

# 3/4 Digest

*Volume 6 Number 7. Summer 2000*

**T**he question of whether a charge is fixed or floating has recently been revisited by the Court of Appeal in Re ASRS Establishment Ltd. The Court of Appeal declined to rule on the reasoning of Park J at first instance who had held that a charge over 'other debts and claims' is to be construed on an 'all or nothing' basis. This means that if the charge is on true analysis a floating charge over one class of assets, it may well be a floating charge over all assets. The result of this reasoning is that when drafting a charge, perhaps the only safe course is to list each asset which it is intended to be subject to a fixed charge in a separate schedule.

The Digest is delighted to announce that Stuart Isaacs QC, formerly of 4-5 Gray's Inn Square, became a member of Chambers on 1 September 2000. His arrival not only strengthens our commercial law expertise (particularly in the areas of banking and insurance/reinsurance) but also further enhances our international services both in the fields of European law and international litigation and arbitration.

This edition of the Digest has been compiled by Tom Smith and digests material up to 31 June 2000.

David Allison

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## GENERAL NEWS

**EU adopts regulation on insolvency proceedings.**  
The EU Council of Ministers has adopted a regulation No 1346/2000 to define common rules on cross-border

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insolvency proceedings so that these proceedings can operate more efficiently and effectively. The

regulation establishes that the main insolvency proceedings can be opened in the member state where the debtor has the centre of his main interests. Secondary proceedings may be opened in a member state where the debtor has an establishment, the effects

of such proceedings being limited to the assets located in that state. The regulation will enter into force on 31 May 2002.

**Insolvency Services consults on landlords' rights in insolvency.** The Insolvency Service has published a proposal to restrict landlords from re-entering premises without consent or the approval of the court when an individual or company is the subject of a statutory moratorium imposed as part of an insolvency regime. An amendment making the right of peaceable re-entry subject to any insolvency moratorium has been put down for consideration at the Committee Stage of the Insolvency Bill. The amendment is aimed at reversing the effect of the decision in Razzaq v Pala [1997] 1 WLR 1336 where it was held that a landlord's right of peaceable re-entry was not a security interest and so not within the scope of the moratorium. The Insolvency Service is concerned that this decision is prejudicing the effectiveness of business rescues using the statutory moratoria.

**Insolvency Service review launched.** The DTI has announced a review of the Insolvency Service's provision of services, its status and whether there is any scope for improved performance. The scope of the review will include examining whether any changes should be made to the way in which the Service operates and the scope of its activities.

**Home Office consultation paper on corporate manslaughter published.** The Home Office has published a consultation paper on involuntary manslaughter and proposed the new offence of corporate killing. The proposed offence would be committed where management failure by a company is the cause of death and that management failure constitutes conduct falling far below what could reasonably be expected.

**Financial Services and Markets Bill receives Royal Assent.** The Financial Services and Markets Bill was enacted on 14 June 2000. It is reported that the Act was subject to the second highest number of amendments that any legislation has ever been subjected to. The Act is not expected to come into force until June/July 2001 after completion of the necessary legislation and other preparations. One feature of the Act is a provision (section 353) empowering the Secretary of State to introduce delegated legislation extending administration orders to insurance companies. This is a development which was advocated by Gabriel Moss QC in "DTI Proposals for Non-Life Insurance Companies: A Step in the Wrong Direction" (1994) 8 *Insolvency Intelligence* 43 in opposition to the Government's proposal in the then Green Paper.

[Gabriel Moss QC]

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## ADMINISTRATION

**Re Norditrack (UK) Ltd** Ch. Div.

Digested at Vol. 6, No. 3. Now further reported at [2000] BCC 441.

**Re UCT (UK) Ltd** *Unreported*, 19 June 2000. Ch Div. (Arden J)

On an application for directions, after a detailed consideration of **Re Powerstore (Trading) Ltd**, **Re Mark One (Oxford Street) plc** and **Re WBSL Realisations Ltd**, Arden J held that there was no need to show sufficient or substantial reasons in order for payments to be made by administrators to preferential creditors by way of trust. It is therefore now settled that when exiting from administration into voluntary liquidation the trust mechanism is an appropriate way for dealing with the claims of preferential creditors.

[Felicity Toube]

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## ARBITRATION

**Eurosteel Ltd v Stinnes AG** [2000] CLC 470 QBD (Comm Ct). (Longmore J)

The question was whether an arbitration came to an end when one of the parties, a German company, was dissolved. The Court held that the arbitration did not lapse on the dissolution of the company. As a matter of German law the right to claim in the arbitration was transferred from the dissolved company to its successor. Furthermore, English law would recognise that the rights and liabilities, constituted by the various agreements making up the arbitration, were vested in the successor company once notice of the transfer had been given.

Davidson, "English arbitration law 1999", [2000] LMCLQ 230.

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## BANKING

**Banco Santander SA v Bayfern Limited** [2000] Lloyd's Rep Bank 165 CA. (Morritt, Waller and Mummery LJ)

The question was whether the issuing bank was liable to the confirming bank where the latter had discounted a letter of credit which had been obtained fraudulently such fraud being discovered prior to the maturity date of the bill. The Court of Appeal held that:

(1) As assignee of the letter of credit the confirming bank was subject to all defences which could have been raised against a claim brought by the original

beneficiary. There was no doubt that the issuing bank would have had a complete defence against a claim for payment by the beneficiary due to the fraud. Accordingly the issuing bank also had a complete defence to any claim brought by the confirming bank as assignee.

(2) If parties did not, for whatever reason, use a negotiable instrument, and did not provide by the terms of the trade or even by the express terms of the instrument itself the protection for assignees that a negotiable instrument would provide, they had to live with the consequences.

**Bank v A Ltd** *New Law Online*, 23 June 2000. Ch Div. (Laddie J)

The Court considered the procedure which should be adopted by a bank where it was concerned that monies in a customer's account had been obtained by fraud. In such a situation the bank might be concerned that if it paid out of the account it would commit an offence under section 93A of the Criminal Justice Act 1988 but that equally if it did not pay out and froze the account it might be considered to have "tipped off" the customer about an impending investigation and so have committed an offence under section 93D.

The Court set out detailed guidance which differed depending whether the institution wanted to make the payments or not. This procedure is to be adopted until the issues are considered fully by the Court of Appeal.

See also **Procedure** below.

**Raiffeisen Zentralbank Osterreich AG v Cross-seas Shipping Ltd** CA.

Digested at Vol. 6, No. 3. Now further reported at [2000] 1 WLR 1135 and [2000] CLC 553.

**Smith v Lloyds TSB Group plc** QBD.

Digested at Vol. 6, No. 3. Now further reported at [2000] 1 WLR 1225.

[**Marion Simmons QC**]

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## BANKRUPTCY

**Cork v Rawlins** *The Times*, 27 June 2000. Ch Div. (Judge Weeks QC)

Benefits payable as a result of the permanent disablement of the insured under an insurance policy were divisible among creditors in his bankruptcy and in circumstances where the payments were not calculated by reference to the bankrupt's pain and suffering no part was held on constructive trust for the bankrupt.

**Dacorum Borough Council v Horne** CA.

Digested at Vol. 6, No. 7. Now further reported at *The Times*, 14 June 2000 and *The Independent*, 7 June 2000.

[**Felicity Toube**]

**Foxley v UK** *The Times*, 4 July 2000. ECHR

Interference with a bankrupt's correspondence after the expiry of a valid order directing the redirection of his mail to his trustee in bankruptcy was a breach of the right to respect for his correspondence contrary to Article 8 of the European Convention on Human Rights. Also as there was no pressing social need for the opening, reading and copying to file of the bankrupt's correspondence with his legal advisers, the interference was not "necessary in a democratic society" within the meaning of Article 8.2 of the Convention.

**Haig v Aitken** [2000] 3 All ER 80 Ch Div. (Rattee J)

A bankrupt's personal correspondence was of a nature peculiarly personal to him and his life as a human being and thus did not constitute part of his estate for the purposes of the Insolvency Act 1986, even though such correspondence might be worth a considerable sum. A conclusion to the contrary would result in a gross and repugnant invasion of privacy. Similarly, it would be repugnant to the true purposes of the 1986 Act to hold that the trustee was entitled to take possession of and sell the correspondence because it "related to the bankrupt's estate or affairs" within the meaning of section 311(1) of the 1986 Act and regulation 30 of the Insolvency Regulations 1994.

**Re Omar** [2000] BCC 434 Ch Div. (Jacob J)

The trustee in bankruptcy applied under section 303(2) of the Insolvency Act 1986 for directions permitting him to pass to the administrator of the estate of a deceased person certain documents of the bankrupt, such disclosure being for the purposes of examining the bankrupt and for bringing an action against the estate.

The Court held that the trustee was the first judge of whether the proposed course of action was genuinely for the purpose of carrying out his duties. In this case there was no doubt that the use of the documents for the purpose of the private examination was also for the purposes of the bankruptcy because it was vital for the trustee to know which assets formed part of the estate.

In relation to documents over which litigation privilege was claimed, such privilege was not to be overridden by a mere allegation of fraud in the proceedings. In this case there was not merely a prima facie case of fraud in the earlier litigation but an established one so there was no reason why the privilege should not be overridden.

**Skjevesland v Geveran Trading Company Ltd** Bankruptcy Chambers.

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

[**David Marks**]

**Waters v Lloyd's of London** *Unreported*, 17 July 2000. Ch Div. (Park J)

Even if a bankruptcy order ought not to have been made, the Court would not annul the order where there

was unrebutted evidence that (i) the bankrupt had sought to distance his assets from creditors; and (ii) he was insolvent even if the petition debt was ignored.

[Barry Isaacs]

Briggs: "Forfeiture on bankruptcy clauses in personal pension schemes for the self-employed in the light of the *Dennison* and *Lesser* appeals", *Insolvency Intelligence*, Vol. 13, No. 7.

[John Briggs]

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## COMPANY

**Re An Inquiry into Mirror Group Newspapers plc**  
Ch Div.

Digested at Vol.5, No.3. Now further reported at [2000] Ch 194.

**Re Ransomes plc** [2000] BCC 455 CA. (Lord Bingham of Cornhill CJ, Otton and Robert Walker LJJ) Preferential shareholders of the company appealed against a decision of Lloyd J confirming under section 137 of the Companies Act 1985 the cancellation of the share premium account of the company as a reduction of the company's capital. The Court of Appeal held that the question was whether on the evidence as a whole the judge had been correct in his conclusion that the cancellation was fair and whether the subsequent changes to the planned cancellation altered that conclusion. The judge had been correct in his conclusion and there was no evidence that the subsequent changes to the plan had increased the risk of prejudice to the holders of preference shares.

[Simon Mortimore QC]

Copp and McGuinness, "Protecting shareholder expectations: a comparison of UK and Canadian approaches to conduct unfairly prejudicial to shareholders", *International Company and Commercial Law Review*, Vol. 11, No. 6, p.217.

Micheler, "The impact of the *Centros* case on Europe's company laws", *The Company Lawyer*, Vol. 21, No. 6, p.179.

O'Neill, "When European integration meets corporate harmonisation", *The Company Lawyer*, Vol. 21, No. 6, p.173.

Rogerson, "The English court's jurisdiction over companies considered", *CCH Company Law Newsletter*, Issue 55

## CONFLICT OF LAWS

**AIG Group (UK) Ltd v Anonymous Greek Insurance Company of General Insurances, The Ethniki** CA.

Digested at Vol. 6, No. 3. Now further reported at [2000] CLC 446.

**Barry v Bradshaw** [2000] CLC 455 CA. (Pill, Aldous and Ward LJJ)

The claimants appealed against a decision that the English court had no jurisdiction to entertain their claim against an accountant for breach of contract and negligence in relation to their English tax affairs since the place of performance of the obligation in question was Ireland where the defendant accountant lived and worked. The Court of Appeal held that the contract was "to represent, conduct and settle the tax affairs" of the claimants and these obligations had to be performed in England as that was where the Inland Revenue was situated. The English court therefore had jurisdiction under Article 5(1) of the Brussels Convention as England was the place of performance of the contract.

**Berezovsky v Forbes Inc.** HL.

Digested at Vol. 6, No. 6. Now further reported at [2000] 2 All ER 986.

**Donohue v Armco Inc** CA.

Digested at Vol. 6, No. 6. Now further reported at [2000] 1 Lloyd's Rep 579.

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

Digested at Vol. 6, No. 4. Now further reported at [2000] All ER (Comm) 833.

**Ryan v Fricton Dynamics Ltd** *The Times*, 14 June 2000. Ch Div. (Neuberger J)

The court should pay heed to several general principles when granting a freezing order ancillary to proceedings in a foreign jurisdiction under section 25 of the Civil Jurisdiction and Judgments Act 1982. These included:

(1) The court should always exercise caution before granting any freezing order and this was particularly so where it was sought under section 25.

(2) Factors such as comity and the need to stop international fraud mean that the High Court should not be too worried about granting an injunction under section 25 where it was satisfied that good grounds existed.

(3) Although it would be slow to do so, a freezing order might be granted even where the foreign court had itself refused to grant such an order.

(4) Furthermore, the High Court has jurisdiction to grant a freezing order that overlaps with one that has already been granted by a foreign court.

**Turner v Grovit** CA

Digested at Vol. 5, No. 4. Now further reported at [2000] 1 QB 345.

**Unibank A/S v Christensen**, Case C-260/97 [2000] 1 All ER (Comm) 859 ECJ.

While resident in Denmark C signed three acknowledgments of indebtedness in favour of U, a Danish bank. C then moved to Germany where the acknowledgments were presented to him for payment. The question was whether the acknowledgments were enforceable instruments within the meaning of Article 50 of the Brussels Convention. The ECJ held that Article 50 requires the authenticity of the instruments to be beyond dispute. Instruments drawn up between private parties were not inherently authentic and the involvement of a public authority was needed in order to endow them with the character of authentic instruments. No public authority had been involved with the drawing up of the acknowledgements so their authenticity had not been established beyond dispute and accordingly they were not enforceable under Article 50.

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## CONTRACT

**Bank of Credit and Commerce International SA v Ali** CA.

Digested at Vol. 6, No. 6. Now further reported at [2000] 3 All ER 51.

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## CORPORATE INSOLVENCY

**Re ASRS Establishment Ltd** *Unreported*, 20 July 2000. CA. (Otton and Robert Walker LJJ, Sir Ronald Waterhouse)

The company granted a debenture to a financing company which purported to grant a fixed charge over book debts and also a fixed charge over "other debts and claims" due to the company. The question was whether the charge over "other debts and claims" was on true analysis a fixed or floating charge. The Court of Appeal held that in this case the charge was floating because the debenture did not provide for the chargee to have sufficient control over the debts and claims and their proceeds.

However, the Court of Appeal left open the question of whether a clause in a charge purporting to create a fixed charge on different items must be construed on an "all or nothing" basis as the judge at first instance had considered or whether some items falling within the terms of the charge could be regarded as fixed and some floating.

In terms of drafting, it seems that the only safe course is to set out each fixed charge item in a separate clause,

so that there is no risk of an "all or nothing" approach being adopted.

**[Gabriel Moss QC, Fidelis Oditah]**

**Re Dewrun Ltd; The Royal Bank of Scotland Plc v Bhardwaj and Miller** *Unreported*, 28 July 2000. Ch Div. (Neuberger J)

This was an application for relief under section 127 of the Insolvency Act 1986 after a winding up order had been made. The Court concluded that it had jurisdiction to grant such partial relief as was necessary to give effect to a mortgage over the relevant property granted by the person to whom the disposition was made. After balancing the factors for and against the grant of relief, the Court concluded that even though it would not (at that stage) grant relief which would validate the disponent's interest in the equity of redemption, partial relief for the benefit of the mortgagee was appropriate.

**[William Trower]**

**Re Floor Fourteen Ltd** Ch Div.

Digested at Vol. 6, No. 1. Now further reported at [2000] BCC 416.

**Re Grey Marlin Ltd** Ch Div.

Digested at Vol.5, No.4. Now further reported at [2000] BCC 410.

**Manchester & District Housing Association v Fearnley Construction** *Unreported*, 2 August 2000. Ch Div. (Kevin Garnett QC)

Fearnley agreed to construct a building for the Claimant and to convey the land once the building was complete. Payment was only due on completion. With the Claimant's consent, Fearnley granted a charge over the land to a bank to secure the borrowing of monies to finance the building works, the charge to rank behind the contract. Fearnley was put into administrative receivership and could not complete. It then went into insolvent voluntary liquidation. The Claimant sought and obtained an order for specific performance of the contract to convey the land on the basis that:

(1) Fearnley could not object on the ground that the condition of completing the building works had not been fulfilled, since that would enable it to rely on its own breach of contract; and

(2) As a matter of fairness and justice the Claimant should have the land and be able to deduct from the purchase price the cost of completing the building: such deduction being consistent with the spirit of rule 4.90 of the Insolvency Rules 1986.

**[Gabriel Moss QC]**

**Re R S & M Engineering Co Ltd** CA.

Digested at Vol.6, No.1. Now further reported at [2000] BCC 445.

**Re Richbell Strategic Holdings Ltd (No. 2)** Ch Div.

Digested at Vol. 6, No. 5. Now reported at *The Times*, 14 June 2000.

[Stephen Atherton]

**Re Thirty-Eight Building Ltd (No. 2)** [2000] BCC 422 Ch Div. (Hazel Williamson QC)

The liquidators applied under rule 7.47(1) of the Insolvency Rules 1986 for the deputy judge to review her order that in relation to a declaration of trust by the company in favour of its pension scheme the trustees were not a connected person within the meaning of sections 239 and 240 of the Insolvency Act 1986. The deputy judge held that the jurisdiction to review had to be exercised extremely cautiously. In this case the new evidence would not have produced a different conclusion and it was not possible to use the review procedure to pursue further arguments on points already canvassed.

[Robin Dicker QC, Adam Goodison]

**Walker Morris v Khalastchi** *Unreported*, 17 July 2000. Ch Div. (Nicholas Strauss QC)

As long as a party is a creditor, even for a very small sum, he has technical standing to make an application in a liquidation. However, as a matter of judicial restraint, the Court will not normally accede to an application by such a party unless he has a sufficient interest. The rule is not absolute and the Court might well act to restrain anticipated impropriety. On the facts of this case there was no reasonable apprehension of impropriety in the liquidator leaving it open to himself to disclose privileged and confidential tax advice to the Inland Revenue. He was not unreasonable in refusing to give an undertaking not to make disclosure without a further application to the Court.

[Gabriel Moss QC, Hilary Stonefrost]

Moss: "Losing can damage your wealth: the estate costs rule", *Insolvency Intelligence*, Vol. 13, No. 7.

[Gabriel Moss QC]

Trower: "Bringing human rights home to the insolvency practitioner", *Insolvency Intelligence*, Vol. 13, No. 7.

[William Trower]

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## COSTS

**Petrotrade Inc v Texaco Ltd** *The Times*, 14 June 2000. CA. (Lord Woolf MR, Clarke and Latham LJ)

Rule 36.21 of the Civil Procedure Rules 1998 providing for the award of enhanced interest on an indemnity basis where a defendant failed at trial to beat a claimant's Part 36 offer to settle, did not apply where summary judgment was given. However, the court always had power to make such orders in the exercise of its discretion.

## DAMAGES

**Bailey v HSS Alarms Ltd** *The Times*, 20 June 2000. CA. (Aldous LJ and Turner J)

Where a claim for damages on account of the defendant's negligence included a claim for loss of profit and the circumstances established that the damages were not too remote and that the loss of profit arose directly from the physical damage caused, there was no policy reason to exclude a duty of care for all foreseeable damage that directly arose.

**Gordon v J.B. Wheatley & Co (a Firm)** *The Times*, 6 June 2000. CA. (Kennedy and May LJ)

A claimant suffered loss as a result of the failure of a solicitor to advise him that the private mortgage scheme he had set up was in the form of a collective investment scheme which could be investigated by the Securities Investment Board. The Court of Appeal held that the loss suffered by the claimant each time an investor had made an investment into the scheme was recoverable from the solicitors.

**Kuwait Airways Corp v Kuwait Insurance Co** QBD (Comm Ct).

Digested at Vol. 6, No. 5. Now further reported at [2000] CLC 498.

**Saleslease Ltd v Davies** CA.

Digested at Vol. 5, No. 3. Now further reported at [2000] 1 All ER (Comm) 883.

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## DIRECTORS AND DISQUALIFICATION

**Mahon v Rahn (No. 2)** *The Times*, 14 June 2000. CA. (Brooke, Mantell and Laws LJ)

Absolute privilege attached to communications between the Securities Association, a financial services regulatory body, and its informants where the information was received during an investigation by the association into a person's fitness to carry on investment business.

**Re Britannia Homes Centres Ltd** *The Times*, 27 June 2000. Ch Div. (Richard Mawbrey QC)

An appeal from a decision of a county court district judge in an application for permission to act as a director after having been disqualified was to a single judge of the High Court. Furthermore where an application for permission to act as a director after having been disqualified was made as part and parcel of winding-up proceedings, the application for permission should be made in the same winding-up and disqualification proceedings.

Esen, "Managing and monitoring: the dual role of non-executive directors on UK and US boards", *International Company and Commercial Law Review*, Vol. 11, No. 6, p.202.

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## INSURANCE

**Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC** *The Times*, 21 June 2000. QBD (Comm Ct). (Longmore J)

An assignee of a marine insurance policy made with French insurers but governed by English law was entitled to recover to the extent of his interest so assigned. This was so even though French law would deny his claim for failure to serve a notice of assignment through a French bailiff as required by French law.

Jess, "Reform of direct rights of action by third parties against non-motor liability insurers", [2000] LMCLQ 192.

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## INTERNATIONAL INSOLVENCY

Goldring and Perry, "Mutual co-operation in multinational insolvencies – approach of the English courts", *Tolley's Insolvency Law & Practice*, Vol. 16, No. 3, p.110.

Prior, "The international implications of the recent Insolvency Bill 2000", *Tolley's Insolvency Law & Practice*, Vol. 16, No. 3, p.108.

Sellers and Zimmerman, "Co-ordinating cross-border restructurings and insolvencies: the *Starcom* and *Dow Corning* decisions", *Tolley's Insolvency Law & Practice*, Vol. 16, No. 3, p.100.

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## LIMITATION

**Hillingdon London Borough Council v ARC Ltd** *The Independent*, 21 June 2000. CA. (Swinton Thomas and Waller LJ, Arden J)

A party to litigation should not be estopped from relying on a limitation defence merely because he had continued to negotiate with the other party about the claim after the limitation period had expired and without anything having been agreed about the manner in which the claim was to be resolved if the negotiations broke down.

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## PROCEDURE

**Bank v A Ltd** *New Law Online*, 23 June 2000. Ch Div. (Laddie J)

The applicant bank suspected that monies held in certain accounts held by one of its customer's had been obtained fraudulently. The bank applied to the court without notice for directions and accepted a suggestion by the judge that a freezing order be made over the accounts. No evidence was placed before the court. The customer was not told of the existence of the order and was not permitted to see the skeleton argument which had been before the court nor the claim form subsequently issued which contained no return date. Further, the customer did not have liberty to apply and the order was not subject to a cross-undertaking in damages. The customer was merely told by the bank that no further transactions would be permitted in respect of its accounts. On the customer's application to have the order set aside the Court held that:

(1) The order should not have been made. Well-known safeguards exist to protect those subject to freezing orders; the bank had failed to ensure that any were included in this order. Although without notice applications were conducted in secret there should be no secrecy surrounding the orders made nor the evidence used to obtain them.

(2) A cross-undertaking in damages should have been given. It was difficult to imagine circumstances in which it would be appropriate by a court to refuse to impose such an undertaking upon a without notice application.

(3) The bank should bear the costs of the proceedings. Whilst there had been a risk to the bank that it might have been liable as a constructive trustee, where such an institution instigated proceedings in order to protect that risk, the costs of the proceedings should be borne by that institution.

See also **Banking** above.

**Brown v Bennett** *The Times*, 13 June 2000. Ch Div. (Neuberger J)

Whether the sequential or simultaneous exchange of skeleton arguments was ordered depended on the particular case; however, in complicated cases sequential exchange with the claimant serving his argument first might be appropriate.

**Bua International Ltd v Hai Hing Shipping Co Ltd** [2000] CLC 603 QBD (Comm Ct). (Rix J)

The principles relating to the setting aside of without notice orders and setting aside service under jurisdictional grounds were the same under the Civil Procedures Rules 1998 as they had been under the RSC. CPR rule 23.10 required an application to set aside an order made without notice to be made within seven days but in the case of an application to dispute

jurisdiction that was overridden by the specific provisions which effectively extended the time for making the application to that allowed for filing a defence. In any event the court could exercise its jurisdiction to extend time.

**Re Debtors (No. 13-MISC-2000 and No. 14-MISC-2000)** *The Times*, 10 April 2000. Ch Div. (Neuberger J)

The fact that litigants had by consent, agreed to directions for dealing with a case did not preclude the court from ordering a transfer from the county court to the High Court where it was plainly good trial management to do so.

[Andreas Gledhill]

**Gadget Shop Ltd v Bug.Com Ltd** *The Times*, 14 June 2000. Ch Div. (Rimer J)

Material departures from the *Practice Direction – Interim Injunctions* contained in Part 25 of the Civil Procedure Rules 1998 would lead to the setting aside of a search and seizure order. In this case the departures included:

- (1) The fact that the search team did not include a partner from the claimant's solicitors as required but only an assistant.
- (2) A failure to check before proposing the supervising solicitors that they had material recent experience of the execution of search orders conducted under the supervision of a supervising solicitor (although it would not be necessary for them to have acted as supervising solicitors before).
- (3) The fact that there was no undertaking by the claimant not to inform anyone else of the proceedings except for the purposes of the proceedings.

**Heaton v AXA Equity and Law Life Assurance Society plc** *The Times*, 7 June 2000. CA. (Chadwick and Robert Walker LJJ, Sir Roy Beldam)

Where a plaintiff had linked claims for independent breaches of contract against two defendants and concluded a settlement agreement with one of the defendants it might be consistent with the plaintiff's "final" settlement with the first defendant to allow the plaintiff to pursue its claim against the second defendant. **Jameson v Central Electricity Generating Board** [1999] 2 WLR 141, which concerned the liability of two concurrent tortfeasors for the same harm, was not authority on this question. The correct approach was to determine from the wording of the settlement agreement what the parties to the agreement intended.

Appeal from decision of Laddie J digested at Vol. 6, No. 1 allowed.

**Locabail (UK) Ltd v Waldorf Investment Corporation** *The Times*, 13 June 2000. Ch Div. (Evans-Lombe J)

A stay of proceedings pending an application to the

European Court of Human Rights would only be granted where the remedy sought against the defendant state in that court would, if granted, lead to an alteration in the law directly affecting the rights of a party bearing upon the subject matter of the litigation.

**McPhilemy v Times Newspapers Ltd** *The Times*, 7 June 2000. CA. (Thorpe and Brooke LJJ)

Although the recently introduced Civil Procedure Rules 1998 appeared to give a judge discretion to allow it, there was no principle of the law of evidence by which a party might put in evidence a written statement of a witness knowing that it conflicted to a substantial degree with the case he seeking to place before a jury in a libel trial and then say straightaway in the witness's absence that the jury should disbelieve as untrue a substantial part of that evidence.

**Merrill Lynch, Pierce Fenner and Smith Inc v Raffa** *The Times*, 14 June 2000. QBD. (Judge Raymond Jack QC)

The defendant applied to stay an action being brought against him in England on the ground that there were existing proceedings between claimants and himself involving a similar claim in the country where he lived. There was, however, a pending application by the claimants for summary judgment against the defendant. In these circumstances the right course might be to refuse the defendant's application leaving the claimants to proceed with their application for summary judgment. If the claimants' application subsequently failed, the forum application could then be decided.

**Pitchmastic plc v Birse Construction Ltd** *The Times*, 21 June 2000. QBD. (Dyson J)

Whether there had been a compromise in pending litigation should be decided by the ordinary rules of offer and acceptance and not by any special principles under Part 36 of the Civil Procedure Rules 1998.

**Prudential Assurance Co Ltd v McBains Cooper (a Firm)** CA.

Digested at Vol. 6, No. 6. Now further reported at *The Times*, 2 June 2000.

**Ropac Ltd v Inntrepreneur Pub Co** *The Times*, 21 June 2000. Ch Div. (Neuberger J)

Where litigants agreed an "unless order" by consent stating that if one of the parties failed to do something within a specified time he would be subject to some form of sanction then, under the Civil Procedure Rules 1998, the court had power to extend the time within which the party had to comply with the order.

**Saab v Saudi American Bank** CA.

Digested at Vol. 5, No. 5. Now further reported at [2000] BCC 466.

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## PROPERTY

**Allied Irish Bank Group (UK) plc v Hennesly Properties Ltd** *The Times*, 7 June 2000. Ch Div. (Evans-Lombe J)

Where it was envisaged by the parties that an advance made by a bank to a borrower might be paid over in stages, it was highly unlikely that a mortgage granted by the borrower to secure the advance would be delivered in escrow until the whole of the advance had been paid to the borrower.

**Whitbread plc v UCB Corporate Services Ltd** *The Times*, 22 June 2000. CA. (Pill and Potter LJJ, Sir Murray Stuart-Smith)

Where a deed of priority made between two mortgagees gave priority to one mortgagee in respect of all moneys due and owing to him by the borrower, such sum not to exceed the capital sum "together with interest thereon", the reference to "interest" was to the compound interest payable on the underlying transaction between the lender and the borrower.

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## TORT

**Electra Private Equity Partners v KPMG Peat Marwick** [2000] BCC 368 CA. (Auld, Chadwick and Clarke LJJ)

The question was whether the defendant auditors owed a duty of care to the claimant in respect of audit information it had provided on a firm in which the claimant had subsequently invested. The Court of Appeal held that an auditor could assume a responsibility to potential investors for the accuracy of audit work (**ADT v BDO Binder Hamlyn** [1996] BCC 808) and that the assumption of responsibility was objective (**Henderson v Merrett Syndicates** [1995] 2 AC 145). The judge at first instance had erred by applying a subjective test. The pleaded case could not be dismissed as having no realistic chance of success at trial and the judge should not have struck it out.

**Gregory v Portsmouth City Council** HL.

Digested at Vol. 6, No. 3. Now further reported at [2000] 1 AC 419.

**Gregory v Shepherds (a Firm)** *The Times*, 28 June 2000. CA. (Simon Brown and Morritt LJJ, Bell J)

Where an English solicitor instructed a Spanish lawyer to act on behalf of an English client in connection with the purchase of property in Spain, the English lawyer was liable for his own negligence in paying over the

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**Motis Exports Ltd v Dampskibsselskabet AF 1912**

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A forged bill of lading was a nullity and delivery of the goods was not in exchange for the original bill but for a worthless piece of paper. It followed that the clause in the bill exempting the carrier from liability for loss and damage to the goods howsoever caused was not apt to cover a case of misdelivery. Even if the language was apt to cover such a case that was not a construction which should be adopted since it would tend to undermine the obligation to deliver against an original bill.

**Three Rivers District Council v Governor and Company of the Bank of England (No. 3)** HL.

Digested at Vol. 6, No. 5. Now reported at [2000] 3 All ER 1 and [2000] 2 WLR 1220.

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

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## TRUSTS

**Bank of Credit and Commerce International (Overseas) Ltd v Akindele** CA.

Digested at Vol. 6, No. 6. Now reported at *The Times*, 22 June 2000 and *The Independent*, 29 June 2000.

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

**Foskett v McKeown** HL.

Digested at Vol. 6, No. 6. Now further reported at [2000] 2 WLR 1299.

**Fyffes Group Ltd v Templeman** QBD (Commercial Court).

Digested at Vol. 6, No. 6. Now further reported at *The Times*, 14 June 2000.

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## SEMINARS/ APPOINTMENTS

Marion Simmons QC has been appointed the Vice-Chairman of the Appeals Committee of the Institute of Chartered Accountants of England and Wales

[Marion Simmons QC]

Richard Adkins QC and Sandra Bristoll gave a talk to Berwin Leighton on post-disclaimer security interests and wrongful trading on 28 June 2000.

[Richard Adkins QC, Sandra Bristoll]

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