

# 3/4 Digest

*Volume 6 Number 7, October 2000*

**The Digest now returns from its summer holiday for the new term.**

**The world of the proprietary trader in the City came under detailed scrutiny by the High Court in Clark v Nomura International plc. The court formulated a modern test, of general application in the employment field, for the standard required where an employer has a contractual discretion in relation to the payment of bonuses. Robin Knowles QC acted for the trader.**

**This edition of the Digest was compiled by Daniel Bayfield and digests material up to 31 August 2000.**

**David Allison**

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## GENERAL NEWS

### **Delinquent disqualified directors targeted**

On 20 July 2000, the Minister for Competition and Consumer Affairs announced a new offensive to deter disqualified directors who abuse limited liability for their own personal benefit and at the expense of the company's creditors. The Insolvency Service has launched a pilot scheme jointly with the Forensic Insolvency Recovery Service to take action against disqualified directors where there has been suspected misappropriation, misfeasance or negligence. The legal proceedings are intended to recover moneys personally from directors who have abused the system, for the benefit of creditors affected.

### **Disqualification orders on the rise**

The number of disqualification orders made increased from 1,284 in 1998/9 to 1,540 in 1999/2000, a 20% increase.

### **E-signatures**

The Electronic Communications Act 2000 received Royal Assent on 25 May 2000, rendering electronic signatures admissible as evidence in court in the same way as hand-written signatures.

### **FSA issues revised market abuse draft Code of Market Conduct**

On 25 July 2000 the FSA issued a new draft Code of Market Conduct for consultation which is intended, when in force together with provisions of the Financial

Services and Markets Act 2000, to counter market abuse.

### **Limited Liability Partnerships Act 2000**

On 20 July 2000 the Limited Liability Partnerships Bill received Royal Assent. When fully in force, the Act will introduce limited liability partnerships (LLPs) as a new form of hybrid body that will allow members to limit their liability via a corporate entity whilst organising themselves internally as a partnership.

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## ADMINISTRATION

**Re Dino Music Ltd** [2000] BCC 696. Ch. Div. (Jacob J).

A resolution purportedly passed by a company subject to an administration order to put the company into voluntary liquidation, where the resolution was expressly conditional so that it could not be effective unless and until the administration order was discharged, was a conditional resolution which was not barred by section 11(3)(a) of the Insolvency Act 1986, since the "resolution" was inchoate unless and until the condition was fulfilled. That was reinforced by the fact that the purpose of section 11(3) was to make the administration order work, which could not be done by virtue of an effective resolution, but could be achieved by a conditional resolution of the sort considered, since such a resolution in no way could affect the administration of the company whilst it was still trading.

**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] BCC 698. [Felicity Toube]

**Environment Agency v Clark** CA (Henry and Robert Walker LJJ and Scott Baker J). Digested at Vol. 6, No. 3. Now reported at [2000] BCC 653.

**Re FJL Realisations Ltd** *The Times*, 2 August 2000. CA (Sir Richard Scott V-C, Aldous and Sedley LJJ). At the end of an insolvent company's administration, the statutory liability for deductions for PAYE and NI contributions relating to the employment of the company's employees by the administrators enjoyed special priority within the expenses of the administration provided for in section 19(5) and (6) of the Insolvency Act 1986, as amended by section 1 of the Insolvency Act 1994. [Gabriel Moss QC, Glen Davis]

**Re Maxwell Fleet and Facilities Management Ltd (In Administration) (No.2)** Ch. Div. (David Mackie QC sitting as a deputy judge of the High Court). Digested at Vol. 6, No. 3. Now reported at [2000] 2 BCLC 155

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## ARBITRATION

**Marc Rich Agriculture Trading SA v Agrimex Ltd** QBD (Langley J). Digested at Vol. 6, No. 5. Now further reported at [2000] 1 All ER (Comm) 951.

**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] CLC 1015.

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## BANKING

**Barclays Bank plc v Coleman** CA (Nourse, Pill and Mummery LJJ). Digested at Vol. 6, No. 6. Now further reported at [2000] 3 WLR 405.

**Hall v The Governor and Company of the Bank of England** [2000] Lloyd's Rep Bank 186. CA (Sir Richard Scott V-C, Chadwick and Buxton LJJ). Digested below under the heading "Tort".

**Portman Building Society v Dusangh** [2000] Lloyd's Bank Rep 197, [2000] 2 All ER (Comm) 221. CA (Simon Brown, Ward and Sedley LJJ). Unconscionable conduct was a legal wrong giving rise to an equity as against the wrongdoer (or those with notice thereof) to set aside a transaction. The principles applicable in relation to undue influence therefore applied to cases where rescission of a bargain was sought by reason of unconscionable conduct.

**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 [2000] Lloyd's Rep Bank 225. [Richard Sheldon QC, Mark Phillips QC, Robin Dicker QC, Ben Valentin]

"Houses built on sand: the case of the debenture-holder", Lorraine Talbot and Michael Grant. *The Company Lawyer*, volume 21, number 7, page 212.

# BANKRUPTCY AND IVAS

**Re Burfoot** *The Times*, 17 August 2000. Ch. Div. (Jacob J).

Where a person, prior to becoming bankrupt, entered into a general assignment of book debts which was void against the Trustee for non-registration, followed by a specific assignment, the pre-bankruptcy specific assignments were effective against the trustee in bankruptcy. The Trustee's argument that the specific assignments could have no effect as the general assignment was valid against the debtor when created, was rejected.

[Gabriel Moss QC]

**Cadbury Schweppes plc v Somji** *newlawonline*, 19 July 2000. Ch. Div. (Mr A Boswood QC sitting as a deputy judge of the High Court).

(1) The decision in **McKewan v Sanderson** (1875) LR 20 Eq 65 was still good law. Secret agreements conferring benefits on one creditor over another were morally wrong and objectionable. Accordingly, where an IVA was approved after an agreement had been entered into whereby a collateral advantage was obtained by creditors from a debtor or on a debtor's behalf over another creditor without the latter's knowledge, the IVA would be revoked.

(2) Moreover, the failure to inform other creditors of the agreement constituted a material omission under section 276(1)(b) of the IA 1986 and the Court would make a bankruptcy order. The correct approach was to consider whether, if the truth had been told, it would have been likely to have made a material difference to the way in which the Petitioner would have considered and assessed the proposed arrangement. It was obvious in this case that the Petitioner would have viewed the proposed IVA differently had it been aware that other creditors were to receive additional payments.

[Mark Phillips QC, Fidelis Oditah]

**Carter-Knight (a bankrupt) v Peat** *The Times*, 11 August 2000. Ch. Div. (Neuberger J).

A person could be the subject matter of a bankruptcy order where there had been serious breaches of an IVA notwithstanding that the breaches had been remedied by the date of the bankruptcy hearing. Where the court (as in these circumstances) made an order where an issue was the exercise of discretion and/or jurisdiction, it was particularly desirable for the court to give reasons for its decision.

**Re a debtor (No. 101 of 1999)** *The Times*, 27 July 2000. Ch. Div. (Ferris J).

When considering whether a voluntary arrangement was unfairly prejudicial to the interests of a particular creditor, the court had to consider the whole range of options open to a creditor in the event of the

arrangement not being approved and not merely whether or not the creditor would have received more or less than he would under a bankruptcy.

**Fletcher v Vooght** Ch. Div. (Lloyd J).

Digested at Vol. 6, No. 3. Now further reported at [2000] BPIR 435.

[Lexa Hilliard]

**Haig v Jonathan Aitken** Ch. Div. (Rattee J).

Digested at Vol. 6, No. 7. Now further reported at [2000] BPIR 462.

**Khan v Mortgage Express Ltd** Ch. Div. (Geoffrey Vos QC).

Digested at Vol. 6, No. 3. Now further reported at [2000] BPIR 473.

[Anthony Zacaroli]

**Krasner v Dennison, Lawrence v Lesser** CA (Kennedy, Chadwick and May LJJ).

Digested at Vol. 6, No. 5. Now further reported at [2000] 3 WLR 720; [2000] 3 All ER 234, [2000] BPIR 410.

[Christopher Brougham QC, John Briggs]

**Lee v Lee** CA (Stuart-Smith and Buxton LJJ and Rattee J).

Digested at Vol. 6, No. 3. Now further reported at [2000] BCC 500.

[Richard Hacker QC, Stephen Atherton]

**Mulkerrins v PriceWaterhouseCoopers (a firm)** Ch. Div. (Jules Sher QC sitting as a deputy judge of the High Court).

Digested at Vol. 6, No. 4. Now further reported at [2000] BPIR 506.

[John Briggs]

**National Westminster Bank plc v Jones** *The Times*, 7 July 2000. Ch. Div. (Neuberger J).

A transaction was at an undervalue for the purposes of section 423 of the Insolvency Act 1986 if it caused prejudice to a single creditor falling within subsection (3), notwithstanding that the transaction did not diminish the debtors' assets and the creditors as a whole were not disadvantaged.

**Raja v Rubin and Goodman** CA (Hirst, Peter Gibson and Clarke LJJ).

Digested at Vol. 5, No. 2. Now further reported at [2000] Ch. 274.

**R v Lord Chancellor ex parte Lightfoot** CA (Simon Brown and Chadwick LJJ and Rattee J).

Digested at Vol.6, No.1. Now further reported at [2000] BCC 537.

**Regina v P** CA (Criminal Division) (Mance, Douglas Brown LJJ, Sachs J).

Digested at Vol. 6, No. 4. Now further reported at [2000] 1 WLR 1568.

**Skjevesland v Geveran Trading Company Ltd**  
Bankruptcy Registry (Mr Registrar Baister).

Digested at Vol. 6, No. 3. Now reported at [2000] BPIR 523.

[David Marks]

**Smith v Ian Simpson & Co** CA (Evans and Laws LJJ and Jonathan Parker J).

Digested at Vol. 6, No. 5. Now further reported at [2000] 3 WLR 495, [2000] 3 All ER 434.

"Radical Proposals for Bankruptcy Law", David Milman. [2000] *Insolvency Lawyer* 147.

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## COMPANY

**Re Blenheim Leisure (Restaurants) Ltd** [2000] BCC 554. CA (Nourse, Aldous and Tuckey LJJ).

Section 653(2B) Companies Act 1985 gave the court a general discretion to allow restoration if satisfied that at least one of the three conditions set out in that section had been complied with. One of the conditions to allow restoration was that it was just to do so. Whether it was just to order restoration depended upon all the circumstances of the case including the nature of the application to remove the company's name from the register, the reasons for the application to restore and the subsequent events which had happened including intervening substantive rights which had arisen since dissolution.

**Centros Ltd v Erhvervs-og Selskabsstyrelsen** [2000] 2 BCLC 68. ECJ.

The EC Treaty provisions on freedom of establishment were intended specifically to enable companies formed in accordance with the law of a member state and having their registered office, central administration or principal place of business within the Community to pursue activities in other member states through an agency, branch or subsidiary. Nevertheless, member states were entitled to take measures to prevent their nationals from attempting, under cover of the Treaty rights, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of Community provisions. The fact that a national of a member state who wished to set up a company chose to form it in the member state whose rules of company law seemed the least restrictive and to set up branches in other member states did not, of itself, constitute an abuse of the right of establishment. Furthermore, the fact that a company did not conduct any business in the member state in which its branch was established was not sufficient to prove the existence of abuse or fraudulent conduct which would have entitled the latter state to deny that

company the benefit of the Community provisions relating to the right of establishment.

**Re Eurofinance Group Ltd** *The Times*, 4 July 2000. Ch. Div. (Pumfrey J).

The legitimate expectation of a member of a quasi-partnership company that he would continue to be involved in the management of the company was a consequence of the restraint imposed by equity upon relations between the majority and any minority of shareholders in a company, and not the cause of such restraints. Where, however, the director of such a company was summarily dismissed without due cause and no offer was made to purchase his shares, then it was likely that the exclusion of that person would be unfairly prejudicial to his interests.

**Eurosteel Ltd v Stinnes AG** [2000] 1 All ER (Comm). QBD (Longmore J).

As a matter of English law, all matters relating to the rights and obligations of a newly merged company were governed by the law of the country of domicile and, if the law of the domicile clothed the new company with the rights and liabilities of the old company, that was part of the status of the new company which should be recognised by the English court.

**Hall v The Governor and Company of the Bank of England** [2000] Lloyd's Rep Bank 186. CA (Sir Richard Scott V-C, Chadwick and Buxton LJJ).

Where a claim involved a wrong done to a company, the company was the proper claimant for the damage caused to it by the wrong and the shareholders could not sue the wrongdoer for the loss in value of their shares that flowed from the damage done to the company.

**Peskin v Anderson** [2000] 2 BCLC 1. Ch. Div. (Neuberger J).

As a matter of principle and on the authorities a director of a company had no general fiduciary duty to shareholders, but could, if he had special knowledge in relation to the sale of shares, have a fiduciary duty to shareholders who did not have such knowledge.

[Stuart Isaacs QC]

**Philip Morris Product Inc. v Rothmans International Enterprises Ltd** *The Times*, 10 August 2000. Ch. Div. (Evans-Lombe J).

Control of a target company, within the meaning of the Takeover Panel Code, could be acquired by a stranger to that company acquiring a shareholding of less than 30% of the voting rights in that company if it could be demonstrated that, at the time of his acquisition, he had an understanding with another shareholder, in the target company, whose stake, aggregated with that of the purchaser, amounted to 30% or more of the votes available at a general meeting.

**Re Rotadata Ltd** Ch. Div. (Neuberger J).  
Digested at Vol. 6, No. 4. Now further reported at  
[2000] BCC 686.

**Walker v Stones** *The Independent*, 27 July 2000. CA  
(Nourse and Mantell LJJ and Sir Christopher Slade).  
(1) The principle in **Prudential Assurance Co. Ltd v  
Newman Industries Ltd (No. 2)** [1982] 1 All ER 354  
would not operate to deprive a claimant of an otherwise  
good cause of action where he could establish that the  
defendant's conduct had constituted a breach of some  
legal duty owed to him personally, and the court was  
satisfied that such breach of duty had caused him  
personal loss, separate and distinct from any loss that  
might have been occasioned to any corporate body in  
which he might be financially interested. (2) In  
considering whether a deliberate breach of trust had  
been "dishonest", although the word "honest" at first  
sight pointed exclusively to a state of mind, its scope  
could not be so limited: a person might act dishonestly,  
according to the ordinary use of language, even though  
he genuinely believed that his action was morally  
justified.

"Book debt charges: following Yorkshire Woolcombers  
– Are we sheep gone astray?", Roger Gregory & Peter  
Watton. [2000] *Insolvency Lawyer* 157.

"A fresh light on shadow directors", David Milman.  
[2000] *Insolvency Lawyer* 171.

"Unfairly prejudicial conduct after O'Neill v Phillips",  
Imogen Moore. CCH Company Law Newsletter, Issue  
59.

"The Pursuit of Legal Proceedings Against Dissolved  
Companies", Andrew Keaty. [2000] JBL 405.

"The Human Rights Act 1998 – Caveat Business?",  
Susannah Williams. [2000] *Business Law Review* 190.

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## 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] CLC 848.

**Credit Agricole Indosuez v Chailase Finance Corp.**  
CA (Potter LJ, Ferris J).  
Digested at Vol. 6, No. 3. Now reported at [2000] CLC  
754.

**Lubbe v Cape plc** [2000] 1 WLR 1545, *The Times*, 27  
July 2000. HL (Lords Bingham, Steyn, Hoffmann,  
Hope and Hobhouse).  
Where a claimant sued a defendant as of right in the  
English court, the defendant's application for a stay on

the ground of forum non conveniens could not succeed  
unless the court was satisfied that there was another  
tribunal of competent jurisdiction in which the case  
might be tried more suitably for the interests of all the  
parties and the ends of justice. Accordingly,  
considerations of public interest and public policy  
which did not relate to the private interests of any of  
the parties and to securing the ends of justice in the  
particular case should be left out of account in  
determining the application.

**Messier-Dowty Ltd v Sabena SA** CA (Lord Woolf  
MR, Lord Mustill and Hale LJ).  
Digested at Vol. 6, No. 4. Now further reported at  
[2000] CLC 889.

**Molins plc v GD SpA** CA (Nourse, Aldous, Potter  
LJJ).  
Digested at Vol. 6, No. 4. Now further reported at  
[2000] CLC 1027.

**UBS AG v Omni Holding AG** Ch. Div. (Rimer J).  
Digested at Vol. 6, No. 3. Now further reported at  
[2000] BCC 593.

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## CONTRACT

**Alfred McAlpine Construction Ltd v Panatown Ltd**  
*The Times*, 15 August 2000. HL (Lords Browne-  
Wilkinson, Goff, Jauncey, Clyde and Millett).

When a contract between a builder and an employer  
was for the construction of building upon the land of a  
third party who would own the building, the employer  
was entitled to claim substantial damages from the  
builder for defects in the building only if the third party  
who actually suffered the loss had no direct remedy  
against the builder.

**A-G v Blake** [2000] 3 WLR 625, *The Times*, 3 August  
2000. HL (Lords Nicholls, Goff, Browne-Wilkinson,  
Steyn and Hobhouse).

In an exceptional case where the normal remedies of  
damages, specific performance and injunction were  
inadequate compensation for a breach of contract, the  
court could, if justice demanded it, grant the  
discretionary remedy of requiring the defendant to  
account to the claimant for the benefits received from  
the breach of contract.

**BS & N Ltd (BVI) v Micado Shipping Ltd (Malta),  
The Seaflower** [2000] 2 All ER (Comm). QBD  
(Comm. Ct) (Timothy Walker J).

The test for establishing repudiatory breach was a strict  
one which required the court to look at the events  
which had occurred at the time at which the charterers  
purported to rescind the charterparty and to decide  
whether the occurrence of those events deprived the

charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charterparty to obtain from the further performance of their undertakings. The breach of the stipulation had to go to the root of the contract so that it made further commercial performance impossible.

**Zoan v Rouamba** CA (Henry, Chadwick and May LJ).  
Digested at Vol. 6, No. 4. Now further reported at [2000] 1 WLR 1509.

"The Contract (Rights of Third Parties) Act 1999", Kiron Reid. *The Company Lawyer*, volume 21, number 7, page 207.

"A birthday present for Lord Denning: The Contract (Rights of Third Parties) Act 1999", Catharine Macmillan. [2000] MLR 721.

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## CONTRACT

**Clark v Nomura International plc** *unreported*, 6 September 2000. QBD (Burton J)

If an investment house exercises a contractual discretion in relation to a proprietary trader's bonus in a way that no reasonable employer would have exercised that discretion, the investment house is in breach of contract. The court will proceed to reach a conclusion on the balance of probabilities as to what would have occurred had the employer complied with its contractual obligations. At least where the discretion is dependent upon individual performance, if a proprietary trader has achieved good trading profits an investment house is not entitled to decide that because, looking forward, it does not regard the payment of a bonus as being in its interests it will pay no or no substantial bonus.

[Robin Knowles QC]

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## CORPORATE INSOLVENCY

**Re ASRS Establishment Ltd** CA (Otton and Robert Walker LJ and Sir Ronald Waterhouse).

Digested at Vol. 6, No. 7. Now reported on *newlawonline*.

[Gabriel Moss QC and Fidelis Oditah]

**Clements v Udall** *The Times*, 7 July 2000. Ch. Div. (Neuberger J).

The court had power under either the Insolvency Act 1986 or the court's inherent jurisdiction to appoint temporary additional office holders in various types of insolvencies where the existing office holder was, for whatever reason, not performing his functions.

**Coutts & Co. v Stock** Ch. Div. (Lightman J).  
Digested in Vol. 6 No. 1. Now reported at [2000] BPIR 400.

**Re Glen Express Ltd** Ch. Div. (Neuberger J).  
Digested at Vol. 6, No. 1. Now further reported at [2000] BPIR 456

[Roxanne Ismail]

**Inland Revenue Commissioners v Adam and Partners Ltd** Ch Div.

Digested at Vol.5, No.5. Now further reported at [2000] BCC 513.

**Official Receiver as Liquidator of Celtic Extraction & Bluestone Chemicals Ltd v Environment Agency**

CA (Roch and Morritt LJ, Rattee J).

Digested at Vol. 5, No. 5. Now further reported at [2000] BCC 487.

**Secretary of State for Trade and Industry v Aurum Marketing Ltd** *The Times*, 10 August 2000. CA

(Simon Brown, Schiemann and Mummery LJ).

The court could order the sole director and shareholder of a company who was not a party to proceedings brought by the Secretary of State for the winding-up of his company on the ground of public interest to pay personally the Trade Secretary's and the company's costs of the winding-up proceedings and that the company's costs should not be paid out of the company's assets until after the unsecured creditors had been paid, if the circumstances were such that it would be just to do so.

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

Digested at Vol. 6, No. 4. Now further reported at [2000] 3 All ER 938.

[Mark Phillips QC, Felicity Toubé]

"Post liquidation tax as a winding-up expense", David Milman. [2000] *Insolvency Lawyer* 169.

"An agency cost analysis of the wrongful trading provisions: redistribution, perverse incentives and the creditors' bargain", Rizwaan Mokal. [2000] CLJ 335.

## COSTS

**Ford v GKR Construction Ltd** CA (Lord Woolf MR, Pill, Judge LJ).

Digested at Vol. 6, No. 4. Now further reported at [2000] 1 WLR 1397.

**Cormack v Washbourne (a firm)** CA (Nourse, Auld and Tuckey LJ).

Digested at Vol. 6, No. 4. Now further reported at [2000] CLC 1039.

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## DAMAGES

**Alcoa Minerals of Jamaica Inc v Broderick** PC (Lords Slynn, Mackay, Jauncey, Hope and Clyde). Digested at Vol. 6, No. 4. Now further reported at [2000] 3 WLR 23.

**Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd** [2000] 3 All ER 493. CA (Simon Brown, Ward and Sedley LJ).

In a claim brought in deceit, there was no absolute rule requiring a deceived person to prove that the actual transaction which he had been induced to enter was itself loss-making. Rather, it would sometimes be possible to prove instead that the claimant would have entered into a different and more favourable transaction but for the fraud, and for the claimant's loss to be measured and recovered on that basis.

**Kuwait Airways Corp. v Kuwait Insurance Co. SAK (No. 2)** QBD (Comm. Ct) (Langley J). Digested at Vol. 6, No. 5. Now further reported at [2000] 1 All ER (Comm) 972.

**Re Structural Concrete Ltd** *The Times*, 5 July 2000. Ch. Div. (Blackburn J).

Only in exceptional circumstances would a company's policy of deliberate non-payment of a certain class of debt over a lengthy period at the risk of other creditors, whether Crown or otherwise, not constitute misconduct justifying a finding of unfitness of the directors.

**R v Secretary of State for Transport, ex parte Factortame (No. 5)** HL (Lords Slynn, Nicholls, Hoffman, Hope and Clyde).

Digested at Vol. 6, No. 1. Now further reported at [2000] AC 524.

[Lucy Frazer]

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## DIRECTORS AND DISQUALIFICATION

**A-G's Reference (No. 2 of 1998)** [2000] QB 412. CA (Beldam LJ and Butterfield and Gray JJ).

The requirement imposed under section 447 Companies Act 1985 was not limited to a requirement to provide an explanation of the text of the document upon which the examinee is being examined, subject to the general limitation that the questions must be reasonable and necessary to enable the examiner to decide whether the reasons which led the Secretary of State to authorise the inquiry in the first place had any foundation. Furthermore, by section 447(8) Parliament has overridden the common law privilege against self-incrimination and in so doing must have contemplated that an examiner might ask for explanations which could be incriminating.

**DC, HS and AD v United Kingdom** [2000] BCC 710. ECHR.

Disqualification proceedings were classified as civil in UK domestic proceedings, the disqualification of directors was a regulatory rather than criminal matter and the "penalty" was neither a fine nor a prison sentence, but rather a prohibition from acting as a director without leave of the court. It could not be said that what was inherently a regulatory matter could thereby become a "criminal charge" within the meaning of article 6(1) of the European Convention on Human Rights. Articles 6(2) and 6(3) are not applicable to directors' disqualification proceedings.

**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 BCLC 133.

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## EMPLOYMENT

**Clark v Nomura International plc** *unreported*, 6 September 2000. QBD (Burton J)

Where an employment contract gives an employer a discretion whether to award a bonus to an employee, and as to the amount of any bonus, the employer will be in breach of contract if it exercises that discretion perversely or irrationally, ie, if it is shown that no reasonable employer would have exercised it in that way. The court concluded that this test is to be preferred to, and in any event subsumes, the test of capriciousness stated in some earlier authorities. It is simpler to understand and apply, and it is familiar due to it being regularly applied in the Administrative Court.

[Robin Knowles QC]

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## INSURANCE

**Alfred McAlpine plc v BAI (Run-Off) Ltd** CA (Peter Gibson, Waller and Buxton LJ).  
Digested at Vol. 6, No. 5. Now further reported at [2000] CLC 812.

**Avon Insurance plc v Swire Fraser Ltd** QBD (Comm. Ct) (Rix J).  
Digested at Vol. 6, No. 5. Now further reported at [2000] Lloyd's Rep IR 535.

**Re Drake Insurance plc (in provisional liquidation), Smith v. Policyholders Protection Board**  
*Unreported*, 8 August 2000 Ch. Div. (Neuberger J).  
This was an application by the provisional liquidators of Drake for directions as to the rights of policyholders in the event that the company exercised its right to cancel under its standard form policy before expiration of the policy term. It was held that in the absence of an express term to that effect, it was an implied term of the policy that upon the insurer cancelling policies, policyholders were entitled to a rateable return of the premium they had paid in respect of the unexpired portion of the policy term.  
[Robin Knowles QC, Martin Pascoe, Lloyd Tamlyn, Andreas Gledhill]

**Equitable Life Assurance Society v Hyman** *The Times*, 21 July 2000. HL (Lords Slynn, Steyn, Hoffmann, Cooke and Hobhouse).  
It was a reasonable expectation of parties to a with-profits retirement annuity policy containing provisions for the application of a guaranteed annuity rate, that the directors of the issuing life assurance society would not exercise their discretion in awarding bonuses in such a way as to deprive the guaranteed rates of any value and an implied term precluding the use of the directors' discretion in that way had to be read into the provision granting the discretion.

**Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC** QBD (Comm. Ct) (Longmore J).  
Digested at Vol. 6, No. 7. Now further reported at [2000] 3 All ER 274.

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## INTERNATIONAL INSOLVENCY

**Re Southern Equities Corp Ltd, England v Smith**  
CA (Morritt, Laws and Jonathan Parker LJ).

Digested at Vol. 6, No. 3. Now further reported at [2000] 2 BCLC 21.  
[Gabriel Moss QC]

"Winding up foreign companies: Stacznia Gdanska v Latreefers Inc. considered", Kate Dawson. [2000] Insolvency Lawyer 173.

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## PARTNERSHIP

**Hurst v Bryk** HL (Lords Browne-Wilkinson, Nicholls, Hope, Clyde and Millett).  
Digested at Vol. 6, No. 4. Now further reported [2000] 2 BCLC 117.

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## PROCEDURE

**Arrow Nominees Inc. v Blackledge** *The Times*, 7 July 2000. CA (Roch, Ward and Chadwick LJ).

Where the conduct of a party to litigation put the fairness of a trial in jeopardy in such a way that any judgement in his favour would have to be regarded as unsafe, or where it amounted to such an abuse of the court's process as to render further proceedings unsatisfactory and to prevent the court from doing justice between the parties, the court was bound to refuse to allow that party to take further part in the proceedings, and, where appropriate, to determine the proceedings against him.

**Arthur J. S. Hall & Co. v Simons** [2000] 3 WLR 543; [2000] 3 All ER 673; *The Times*, 21 July 2000, *The Independent*, 25 July 2000. HL (Lords Steyn, Browne-Wilkinson, Hoffmann, Hope, Hutton, Hobhouse and Millett).

In the light of changes in the law of negligence, the functioning of the legal profession, the administration of justice and public perceptions, reconsideration of the issue of advocates' immunity from suit was appropriate. None of the reasons said to justify the immunity had sufficient weight to sustain the immunity in relation to civil proceedings. The public interest in the administration of justice no longer required that advocates enjoy immunity from suit for alleged negligence in the conduct of civil proceedings.

**Barclays Bank plc v Ellis** *newlawonline*, 9 August 2000. CA (Schiemann and Mummery LJ).

If an advocate wished to rely on the provisions of the Human Rights Act 1998, he was under a duty to have available any material in terms of decisions of the European Court of Human Rights on which he could rely for the assistance of the court. Mere reference to the Convention in a case could not help the court in doing justice to an argument.

**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 [2000] 3 All ER 910, [2000] Lloyd's Rep Bank 225.  
[Mark Phillips QC, Jeremy Goldring]

**Bermuda International Securities Ltd v KPMG** *unreported*, 12 September 2000. CA (May LJ)  
The Court of Appeal has given permission to appeal from a decision of Timothy Walker J in the Commercial Court ordering substantial disclosure before proceedings under CPR 31.16. The appeal will consider the approach to the use of this widened jurisdiction in cases outside the personal injury field.  
[Robin Knowles QC, David Allison]

**Copeland v Smith** [2000] 1 WLR 1371. CA (Brooke and Buxton LJJ).  
It is the duty of an advocate under the English system of justice to draw the judge's attention to authorities which are in point, even if they are adverse to that advocate's case.

**Daniels v Walker** CA (Lord Woolf MR and Latham LJ).  
Digested at Vol. 6, No. 6. Now further reported at [2000] 1 WLR 1382.

**Johnson v Valks** CA (Sir Richard Scott V-C, Swinton Thomas and Robert Walker LJJ).  
Digested at Vol. 6, No. 1. Now further reported at [2000] 1 WLR 1502.

**Re L (Minors) (Care proceedings: cohabiting solicitors)** *The Times* 27 July 2000. Fam. Div. (Wilson J).  
Where two solicitors on either side of a case were cohabiting and that fact could give rise to an apprehension of bias, the court could make an order to remove those solicitors from the record by declaring that they were no longer acting.

**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] QB 451.

**Memory Corp plc v Sidhu** CA (Mummery and Robert Walker LJJ, Allott J).  
Digested at Vol. 6, No. 2. Now further reported at [2000] 1 WLR 1443.

**Minton v Kenburgh Investments (Northern Ltd) (in liquidation)** *The Times*, 11 July 2000. CA (Nourse, Robert Walker and Latham LJJ).  
An agreement "in full and final settlement" of proceedings by liquidators against directors and others under section 212 of the Insolvency Act 1986, on

summary remedy against delinquent directors, did not inhibit the liquidators from pursuing proceedings arising out of the same contractual transaction against solicitors who had issued third party proceedings against the directors claiming under the Civil Liability (Contributions) Act 1978.

**Securum Finance Ltd v Ashton** *The Times*, 5 July 2000. CA (Chadwick LJ and Rattee J).  
Following the change in culture in the approach of the courts to case management, it was no longer acceptable to seek to litigate, in subsequent proceedings, issues already raised but not adjudicated upon in earlier proceedings which had themselves been struck out on grounds of delay or abuse of process.

**Stewart v Engel** CA (Roch and Clarke LJJ and Sir Christopher Slade).  
Digested at Vol. 6, No. 6. Now further reported at [2000] 3 All ER 518.

**Tanfern Ltd v Cameron-Macdonald** CA (Lord Woolf MR, Peter Gibson and Brooke LJJ).  
Digested at Vol. 6, No. 6. Now further reported at [2000] 1 WLR 1311.

**Weatherill v Lloyds TSB Bank plc** *newlawonline*, 26 July 2000. (CA (Nourse, Mummery and Rix LJJ)).  
12 or 13 days into a trial the judge discovered that he had a small shareholding in the defendant bank. The judge immediately disposed of the shares and the parties appeared to accept the situation. The claimant then applied to the judge to disqualify himself. The CA held that the judge was right to refuse that application. The attitude of the court to an application to disqualify on the grounds of perceived or actual bias was governed by the decision in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 2 WLR 870. The judge was not automatically disqualified because of his interest as it was subject to the de minimis principle (he held 570 shares). Nor was there a real danger or possibility of bias as the judge had originally been unaware of his shareholding and sold it on discovering it existed.

"Anton Piller Orders Revisited", Michael Wabwile. [2000] JBL 387.

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## PROPERTY

**Lee v Lee** CA (Stuart-Smith and Buxton LJJ and Rattee J).  
Digested at Vol. 6, No. 3. Now further reported at [2000] BCC 500.  
[Richard Hacker QC, Stephen Atherton]

**Mortgage Corporation v Shaire** Ch. Div. (Neuberger J).

Digested at Vol. 6, No. 4. Now further reported at [2000] BPIR 483.

**Pye v Graham** Ch. Div. (Neuberger J).  
Digested at Vol. 6, No. 2. Now further reported at [2000] 3 WLR 242.

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## TORT

**Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department** HL (Lords Slynn, Woolf, Steyn, Clyde and Millett).  
Digested at Vol. 5, No. 2. Now further reported at [2000] AC 486.

**Gorham v British Telecommunications plc** *The Times*, 16 August 2000. CA (Pill and Schiemann LJJ and Sir Murray Stuart-Smith).

An insurance company which owed a duty of care to a customer when giving advice in relation to insurance provision for pension and life cover, also owed a duty of care to the customer's dependent wife and children where it was clear that the customer intended to create a benefit for them in the event of his pre-deceasing them.

**Hall v The Governor and Company of the Bank of England** [2000] Lloyd's Rep Bank 186. CA (Sir Richard Scott V-C, Chadwick and Buxton LJJ).

In order to justify a claim in tort for misfeasance in public office it was necessary to show that the public officer had either acted with the positive intention of injuring the claimant alternatively that the public officer knew that he had no power to act in the way he did and that in so acting he would probably injure the claimant. In the case of an omission to exercise a statutory power, it was essential for the public officer to have actual knowledge that to do nothing would be unreasonable in the *Wednesbury* sense. If with that knowledge, the public officer continued to do nothing and knew that his inaction would be likely to injure the claimant, the requirement of bad faith would be satisfied. (See also the Three Rivers case referred to below.)

**Japura Development Pte Ltd v Singapore Telecommunications Ltd** [2000] 3 SLR 35. High Court of Singapore

The case concerned an important question of statutory construction of the Telecommunication Authority of Singapore Act 1992. The issue was whether the provisions of the Act legitimised the maintenance on private land acquired from the State of telecommunications plant and equipment even where the original placing of the plant and equipment was unlawful. The Court held that they did, with the consequence that the defendant was not guilty of trespass.

[Stuart Isaacs QC]

**Jameson v. Central Electricity Generating Board** HL (Lords Browne-Wilkinson, Lloyd, Hoffmann, Hope and Clyde).

Digested at Vol. 5, No. 1. Now further reported at [2000] AC 455.

**Kuwait Oil Tanker Company SAK v Al Bader** CA (Nourse, Potter and Clarke LJJ).

Digested at Vol. 6, No. 6. Now further reported in [2000] 2 All ER (Comm) 271.

**Michael Hyde and Associates Ltd v J.D. Williams and Co. Ltd** *The Times*, 4 August 2000. CA (Nourse, Ward and Sedley LJJ).

In an action for negligence, if the profession itself embraced different views, then the competence of a professional person was to be gauged by the lowest acceptable standard.

**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 [2000] Lloyd's Rep Bank 225.

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

**Tuppen v Microsoft Corporation** (*Unreported*, 14<sup>th</sup> July 2000.) QBD (Douglas Brown J).

The claimants commenced proceedings against Microsoft seeking damages and injunctive relief under the Protection from Harassment Act 1997. They alleged (among other things) that anti-counterfeiting proceedings brought against them by Microsoft had been launched in bad faith and conducted oppressively. Striking out the claim, the judge held that the matters complained of did not fall within the Act. Referring to the Parliamentary debates in reliance on Pepper v. Hart [1993] A.C. 593 (H.L.), he held that the scope of the Act was limited to stalking, racial harassment and anti-social behaviour by neighbours.

[Andreas Gledhill]

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## TRUSTS

**A Bank v A Ltd** Ch. Div. (Laddie J).

Digested at Vol. 6, No. 7. Now further reported in *The Times*, 18 July 2000.

**Foskett v McKeown** HL (Lords Browne-Wilkinson, Steyn, Hoffmann, Hope and Millett).

Digested at Vol. 6, No. 6. Now further reported at [2000] 3 All ER 97.

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## SEMINARS

Robin Knowles QC chaired a seminar entitled “Civil Justice in a modern litigation culture”. The lead speech was given by the new Deputy Head of Civil Justice, May LJ  
**[Robin Knowles 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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