

# 3/4 Digest

*Volume 6 Number 9. November 2000*

In the case of Bank of Ireland v Hollicourt (Contracts) Ltd, the Court of Appeal has recently considered the application of section 127 of the Insolvency Act 1986 to payments made out of a company's bank account by its bankers following the presentation of a winding up petition against the company. The Court of Appeal held that section 127 did not operate to avoid the payments made out of the account by the bank on the instructions of the company between the company and the bank as the payment was not a disposition of the Company's property in favour of the bank, but only between the company and the payee.

This edition of the Digest was digested by Tom Smith and Daniel Bayfield and digests material up to 16 October 2000.

**David Allison**

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## GENERAL NEWS

### **Company Law Review looks at registration of charges**

The Steering Group of the DTI Company Law Review has issued a consultation paper dealing with the registration of company charges. The paper poses two alternative approaches to the subject. The first approach is to improve the present system (e.g.

extending the categories of charges to be registered and the clarifying the invalidity of an unregistered charge. The second alternative approach put forward is to abandon the time-registration requirement and introduce a notice-filing system where all that is registered is a notice giving particulars of the property over which the charge has been taken and certain details of the creditor (similar to that in Article 9 of the US Uniform Commercial Code).

### **Distance Selling Regulations**

The Consumer Protection (Distance Selling) Regulations 2000 came into force on 31 October 2000 and are likely to have a significant effect on anyone who provides an "organised distance sales or service provision scheme". As that term is not defined in the Regulations, we anticipate early litigation in this regard.

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## **ADMINISTRATION**

**Re Longcross Construction Ltd** *Unreported*, 10 October 2000. Ch. Div. (Ferris J).

Where the majority of unconnected creditors were implacably opposed to the making of an administration order for the purpose of approving a CVA, the court did not have jurisdiction to make the administration order, nor would it have made an order if it had jurisdiction to do so.

[Barry Isaacs]

**Re Stallton Distribution Ltd** *Unreported*, 27 October 2000. Ch. Div. (Nigel Davis QC sitting as a deputy judge of the High Court).

A Rule 2.2 Report in relation to a directors' administration petition was served on the day before the hearing. The petitioners applied for an adjournment to deal with submissions made by an opposing creditor in relation to the Report. The adjournment was granted and the directors were ordered to pay the costs thereof.

[Barry Isaacs]

**Re Stallton Distribution Limited** Ch D (Pumfrey J) *unreported*, 16 November 2000

An administration report presented by the directors of the Company was dismissed and a costs order made against the directors personally in circumstances where they failed to give full and frank disclosure in the evidence in support.

[Barry Isaacs]

David Milman, "Judicial Support for Administration"  
*Palmer's In Company* Issue 08/00.

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## **ARBITRATION**

**Patel v. Patel** CA

Digested at Vol.5, No.3. Now further reported at [2000] QB 551.

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## **BANKING**

**Crantrave Ltd v Lloyds Bank Plc** CA.

Digested at Vol.6, No.5. Now reported at [2000] 3 WLR 877.

**SAFA Ltd v Banque du Caire** [2000] 2 All ER (Comm) 567. CA. (Schiemann, Waller and Hale LJJ)

The principle that letters of credit were to be treated as cash was an important one and had to be maintained. Where a bank was involved in the underlying transaction, however, it might be unjust for a bank to have summary judgment given against it on a letter of credit. If a bank could establish a claim with a real prospect of success, either that the demand was fraudulent or that there had been a misrepresentation, then the court ought not to give summary judgment on the grounds that a set-off had reasonable prospects of success or that there was a compelling reason to have a trial of the letter of credit issue.

**Smith v Lloyds TSB Bank plc** *The Times*, 6 September 2000. CA (Pill and Potter LJJ and Sir Murray Stuart-Smith).

On a proper construction of section 64 of the Bills of Exchange Act 1882, and subject to the qualifications therein, a cheque or bankers draft which had been materially altered by the fraud of a third party was no longer a cheque or draft but a worthless piece of paper. Accordingly, a party who, but for the material alteration, would have had contractual rights based on the cheque, could not bring an action for damages in conversion for its face value because it no longer represented a chose in action for that amount.

[Marion Simmons QC]

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## **BANKRUPTCY AND IVAS**

**Ashurst v Pollard** *The Times*, 29 November 2000. CA.

The Court of Appeal has confirmed that Article 16 of the Brussels Convention which gives a foreign court exclusive jurisdiction in relation to "proceedings which have as their object rights in rem in immovable property" does not apply to the case of an English trustee in bankruptcy seeking to realise foreign property, albeit situated abroad.

However, the Court of Appeal did not overrule the decision in **Re Hayward** [1997] Ch 45 which held that proceedings which, in effect, seek to perfect the title of foreign property do not fall within the bankruptcy exception provided for in Article 1 of the Convention.

[David Marks]

**Mathew v Byng** Ch D (Lawrence Collins J) *unreported*, 3 November 2000

The court did not have jurisdiction to entertain an appeal against a finding of the bankruptcy registrar that the petition debt was not substantially disputed and the petitioner was therefore entitled to a bankruptcy order, in circumstances where (i) the petition was adjourned to allow the debtor to pay the sum claimed; and (ii) no formal order had or would be made in relation to the registrar's finding prior to final determination of the petition.

[Barry Isaacs]

**Re a Debtor (No. 303 of 1997)** *The Times*, 2 October 2000. Ch Div. (Ferris J)

A former partner in a firm could not set off claims for money allegedly due to him on the taking of accounts on the dissolution of that partnership against the claim of certain ex-partners to be indemnified against expenses they had incurred in their capacity as trustees for the firm of the legal title to the lease of the former partnership's office.

**Everitt v Floyd** *Unreported*, 26 October 2000. Ch. Div. (David Donaldson QC sitting as a deputy judge of the High Court).

Where there was a term in an IVA that the supervisor should, upon the debtor defaulting on payments to be made by him, ascertain the views of creditors as to whether the arrangement had failed and the supervisor should petition for the debtor's bankruptcy, the Court was entitled to make a bankruptcy order notwithstanding the failure of the supervisor to do so.

[Barry Isaacs]

**Haig v Jonathan Aitken** Ch. Div.

Digested at Vol. 6, No. 7. Now further reported at [2000] 3 WLR 1117.

**Trustee of Property of Harper v Waters** *Unreported*, 24 May 2000. Ch Div. (Jonathan Parker J)

The remedy of seizure of a bankrupt's property under Section 365 of the Insolvency Act 1986 is a remedy of last resort but may be appropriate where the court is satisfied that there is a real risk that the bankrupt's property or possessions may be dissipated, destroyed or disposed of. In considering whether to make an order the court must consider the value of the property which is liable to be seized in order to satisfy itself that its value justifies the use of the remedy. Finally, the court will in most cases be concerned to find a balance between the rights of third parties and the need to advance the bankruptcy in the interests of the creditors.

Vernon S Dennis, "Bankruptcy reform – a start in the wrong direction?", *Tolley's Insolvency Law and Practice*, Vol.16, No.5, 179.

## COMPANY

**Attorney General's Reference (No. 2 of 1999)** [2000] 2 BCLC 257. CA. (Rose LJ, Potts and Curtis JJ)

A non-human defendant could not be convicted of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual. The courts had not started a process from moving from identification as the basis for corporate liability for manslaughter and the authorities did not support such a contention. Thus the identification principle remained the only basis in common law for manslaughter by gross negligence.

**Jarvis plc v PricewaterhouseCoopers** *The Times*, 10 October 2000. Ch. Div. (Lightman J).

When auditors resigned and served a statement concerning the circumstances connected with their resignation on a company under Section 394 of the Companies Act 1985 and where the company subsequently applied to the court under Section 394(3) and then served a notice of discontinuance, the notice of discontinuance constituted a decision of the court and therefore triggered the obligation upon the company to serve the auditor's statement upon interested parties.

**MacPherson v European Strategic Bureau Ltd** *The Times*, 5 September 2000. CA (Peter Gibson, Chadwick, Buxton LJJ).

The directors of a company who caused the company to enter into an agreement whereby the assets to which the company was then entitled were to be applied in making payments to certain creditors, including the directors and payments for past services under a liability assumed under the agreement itself, to the exclusion of other creditors and without making any provision, other than for consultancy services to be provided by the parties themselves, for the cost of bringing the existing contracts to fruition or of recovering any monies due under them, were in breach of duty to the company since the transaction was not for the benefit or to promote the prosperity of the company but to effect an informal winding-up of the business.

**Re Nottingham Forest plc** *The Times*, 5 September 2000. Ch. Div. (Evans-Lombe J).

The size and importance of a company had no bearing on the operation of the rule in **Woodhouse & Co v Woodhouse** ((1914) 30 TLR 559) since that rule of equity arose from the fiduciary relationship between the directors of a company and its shareholders. The rule entitled a person to obtain the production of documents by a company in which he held shares even if those documents would normally attract legal professional privilege.

**Re Sedgefield Steeplechase Co (1927) Ltd; Scotto v Petch** Ch Div.

Digested at Vol.6, No.2. Now further reported at [2000] 2 BCLC 211.

**Walker v Stones** *The Times*, 26 September 2000. CA (Nourse and Mantell LJJ and Sir Christopher Slade).

(1) Where a defendant's conduct had breached some legal duty owed to the claimant personally and caused the claimant personal loss, separate and distinct from any loss occasioned to any corporate body in which the claimant might be financially interested, then the mere fact that the defendant's conduct might also have given rise to a cause of action at the suit of that body would not deprive the claimant of his cause of action.

(2) A trustee-solicitor who deliberately committed a breach of trust which no reasonable trustee-solicitor could have thought was for the benefit of the beneficiaries of the trust was acting dishonestly.

(3) A breach of trust committed by a trustee who was also a partner in a firm fell outside the ordinary course of the business of that firm and the firm was not vicariously liable for it.

Sarah Worthington, "Corporate Governance: Remediating and Ratifying Directors' Breaches" [2000] LQR 638.

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## CONFLICT OF LAWS

**Ace Insurance SA-NV v Zurich Insurance Co** [2000] 2 All ER (Comm) 449; [2000] 2 Lloyds Rep 423; *The Times*, 6 September 2000. QBD (Comm Ct). (Longmore J)

As the Brussels and Lugano Conventions were designed to regulate jurisdiction between contracting states, if a competing jurisdiction was not a contracting state, the doctrine of stay for forum non conveniens was not inconsistent with the conventions and remained available to the English courts. There was binding authority to the effect that jurisdiction to stay on the ground of forum non conveniens could be exercised in favour of a non-contracting state even though the defendant was domiciled in a contracting state. **Re Harrods (Buenos Aires) Ltd** [1991] 4 All ER 334 followed.

**Lubbe v Cape plc** HL.

Digested at Vol.6, No.8. Now further reported at [2000] 2 Lloyd's Rep 383.

**Molins plc v GD SpA** CA.

Digested at Vol. 6, No. 4. Now further reported at [2000] 1 WLR 1741.

**Societe Group Josi Reinsurance Co SA v Universal General Insurance Co** [2000] 2 All ER (Comm) 467. ECJ.

The general rule of the Brussels Convention is that the courts of the contracting state in which the defendant is domiciled have jurisdiction. This rule is based on the principle that a defendant should not be handicapped in defending himself. It followed that, as a general rule, the place where the claimant was domiciled was not relevant for the purpose of applying the rules of jurisdiction laid down by the convention. Furthermore, the rules of jurisdiction which derogate from the general principle cannot give rise to an interpretation going beyond the cases expressly envisaged by the convention. Thus the exception to the general principle in Article 7 relating to contracts of insurance should not be extended beyond the specific cases envisaged by the convention which were all concerned with protecting the position of the policyholder. It follows that Article 7 did not apply to a contract of reinsurance since both parties to the contract were insurance professionals.

**UBS AG v Omni Holding AG** Ch Div.

Digested at Vol. 6, No. 3. Now further reported at [2000] 2 BCLC 310.

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## CONTRACT

**Alfred McAlpine Construction Ltd v Panatown Ltd** HL.

Digested at Vol.6, No.8. Now further reported at [2000] 3 WLR 946 and [2000] 4 All ER 97.

**A-G v Blake** HL.

Digested at Vol.6, No.8. Now further reported at [2000] 2 All ER (Comm) 487.

**Awwad v Geraghty & Co** [2000] 3 WLR 1041. CA. (Lord Bingham of Cornhill CJ, Schiemann and May LJJ)

A solicitor entered into an agreement with her client whereby she agreed to charge her normal hourly rate if he was successful and a lower rate if he was not. Held that it was contrary to public policy for a solicitor to act for a client in pursuance of a conditional fee agreement in circumstances which were not sanctioned by statute. The difference between the hourly rates was "a sum payable only in the event of success" and was not sanctioned by the Solicitors' Practice Rules 1990. Accordingly the agreement was unlawful and unenforceable and, for the same reasons, a claim for a quantum meruit would also fail.

**Clark v Nomura Finance Plc** QBD.

Digested at Vol.6, No.8. Now further reported at [2000] IRLR 766.

**[Robin Knowles QC]**

**Hillsbridge Investments Ltd v Moresfield Ltd** [2000] 2 BCLC 241. Ch Div. (Rimer J)

Where in order to calculate the acquisition price of a company an acquisition agreement required a balance sheet to be audited, the application of an expert determination clause was not, on its true construction, limited to disputes over the manner of the audit of the balance sheet. The audit required by the agreement increased the prospect that there would be no dispute requiring expert determination, but did not limit the matters that could be disputed.

[Robin Knowles QC]

**Intreprenuer Pub Company Ltd v East Crown Ltd**

*The Times*, 5 September 2000. Ch. Div. (Lightman J). An entire agreement clause did not merely render evidence of the giving of a collateral warranty inadmissible; it deprived what would otherwise have been a valid collateral warranty of its legal effect.

**Mohamed v Alaga & Co (a firm)** CA

Digested at Vol.6, No.1. Now further reported at [2000] 1 WLR 1815.

**On Demand Information Plc v Michael Gerson (Finance) Plc** [2000] 2 All ER (Comm) 513; *The Times*, 19 September 2000. CA. (Pill, Robert Walker LJJ and Sir Murray Stuart-Smith)

A finance lease was in principle capable of attracting relief from forfeiture providing that the provision occasioning forfeiture constituted either security for payment of money or security for attaining a specific result. The fact that a finance lease was a commercial contract and its subject matter was chattels went to the question of discretion rather than jurisdiction. Furthermore, where the lessor's only real interest under a finance lease was in securing the prompt and regular payment of rentals, any provision for forfeiture (including the appointment of receivers) might readily be seen as security for that end. However, once the equipment had been sold the court could not grant relief from forfeiture in respect of the proceeds of sale.

[Fidelis Oditah]

**UCB Corporate Services Ltd v Clyde & Co** [2000] 2 All ER (Comm) 257. CA. (Beldam, Otton and Judge LJJ)

Solicitors retained by a bank to obtain an enforceable guarantee negligently failed to do so due to an omission in the guarantee form. The question was whether the solicitors were absolutely liable to the bank for the failure to obtain the security. Held that where banks wished to impose liability on solicitors they must do so in clear terms. A bank which sought to ensure that its solicitors would assume the role of insurer against a failure to realise its security had to put the solicitors into a position where they were able to withdraw from

providing such services or to charge for them at a suitable commercial rate to take account of the risk.

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

Digested at Vol. 6, No. 4. Now further reported at [2000] 1 WLR 1509.

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## CORPORATE INSOLVENCY & CVAS

**Bank of Ireland v Hollicourt (Contracts) Ltd** *Unreported*, 20 October 2000. CA. (Peter Gibson, Mummery and Latham LJJ)

The Court of Appeal considered the question whether Section 127 of the Insolvency Act 1986 renders a bank which, following the presentation of a winding up petition against a company, has no actual knowledge of the petition and continues to operate the company's account, liable to make restitution to the company in liquidation of the amounts paid out of the account following the presentation of the petition. Held that the bank was not liable to the company. In particular, the debits to the account (which was in credit) did not constitute a disposition of the company's property in favour of the bank so as to render the bank liable to restore the account to its pre-disposition condition. Furthermore, Section 127 on true construction did not operate to avoid the transactions on the account as between the company and banker (as customer and banker). Section 127 only avoided the disposition as between the company and the payee.

[Gabriel Moss QC, David Marks]

**Re CE King Ltd** Ch Div.

Digested at Vol.5, No.3. Now further reported at [2000] 2 BCLC 297.

[Antony Zacaroli]

**Re Continental Assurance Co of London Plc** *Unreported*, 24 October 2000. Ch Div. (Park J)

In a claim against directors for wrongful trading under Section 214 of the Insolvency Act 1986, the starting point for measuring the directors' contribution to the assets of the company is the loss to the company caused by the wrongful trading. In order to ascertain this loss the only possible starting point, or at least the normal starting point, is the increase in the net deficiency to creditors between a notional liquidation on the date it is alleged that the directors should have put the company into liquidation and the actual liquidation.

[Stephen Atherton, Tom Smith]

**Re Leyland DAF Ltd** *Lawtel*, 22 November 2000. Ch Div. (Rimer J)

The "assets" which are made available by sections 115 and 175 IA 1986 for the payment of the costs and

expenses of the liquidation include property comprised within a charge which, as created, was a floating charge, but which had subsequently crystallised before the commencement of the winding-up. This conclusion resulted from section 251 IA 1986 which defines a "floating charge" as one which when created was a floating charge.

**Morris v Banque Arabe et Internationale d'Investissement SA (No.2)** *The Times*, 26 October 2000. Ch Div. (Neuberger J)

An application was made for the determination of a preliminary issue by the respondent to fraudulent trading proceedings pursuant to section 213 of the Insolvency Act 1986. The proposed preliminary issue was whether, to be liable pursuant to section 213 as a person who was knowingly party to the carrying on of the company's business in a fraudulent manner, it was necessary that the person had been involved in the management or running of the company's business. The Judge was not prepared to order the trial of the preliminary issue unless:

1. it was so formulated that it could be answered without making any artificial findings of fact;
2. if determined in one way, it would enable the court to dismiss at least one of the three fraudulent trading claims made;
3. the preliminary issue raised a reasonably arguable issue.

The Judge did not consider that the preliminary issue was reasonably arguable, and in any event was not satisfied that a determination of the issue would mean that any of the claims would be dismissed.

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

Marion Simmons QC and Tom Smith, "The Human Rights Act 1998: the practical impact on insolvency", *Tolley's Insolvency Law and Practice*, Vol.16, No.5, 167.

**[Marion Simmons QC, Tom Smith]**

Clare Campbell, "Investigations by insolvency practitioners: powers and restraints", *Tolley's Insolvency Law and Practice*, Vol.16, No.5, 182.

Linden Ife, "Liability of Receivers and Banks in Selling and Managing Property", *Insolvency Intelligence*, Vol.13, No.8.

Paul McCartney, "Insolvency Procedures and a Landlord's Right of Peaceable Re-entry", *Insolvency Intelligence*, Vol.13, No.10.

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## COSTS

**Bunzl v Martin Bunzl International Ltd** *The Times*, 19 September 2000. Ch. Div. (Ian Hunter QC sitting as a deputy High Court Judge).

When considering whether to grant an order for security for costs under Order 23, rule 1 of the Rules of the Supreme Court against a Swiss national the approach should be similar to that taken when considering whether to order security for costs against a national of a member state of the European Union or of the European Economic Area and the Court should rarely, if ever, grant the order.

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## DAMAGES

**Total Liban SA v Vitol Energy SA** QBD (Comm Ct). Digested at Vol.6, No.1. Now further reported at [2000] 3 WLR 1142.

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## DIRECTORS AND DISQUALIFICATION

**Re Helene Plc, Secretary of State for Trade and Industry v Forsyth** [2000] 2 BCLC 249. Ch Div. (Blackburne J)

In light of the clear distinction in the Companies Act 1985 and the Insolvency Act 1986 between companies registered in England and Wales and companies registered in Scotland, Section 8 of the Company Directors Disqualification Act 1986 did not confer jurisdiction on the High Court to make a disqualification order in relation to the affairs of a company registered in Scotland.

**IJL, GMR and AKP v United Kingdom** *The Times*, 13 October 2000. ECHR.

The right against self-incrimination under Article 6.1 of the European Convention on Human Rights was infringed by the use at the trial of the applicant directors of statements which they had been compelled under statute to give to inspectors appointed by the Department of Trade and Industry.

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## EUROPEAN UNION

**Minister of Agriculture, Fisheries and Food, ex parte J H Cooke & Sons** (C-372/98) *Unreported* 12 October 2000. ECJ.

Land sown with grass which was subsequently cut and removed was "cultivated with a view to a harvest"

within the meaning of the Community rules and so was eligible for consideration as set-aside land for the purposes of the EC Arable Area Payments Scheme.

[Stuart Isaacs QC]

**R v Secretary of State for Transport ex parte Factortame** *Unreported*, 30 November 2000. QBD (Technology and Construction Court) (HH Judge Toulmin QC)

The appropriate period of limitation in respect of claims against states for breach of European law is the same period as applicable to claims for actions founded on a tort within the meaning of the Limitation Act 1980. In addition such claims cannot include damages for distress or damages on an aggravated basis.

[David Marks]

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## FINANCIAL SERVICES

**Mahon v Rahn (No.2)** [2000] 4 All ER 41. CA (Brooke, Mantell and Laws LJ).

In relation to the question of whether documents created by a financial regulator attracted absolute privilege, it was not possible to make a logical distinction between the situation in which a criminal investigator sought evidence to support a criminal charge and a situation in which a financial regulator sought evidence to put before a tribunal to the effect that someone was not a fit and proper person to conduct investment business. Such evidence attracted absolute privilege. The flow of information to financial regulators might be seriously impeded if informants feared that they might be harassed by libel proceedings.

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## INSURANCE

**Equitable Life Assurance Society v Hyman** HL.

Digested at Vol.6, No.8. Now further reported at [2000] 3 All ER 961.

**Re Friends' Provident Life Office** CA.

Digested at Vol.6, No.1. Now further reported at [2000] 2 BCLC 203.

Nigel Montgomery and Gabriel Moss QC, "In the Long Run-Off – Parts 1 and 2", *Insolvency Intelligence*, Vol.13, Nos.9 and 10.

[Gabriel Moss QC]

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## INTERNATIONAL INSOLVENCY

Professor Ian Fletcher, "A New Age of International Insolvency – The Countdown Has Begun", *Insolvency Intelligence*, Vol.13, No.8.

[Ian Fletcher]

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## PARTNERSHIP

**Don King Productions Inc v Warren** CA

Digested at Vol.5, No.2. Now further reported at [2000] Ch 291.

**Dubai Aluminium Co Ltd v Salaam** CA.

Digested at Vol.6, No.5. Now further reported at [2000] 3 WLR 910.

Michael Lower, "Limited liability partnerships: encouraging entrepreneurs at the expense of creditors?" *CCH Company Law Newsletter* Issue 64.

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## PROCEDURE

**Compania de Seguros Imperio v Heath (REBX) Ltd**

*The Times*, 26 September 2000. CA (Waller and Clarke LJ and Sir Christopher Staughton).

Although a claim for breach of fiduciary duty was intrinsically different from claims in tort or in contract, so that neither section 2 nor 5 of the Limitation Act 1980 was a direct bar to such a claim's success, equity would ordinarily, by analogy, apply the six year limitation periods in those sections to such a claim, whether it was framed as for equitable damages or for equitable compensation.

**Federal Bank of the Middle East v Hadkinson** CA.

Digested at Vol.6, No.3. Now further reported at [2000] 1 WLR 1695.

**McPhilemy v Times Newspapers Ltd (No.2)** CA.

Digested at Vol.6, No.7. Now further reported at [2000] 1 WLR 1732.

**Morgan v Legal Aid Board** [2000] 3 All ER 974. Ch Div. (Neuberger J)

Where a party in receipt of legal aid settled an action, the legal aid charge could be executed over property which was not in issue in the proceedings only if it could fairly be said that that property had been effectively recovered or preserved by the claimant in substitution for property (including rights) in issue in those proceedings.

**SEA Assets Ltd v PT Garuda Indonesia** QBD (Comm Ct).  
Digested at Vol.6, No.3. Now further reported at [2000] 4 All ER 371.  
[Robin Dicker QC]

**Somatra Ltd v Sinclair Roche & Temperley (a firm)**  
*The Times*, 22 September 2000. CA (Waller and Clarke LJ).  
A party who relied on "without prejudice" communications in support of its case on the merits in order to obtain an asset freezing injunction could not prevent the other party relying on those same communications in order to advance its case on the merits at trial.

**Spice Girls Ltd v Aprilia World Service BV (No. 3)**  
*The Times*, 12 September 2000. Ch. Div. (Arden J).  
An appeal was not the right way to correct errors of fact in a final judgment which could be corrected by the court that had conducted the trial as it had the power to correct errors if the question was raised promptly.

**State of Brunei Darussalam v Bolkihah** *The Times*, 5 September 2000. Ch. Div. (Jacob J).  
A court granting interim relief, such as freezing orders, ancillary to proceedings in a foreign court under section 25 of the Civil Jurisdiction and Judgments Act 1982, should generally seek to avoid making orders inconsistent with those of the courts in which the primary litigation was taking place, even where the primary court had made orders of a kind that would not have been made in domestic litigation.  
[Martin Pascoe, Stephen Atherton]

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## PROPERTY

**Skipton Building Society v Bratley and Stott** CA.  
Digested at Vol.6, No.3. Now further reported at [2000] 3 WLR 1031.

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## RESTITUTION

**Philip Collins Ltd v Davis** [2000] 3 All ER 808. Ch Div. (Jonathan Parker J)  
The defendants had been overpaid as a result of a mistaken belief that they had performed on all the tracks of the album. The mere tendering of a payment under a contract did not, without more, amount to a representation that the payment was due. In any event, a defence of estoppel by representation was no longer apt in restitutionary claims where the defence of change of position was in principle available. Although there was no evidence that the defendants had acted to their detriment, the overpayments had caused a general

change of position in that the defendants had increased their level of outgoings. However, that change of position did not provide a defence to the whole claim since the defendants' level of outgoings might not have reduced proportionately if the correct sums had been paid. Adopting a broad approach, the defence would only extend to half the overpayment, and accordingly the company was entitled to set off one-half of the sums overpaid against the defendants' future royalties.

**Scottish Equitable Plc v Derby** [2000] 3 All ER 778. QBD. (Harrison J)

The defendant was mistakenly overpaid sums under a personal pension policy he held with the claimant company. Held that the defence of change of position required some causal link between the receipt of the overpayment and the defendant's change of position, such that it would be inequitable to require the recipient to return the money to its owners. In the instant case, D's general financial difficulties arising from the future separation or divorce from his wife were not causally linked in any way with the money mistakenly paid by the company. Thus repayment would merely result in D ceasing to enjoy a benefit to which he had never been entitled, and would leave him no worse off than he would have been without the windfall. Accordingly, the company was entitled to recover the overpayment.

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## TORT

**Arthur J. S. Hall & Co. v Simons** HL.  
Digested at Vol.6, No.8. Now further reported at [2000] 3 All ER 673.

**Hamilton v Al Fayed** *The Times*, 13 October 2000. CA. (Lord Phillips MR and Sedley LJ)

A person who agreed to pay the costs of one party to litigation could not be joined as a party to the substantive proceedings merely because he was at risk financially and might have no opportunity to raise objections concerning the other party's conduct of the trial.

**Kuwait Airways Corp v Iraqi Airways Co (No. 3)** [2000] 2 All ER (Comm) 360. QBD (Comm Ct). (Aikens J)

In a claim based on wrongful interference with goods a claimant has to prove that the wrongful interference caused the loss alleged. The first test is whether the loss would have occurred 'but for' the acts of the defendant. In relation to an intervening act, the sequence of events had to be disturbed by something which could be described as either unreasonable or extraneous or extrinsic. The test for remoteness of damage is whether the damage is foreseeable rather than whether the damage is the direct or direct and natural result of the tort.

**Standard Chartered Bank v Pakistan National Shipping Corporation (No. 2)** *The Times*, 2 October 2000. CA. (Aldous and Ward LJJ and Sir Anthony Evans)

A claimant who established his claim for damages for deceit could not have those damages reduced pursuant to Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 by a party raising the defence that the claimant's actions contributed to the loss it suffered.

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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] Ch 372; [2000] 2 BCLC 269.

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## SEMINARS/NEWS

Glen Davis spoke at an ILA Western Region training conference in Bristol the early lessons to be learnt from the recent collapses of dot.com companies.

**[Glen Davis]**

Gabriel Moss QC chaired a workshop and delivered a talk on European Insolvency law at the Europaenische Rechtsacademia conference in Trier on 2<sup>nd</sup> and 3<sup>rd</sup> November 2000.

**[Gabriel Moss QC]**

Glen Davis has been invited to chair the Media Board of the Society for Computers and Law

**[Glen Davis]**

David Marks spoke at a seminar on Conditional Fee Agreements and other funding options in insolvency sponsored by Litigation Protection Ltd and Davies Wallis Foyster in Manchester on 9 November 2000.

**[David Marks]**

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