that:

(1) The creditors could not enforce their charging order while the lease remained forfeited since the lease no longer existed.

(2) However, an application under section 138(9C) of the County Courts Act 1984 was not confined to the relief mentioned in that section and, on an application by the holder of a charging order, the court could if it thought fit restore the original lease for the purpose of enabling the applicant to apply for an order for sale.

(3) It would usually be unjust to deprive the holder of a charging order who had registered his interest of any right to apply for relief from forfeiture.

(4) Accordingly, although the reason for obtaining the charging order had been a debt unconnected with the lease, the grant of the charging order gave the creditors a proprietary interest in the land which was sufficient to bring them within section 138(9C).

**Gillett v Holt** [2000] 2 All ER 289. CA. (Beldam, Waller and Robert Walker LJ)

All elements of the doctrine of proprietary estoppel were permeated by the fundamental principle that equity was concerned to prevent unconscionable conduct. Thus detriment was not a narrow or technical concept and need not consist of the expenditure of money or other quantifiable financial detriment provided that it something substantial. The issue of detriment had to be approached as part of a broad inquiry as to whether repudiation of an assurance was or was not unconscionable in all the circumstances.

Decision of Carnwath J digested at Vol.4, No.8 reversed.

**On Demand Information plc v. Michael Gerson (Finance) plc** Ch Div.

Digested at Vol.5, No.3. Now further reported at [2000] BCC 289.

[Fidelis Oditah]

**R v Braintree District Council ex parte Halls** *The Independent*, 14 April 2000. CA. (Evans and Laws LJ and Jonathan Parker J)

A restrictive covenant inserted into all conveyances made by a local authority under the "right to buy" scheme created by the Housing Act 1985, restricting the use of the property conveyed to that of a single dwelling house, was unlawful since its object was to enable the authority to demand a share of any future development value in return for lifting the covenant.

**Ropaigealach v Barclays Bank plc** CA.

Digested at Vol.5, No.1. Now further reported at [2000] 1 QB 263.

**Secured Residential Funding plc v Douglas Goldberg Hendeles & Co (a firm)** *New Law Online*, 25 April 2000; *The Times*, 26 April 2000. CA. (Swinton Thomas, Brooke and Laws LJ)

An advance to a borrower to buy a house was made on the day the mortgage company transferred the funds to the client account of the borrower's solicitors, not on the completion date when the borrower's solicitors remitted the entire purchase price of the property to the vendor's solicitors.

Walton: "The landlord, his distress, the insolvent tenant and the stranger" [2000] *Tolley's ILP* 47.

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## RECEIVERS

**Don King Productions v Warren** [2000] BCC 263. Ch Div. (Neuberger J)

The court would only appoint a receiver over a business where it was appropriate to do so. Generally it would be appropriate where there was concern over the defendant's conduct. However, this consideration had to be balanced against the fact that in this case there was a high risk that the appointment of a receiver would do substantial and irrevocable damage to the business. It was therefore preferable to accept undertakings from the defendants and the imposition of a regime over the business under the supervision of an independent accountant.

**Triffit Nurseries v Salads Etcetera Ltd** Ch Div. Digested at Vol.5, No.1. Now further reported at [2000] 1 BCLC 262. [Simon Mortimore QC]

**Triffit Nurseries v Salads Etcetera Ltd** CA. Digested at Vol.6, No.4. Now further reported at *New Law Online*, 18 April 2000; *The Times*, 26 April 2000. [Simon Mortimore QC]

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## RESTITUTION

**Countrywide Communications Ltd v ICL Pathway** [2000] CLC 324. QBD. (Nicholas Strauss QC)

The court in appropriate circumstances has jurisdiction to impose an obligation on one party to a proposed contract which never materialised to reimburse the other for services rendered. In deciding whether to impose an obligation to reimburse and, if so, its extent, the court will take into account a number of considerations identified in the authorities. However, it was unlikely that an obligation to repay an expense incurred would be imposed if the expense was not incurred in the course of providing services requested by the defendant.

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## TORT

**Hamilton v Al Fayed** HL.

Digested at Vol.6, No.4. Now further reported at [2000] 2 All ER 224; [2000] 2 WLR 609; *The Independent*, 5 April 2000.

**Holtby v Brigham & Cowan (Hull) Ltd** *New Law Online*, 7 April 2000. CA. (Stuart-Smith, Mummery and Clarke LJJ)

A tortfeasor was only liable to the extent of his contribution towards any disability. That contribution could be estimated by the court in the light of the evidence. If the issue of contribution was never raised by a defendant then that defendant was at risk of being held liable for the full amount of damages. However, the onus of proof did not shift on to a defendant to prove that other tortfeasors were responsible for identified parts of a disability.

**Jupiter Unit Trust Managers Ltd v Johnson Fry Asset Managers plc** *New Law Online*, 20 April 2000. QBD. (Morland J)

A statement in a "knocking" advertisement that a rival financial service provider's product was not a good investment could be libellous in context. However, in this case no fair minded reader of the advertisements could have come to the conclusion that it contained any meaning defamatory of the claimant in its trading reputation. Further, in relation to the claim for malicious falsehood, the defendant had not overstepped the permissible limit of denigration or disparagement of the claimant's products.

**R v Commissioners of Customs and Excise ex parte F and I Services Ltd** *The Times*, 26 April 2000. QBD. (Carnwath J)

The scope of the duties of care, if any, owed by public authorities in the exercise of their statutory functions is a developing area of law. Therefore it could not be categorically stated that the Commissioners of Customs and Excise did not owe a duty to exercise reasonable care and skill when responding to the specific inquiry of an individual taxpayer as to the value-added tax implications of a particular scheme on which the Commissioners had agreed to offer an opinion.

**Sasea Finance Ltd v KPMG (a firm)** CA. Digested at Vol.6, No.4. Now further reported at [2000] 1 BCLC 236.

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## TRUSTS

**Banner Homes Group plc v Luff Developments Ltd** CA.

Digested at Vol.6, No.3. Now further reported at [2000] 2 All ER 117; [2000] 2 WLR 772.

**Dubai Aluminium Co Ltd v Salaam** *New Law Online*, 7 April 2000. CA. (Evans and Aldous LJJ, Turner J)

The vicarious liability imposed by section 10 of the Partnership Act 1890 was not limited to liability in tort but extended to accessory liability for dishonest assistance. Further, there is no principle of law that a solicitor who becomes liable as an accessory cannot have been acting in the ordinary course of business within the meaning of section 10. The question as to whether he was so acting depends on the facts of each case. In addition, the vicarious liability imposed by section 10 could provide the basis for a claim for contribution pursuant to the Civil Liability (Contribution) Act 1978.

**Pan-Europe Communications NV v Deutsche Bank AG** *New Law Online*, 19 April 2000. Ch Div. (Jacob J)

Where a party was under a duty not to compete with another party in relation to a particular transaction (e.g. an auction), then breach of that duty would not create a constructive trust of anything and everything acquired as a consequence of the breach. For such a trust to arise the authorities required that the defendant was only able to carry out the breach because of its fiduciary position.

**Wight v Olswang** *The Times*, 18 April 2000. Ch Div. (Neuberger J)

Irrespective of breaches of trust which had occurred during the decision-making process, the beneficiaries of a trust did not have a claim against a trustee who had made an investment decision unless they could establish that the decision was one that no reasonable trustee could have made.

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## VOLUNTARY ARRANGEMENTS

**Re Brelec Installations Ltd**, Ch Div.

Digested at Vol.6, No.4. Now further reported at *New Law Online*, 11 April 2000; *The Times*, 18 April 2000.

[Glen Davis]

**Horrocks v Broome** Ch Div.

Digested at Vol.5, No.1. Now further reported at [2000] BCC 257.

[John Briggs]

Rutstein: "Corporate Failure: A Change of Direction" [2000] JIBL 71.

Steiner: "The Insolvency Bill 2000: Rescue Culture in the New Millennium" [2000] JIBL 61.

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## MEDIATION

Sandra Bristoll is now a CEDR accredited mediator.

[Sandra Bristol]

For further information please contact Lucy Frazer or one of the Clerks at 3~4 South Square on (tel) 020 7696 9900 or (fax) 020 7696 9911. E-mail may be sent to [clerks@southsquare.com](mailto:clerks@southsquare.com).

