

# 3/4 Digest

*Volume 7 Number 4. July 2001.*

The Financial Law Panel has recently produced an important paper “Charges over Debts”, following consultation with a panel of Law Lords, Lords Justices and leading commercial law academics, including Lords Donaldson, Mustill, Hoffmann, Millett, Lords Justices Chadwick and Mance and Professors Jack Beatson QC and Sir Roy Goode QC. The aim was to obtain guidance as to the likely reaction of the courts to various legal issues concerning charges over debts, by the innovative method of obtaining responses to a detailed hypothetical set of facts. The group involved on the part of the Financial Law Panel included **Michael Crystal QC**, as Chairman, and **Robin Dicker QC**.

The Digest welcomes Richard Fisher as a tenant from 1 October 2001 following the completion of his pupillage.

This edition of the Digest contains decisions up to 31 July 2001 including decisions of the Vice Chancellor on a number of applications made in the liquidations of Barings plc and a some of its subsidiaries.

David Allison

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## GENERAL NEWS

### **FLP Paper on Charges over Debts**

The Financial Law Panel have produced a paper on the important issues of charges over debts. The FLP asked a group of practitioners to draft a set of facts raising many of the issues which arise in relation to charges over debts. These facts were then considered by a panel of Law Lords, Lords Justices and leading commercial law academics. The FLP used their

responses to produce a statement of views. It is intended that this paper will help practitioners and commercial lending institutions predict the likely response of the courts to the issues which arise in this area. Michael Crystal QC was chairman of the Practitioners Group and Robin Dicker QC was a member of the Group.

**[Michael Crystal QC, Robin Dicker QC]**

### **EU Directives on Prospectuses and Insider Dealing**

The European Commission has published draft directives on prospectuses and on insider dealing and market manipulation. These proposals are part of a

wider initiative to integrate financial markets across the EU by 2003. In relation to share offerings and admission to markets, the draft prospectus directive provides for a single prospectus to be issued by the home country authority of the issuer which would then be accepted throughout the EU.

#### **Environmental Reporting for Companies**

The Department of the Environment, Transport and the Regions has issued draft guidelines on environmental reporting by companies. These are intended to help companies measure, manage and report on their environmental impact and to give the public an understanding of the company's policies and performance in respect of the environment.

#### **FSMA 2000 operational date set for 30 November 2001**

The Economic Secretary to the Treasury, Ruth Kelly, announced on 12 July 2001 that the effective date for the FSMA will now be midnight on 30 November 2001. The implementation date will also be the date for commencement of other subordinate legislation and quasi-legislation.

#### **The end of Administrative Receivership?**

Published at the end of July, the latest White paper concerning insolvency reform proposes that 'administrative receivership should cease to be a major mechanism for handling insolvencies.' The DTI suggests that all corporate insolvency systems should be a collective procedure in which there is a duty of care to all creditors and all creditors have the opportunity to influence the outcome. Lending bank and finance provider comments are eagerly awaited.

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## **ADMINISTRATION**

#### **Re Dianoor Jewels Ltd** Ch. Div.

Digested at Vol. 7, No. 3. Now further reported at [2001] BPIR 234.  
[Lloyd Tamlyn]

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## **ARBITRATION**

#### **LG Caltex Gas Co. Ltd v China National Petroleum Corporation** CA (Lord Phillips MR, Pill and Keene LJ). *The Times* 6 June 2001.

Arbitration awards determining that the respondents were not parties to the contracts containing the arbitration agreements and therefore not liable to the applicants were awards as to the arbitrator's substantive jurisdiction within section 67(1)(a) of the Arbitration Act 1996. Since the parties had not in fact entered into an *ad hoc* agreement concerning the scope of the

arbitrator's jurisdiction, the applicants were not precluded from challenging the awards and were not prevented from objecting to the awards by section 73 of that Act.

#### **Profilati Italia SRL v PaineWebber Inc** QBD (Moore-Bick J). [2001] 1 All ER (Comm) 1065; [2001] 1 Lloyd's Rep 715.

Where the successful party to an arbitration was said to have procured the award in a manner contrary to public policy, it would normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct on its part had contributed substantially to obtaining an award in its favour.

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## **BANKING**

#### **HSBC Bank Plc v Liberty Mutual Insurance Co. (UK) Ltd** Ch. Div.

Digested at Vol. 7, No. 3. Now reported at *The Times*, 11 June 2001.

[Gabriel Moss QC, Richard Adkins QC, Mark Arnold, Felicity Toube]

#### **Smith v Lloyds TSB Group plc** CA.

Digested at Vol.6, No.9. Now further reported at [2001] QB 541.

[Marion Simmons QC]

#### **Three Rivers District Council v Bank of England (No 3)** HL.

Digested at Vol.7, No.2. Now further reported at [2001] Lloyd's Law Reports (Banking) 125.

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

W Silbree: "Why do the Co-operative banks get special favours? – the Own Funds Directive", *Journal of International Banking Law*, Vol. 16, No. 4.

T Paul: "UCITS III: An analysis of the Proposals for the Amendment of the European Investment Fund Directive", *Journal of International Banking Law*, Vol. 16, No. 4.

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## **BANKRUPTCY**

#### **Ashurst v Pollard** CA

Digested at Vol.6, No.10. Now further reported at [2001] Ch 595.

[David Marks]

#### **Cadbury Schweppes plc v Somji** CA.

Digested at Vol.6, No.10. Now further reported at [2001] 2 BCLC 498.

[Mark Phillips QC, Fidelis Oditah]

**Cork v Rawlins** CA (Peter Gibson, Chadwick and Keene LJJ). [2001] BPIR 222; [2001] 3 WLR 300.

The common law exception from the statutory definition of property which vested in a trustee in bankruptcy, excepting monies received in relation to personal pain and suffering, did not extend to a contract to pay money; and just as the benefit of the policies had been available immediately before bankruptcy to be disposed of or seized by creditors so they should be available to creditors after bankruptcy.

**Dear v Reeves** CA (Mummery and May LJJ). [2001] 2 BCLC 643.

A right of pre-emption held by an individual to purchase a property was 'property' within the meaning of section 436 of the Insolvency Act 1986 and therefore vested in the trustee in bankruptcy upon the individual being adjudged bankrupt.

**HM Customs and Excise v Dougall** Ch Div (Lightman J). [2001] BPIR 269.

In considering the test under section 271(3) of the Insolvency Act 1986 as to whether an offer to secure or compound the petition debt had been unreasonably refused, the test was objective based on the response of the hypothetical reasonable creditor. The court was not limited to taking into account the considerations that were taken into account by the petitioning creditor himself. It was incumbent on the debtor to be full, frank and open and to provide all the necessary information to enable an informed decision to be made by the creditor.

**Hurst v Bennett** CA (Peter Gibson and Arden LJJ, Sir Christopher Staughton). [2001] BPIR 287.

The legal character in which a debtor made a counterclaim or cross-demand had to be the same as the legal character in which the creditor was entitled to the debt in respect of which the statutory demand had been served in order to fall within rule 6.5(4)(a) of the Insolvency Rules 1986.

**Times Newspapers Ltd v Chohan** CA (Aldous, Robert Walker and Jonathan Parker LJJ). *New Law Online*, 22 June 2001.

An order for costs became enforceable and time started to run for limitation purposes when the costs were quantified and certified by the process of assessment. Accordingly a bankruptcy petition presented in respect of a costs order was not statute-barred pursuant to section 24 of the Limitation Act 1980 if presented within 6 years from date when the costs were assessed.

**Mander v Evans** Ch Div (Ferris J). *The Independent*, 9 July 2001.

The word "fraud" in s.281(3) of the Insolvency Act 1986 had to be construed in accordance with ordinary principles without assistance from authority on the construction of statute. The natural meaning of "fraud"

was actual fraud, and undue influence did not come within that meaning.

**Banca Carige v Banco Nacional de Cuba** Ch Div (Lightman J). [2001] BPIR 408; [2001] 2 Lloyd's Rep 147.

A claim under s.423 of the Insolvency Act 1986 did not fall within CPR r6.19(2). Permission to serve proceedings out of the jurisdiction was therefore required.

*Per curiam*, that whilst there is some disarray in the authorities as to whether the iniquitous 'purpose' in s.423 must be a dominant or substantial purpose, on balance the authorities and text books favour the former view.

[Richard Sheldon QC and William Trower]

J Harris, "Ordering the sale of land situated overseas – a comment on *Ashurst v Pollard*", [2001] LMCLQ 205.

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## COMPANY

**Ball v Eden Project Ltd** Ch Div (Laddie J). *The Times*, 6 June 2001

A company director could not, without his board's consent, register the company's name as his own trade mark.

**Trustor AB v Smallbone** Ch Div (Sir Andrew Morritt V-C). [2001] 2 WLR 1177.

The court was entitled to pierce the corporate veil and recognise the receipt of a company as that of the individual or individuals in control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of that individual or those individuals. It is not permissible for the court to pierce the corporate veil merely because the company is involved in some impropriety or because it considers that justice so requires.

**Re X Ltd** Ch Div (Neuberger J). *The Times*, 5 June 2001.

Where an applicant brought proceedings under section 459 of the Companies Act 1985, the court had jurisdiction to grant an interlocutory injunction in order to maintain the status quo and prevent a change of circumstances which could cause irredeemable prejudice to the applicant.

**Smith v White Knight Laundry Ltd** CA (Waller, Laws and Jonathan Parker LJJ). *The Independent*, 2 July 2001.

Where a prospective claimant in an action claiming damages for personal injuries sought a restoration order under s651 of the Companies Act 1985 to restore the name of the prospective defendant to the register of companies, the effect of such a restoration would be the

same as granting relief to the claimant under s.33 of the Limitation Act 1980.

**Profinance Trust SA v Gladstone** CA (Schiemann, and Robert Walker LJ, Lloyd J). *The Independent*, 11 July 2001.

First instance decision digested at Vol.6, No. 3 and reported at [2000] 2 BCLC 516.

The starting point when exercising the discretion as to the date of valuation of shares for the purposes of a petition under s.459 of the Companies Act 1985 was that, *prima facie*, an interest in a going concern should be valued at the date on which it was ordered to be purchased, subject to the overriding requirement that the valuation should be fair on the particular facts of the case.

**Agnew and Anor v Inland Revenue Commissioner and Anor** PC (Lords Bingham, Nicholls, Hoffmann, Hobhouse and Millett). *The Independent*, 16 July 2001, [2001] 3 WLR 454; [2001] BCC 259.

In deciding whether a charge was a fixed or floating charge, the fact that the company was free to deal with the charge's assets without the consent of the holder of the charge, and to use the proceedings of the uncollected book debts for its own benefit, was inconsistent with the nature of a fixed charge and was characteristic of a floating charge.

**Regentcrest Plc (in liquidation) v Cohen** Ch Div  
Digested Vol.6, No.7. Now reported at [2001] 2 BCLC 80.

**Re Britannia Homes Centres Ltd** Ch Div  
Digested at Vol.6, No.7. Now reported at [2001] 2 BCLC 63.

**Parkinson v Eurofinance Group Ltd and others** Ch Div (Pumfrey J). [2001] 1 BCLC 720

When arriving at a fair value for the purpose of s.459 of the Companies Act 1985 of a slight majority shareholding by an unwilling buyer in the absence of a market, it was necessary to assume that the notional sale was taking place between the actual participants in the transaction and that they were willing participants in the sale, since there was no market to provide an objective external criterion and therefore a valuation on the basis of a sale to an independent third party could not be determinative of the price. It was appropriate to value the company as a going concern.

**Re Anglo American Insurance Ltd** Ch Div (Neuberger J). [2001] 1 BCLC 755

For the purpose of s.425 of the Companies Act 1985, whether a particular group constitutes a separate class of creditors depended on the facts of the particular case, on the relevant terms of the particular scheme, on the nature of the differences said to exist between the two alleged classes, and whether there was a possibility of compulsion by the majority or unfairness in the terms

of the scheme or the procedure at the creditors' meeting, and on any relevant practical considerations.

The court had jurisdiction to make an order approving a scheme which imposed on a subsequent liquidator terms which differed from the statutory scheme on a liquidation, since if s.425 could be invoked so as to provide a scheme which was binding on the liquidator and the creditors after the company had gone into liquidation and a liquidator was appointed, logically it followed that the court was able to approve a scheme before the company had gone into liquidation so as to bind the company and the liquidator after it had gone into liquidation.

The court has the jurisdiction to make an order which involved a departure from r.4.90 of the Insolvency Rules 1986, albeit that it should only be exercised in limited circumstances.

**Brownlow v GH Marshall Ltd** Ch Div.  
Digested at Vol.6, No.4. Now further reported at [2001] BCC 152.

E Ferran, "Litigation by Shareholders and Reflective Loss – a comment on **Johnson v Gore Wood & Co**", *The Cambridge Law Journal* [2001] CLJ 245.

A Edgar, "Corporate Manslaughter is Just Around the Corner", *International Company and Commercial Law Review* Vol.12, No. 4.

K Reece Thomas and C L Ryan, "Section 459, public policy and freedom of contract", *The Company Lawyer*, Vol.22, No.7.

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## CONFLICT OF LAWS

**Kenburne Waste Management Ltd v Bergmann** Ch. Div. (Pumfrey J). *The Times*, 9 July 2001.

For the purpose of establishing jurisdiction under the Brussels Convention, the place of performance of a contractual obligation not to contact certain persons was the country of residence of the persons who were not to be contacted and not the country of residence of the person who was obliged not to contact them.

The relevant negative obligation had no real connection with the latter, since the obligation to the party whose performance was characteristic of the contract would have been the same wherever he was in the world, and the agreement was intended to have effect in the country in which the relevant persons were not to be contacted.

**Raiffeisen Zentralbank Osterreich AG v Five Star Trading LLC** CA

Digested at Vol. 6, No. 3. Now further reported at [2001] 3 All ER 257; [2001] CLC 843; [2001] Lloyd's Reinsurance Reports 483.

**Dansommer A/S v Gotz** ECJ [2001] 1 WLR 1069  
Insofar as Article 16(1)(a) of the Brussels Convention refers to “tenancies of immovable property”, it applies to proceedings in which the dispute directly concerned rights and obligations arising under an agreement for the letting of immovable property, even where the action is brought not by the owner of the property but, in this case, by a tour operator subrogated to his rights.

**Bamberski v Krombach** ECJ [2001] 3 WLR 488.  
The court of a Convention state in which enforcement of a foreign judgment against a defendant domiciled in that state was sought could not refuse recognition of the judgment under article 27(1) of the Convention on the ground that the court of origin had assumed jurisdiction on a basis that was contrary to the Convention jurisdiction rules.

However, the court could so refuse recognition if in its eyes the court of origin had committed a manifest breach of a fundamental right, for example, by refusing to allow the defendant to have his defence presented unless he appeared in person.

**Group Josi Reinsurance Co SA v Universal General Insurance Co** ECJ. [2001] CLC 893; [2001] Lloyd’s Reinsurance Reports 483.

The rules of special jurisdiction in matters relating to insurance set out in article 7-12A of the convention did not cover disputes between a reinsurer and a reinsured in connection with a reinsurance contract.

**Ace Insurance SA-NV v Zurich Insurance Co** CA  
Digested Vol. 6, No.10. Now further reported at [2001] CLC 526; [2001] Lloyd’s Reinsurance Reports 504

**National Westminster Bank v Utrecht-America Finance Company** CA (Aldous, Clarke and Laws LJ). [2001] 2 All ER (Comm) 7

Where the court had held, in a decision on the merits, that a party was in breach of contract in bringing foreign proceedings, and that it would continue to be in breach if it continued with them, the foreign proceedings were vexatious and oppressive and accordingly the grant of a permanent injunction restraining the party in breach from continuing those proceedings would not offend the principles of comity.

J Fawcett, “Non-exclusive jurisdiction agreements in private international law”, [2001] LMCLQ 234

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## CONTRACT

**Alfred McAlpine Construction Ltd v Panatown Ltd**  
HL  
Digested at Vol.6, No.9. Now further reported at [2001] AC 518.

**Europhone International Ltd v Frontel Communications Ltd** Ch Div (Ferris J). *Unreported*, 25 July 2001.

An express obligation to “make payments” within a specified number of days of the date of an invoice which the other party “will provide at the end of each month to which it relates” simply reflected a joint expectation that in all probability such invoices would be issued, as distinct from imposing a binding obligation to issue the relevant invoice. Alternatively, the party responsible for the invoicing had the benefit of issuing invoices which could at any time be waived.

[David Marks]

**Shanning International Ltd (in liquidation) v Lloyds TSB Bank plc v Rasheed Bank** HL (Lords Bingham, Steyn, Hope, Hobhouse and Scott). *The Times*, 3 July 2001; [2001] 1 WLR 1462.

Sanctions imposed by the European Community on trade and financial dealings with Iraq in the aftermath of the invasion in Kuwait were intended to impose a permanent prohibition on satisfying or making claims in connection with transactions, the performance of which had been affected by United Nations Security Council resolutions.

Therefore, any future lifting of sanctions could not give rise to claims against parties who had by virtue of the sanctions been prevented from performing their contracts.

**Awwad v Geraghty & Co** CA

Digested at Volume 6, No. 10. Now further reported at [2001] QB 570.

**Bim Kemi AB v Blackburn Chemicals Ltd** CA (Potter, Jonathon Parker and Sedley LJ). [2001] 2 Lloyd’s Rep 93.

The degree of closeness required which must be shown between a claim for unliquidated damages for breach of contract and a cross-claim for unliquidated damages for breach of a different contract between the same parties in order to permit the latter claim to be the subject of an equitable set-off against the former claim was that of an “inseparable connection”. It was not, however, necessary that the cross-claim should arise out of the same contract; all that was required was that it should flow from the dealings and transactions which gave rise to the subject of the claim.

N Andrews, “Strangers to Justice no Longer: the Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999”, *The Cambridge Law Journal* [2001] CLJ 353

R Fletcher, “An offer you can’t refuse”, *Business Law Review* Vol.22, No.7.

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## CORPORATE INSOLVENCY

**Re Adbury Estates Ltd** Ch Div (Jacob J). *New Law Online*, 28 June 2001.

The liquidators of the company mistakenly admitted a proof of debt from a bank which was in fact in respect of a personal liability owed by a former director of the company, and paid a dividend on the proof. After the mistake had been brought to light, the dividend was repaid. The director applied under section 4 of the Company Directors Disqualification Act 1986 for the disqualification of the liquidators. Held that as a non-creditor, the claimant had no standing to make such an application because he had no legitimate interest in the relief sought. In any event the application was unlikely to succeed since section 4 was not intended to be applied to trivial breaches or breaches resulting from a mere mistake.

[Simon Mortimore QC, Lloyd Tamlyn]

**Alman v Approach Housing Ltd** Ch Div (Rimer J). [2001] 2 BCLC 530.

Where a CVA did not contain an express term preventing a party bound by the CVA from bringing a claim against the company, then the courts would be reluctant to imply such a term into the terms of the arrangement.

**Bank of Ireland v Hollicourt (Contracts) Ltd** CA  
Digested at Vol.6, No.9. Now further reported at [2001] Ch. 555.

[Gabriel Moss QC, David Marks]

**Re Barings Plc. Hamilton and others v Law Debenture Trustees Limited and Others** Ch Div (Sir Morritt V-C). *Unreported*, 18 June 2001.

The Vice-Chancellor held that when the Court was asked to determine whether liquidators should comply with a request for them to requisition a meeting for creditors to vote on the removal of the liquidators the Court should consider whether to hold such a meeting would be conducive to the proper operation of the process of the liquidation and to justice as between all those interested in the liquidation. On the facts of this case the Vice-Chancellor held that neither of these tests were satisfied. The Vice-Chancellor directed the Liquidators not, until further order, to convene a meeting of the creditors of Barings on the requisition of any creditor.

[Simon Mortimore QC, Stuart Isaacs QC, Sandra Bristol, Hilary Stonefrost]

**Re Brelec Installations Ltd** Ch. Div.  
Digested at Vol. 6, No. 4. Now further reported at [2001] BPIR 210.

[Glen Davis]

**Re Maple Environmental Services Ltd** Ch Div.  
Digested at Vol.6, No.3. Now further reported at [2001] BPIR 321.

**Morris v Bank of America National Trust** CA  
Digested at Vol.6, No.2. Now further reported at [2001] 2 BCLC 771.

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

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

Digested at Vol.5, No.5. Now further reported at [2001] Ch 475.

**Lewis v Commr of Inland Revenue** CA (Peter Gibson, Mummery LJ and Maurice Kay J)

Digested at Vol. 6, No.3. Now further reported at [2001] 3 All ER 499.

**Morphites v Bernasconi** Ch Div. (Antony Ellera QC sitting as a deputy judge of the High Court). [2001] 2 BCLC 1

In order to prove 'intent to defraud creditors' or a 'fraudulent purpose' for the purposes of s.213 of the 1986 Act, the liquidator had to prove against a relevant defendant that he took an active part in carrying on the relevant business of the company, that in doing so he intended to defraud creditors or had some other fraudulent purpose and that he acted dishonestly. However, it was sufficient for the purposes of s.213 for the liquidator to establish a relevant intent to defraud or other fraudulent purpose and it was not a pre-condition to a finding of such intent or purpose that credit had in fact been incurred, since it was not necessary to prove the victim's reliance on the fraud as in a deceit case.

**Re Latreefers** CA.  
Digested at Vol.6, No.2. Now further at [2001] 2 BCLC 116; [2001] BCC 174.

[Gabriel Moss QC, Martin Pascoe]

**Re Transnational Insurance Co Ltd, Cleaver v Delta American Reinsurance Co** PC.

Digested at Vol.7, No.2. Now reported at [2001] 2 WLR 1202; [2001] 1 BCLC 482 and [2001] BPIR 438.

[Jeremy Goldring]

**Dear v Reeves** CA  
Digested at Vol. 7, No. 3. Now further reported at [2001] 1 BCLC 643.

**Re NT Gallagher & Son Ltd** Ch Div (Judge Howarth sitting as a judge of the High Court). *The Independent*, 23 July 2001.

Where a company had entered into a CVA and the assets of the company were held by supervisor of the CVA, the assets were held on trust for the beneficiaries

of the CVA creditors and the trust did not come to an end even on the commencement of the liquidation.  
[Antony Zacaroli, Martin Pascoe]

**Duke Group Ltd v Carver et al** Ch Div (Jonathon Parker J). [2001] BPIR 459; [2001] BCC 144.

The court enjoyed a discretion as to whether to grant assistance to a foreign court which had asked for the assistance of the English court in procuring the examination of a witnesses, even where some of those witnesses worked or lived abroad. The proper law of the examination was that of the foreign court. It would require extraordinary circumstances for the English courts to deny the request or offer some sort of lesser assistance.

[Martin Pascoe]

**Re Kudos Glass Ltd** Ch. Div.

Digested at Vol.6, No.10. Now reported at [2001] BPIR 517.

**Mahomed v Morris** CA

Digested at Vol.7, No. 2. Now further reported at [2001] BCC 233.

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

Digested at Vol.6, No.4. Now further reported at [2000] BCC 294.

[Robin Dicker QC]

**Bellmex International Ltd (in liquidation) v British American Tobacco** Ch Div.

Digested at Vol.6, No.4. Now further reported at [2001] BCC 253.

[Robin Dicker QC]

**Re Toshoku Finance UK plc, The Commissioners of Inland Revenue v Kahn** CA

Digested at Vol.6, No.4. Now further reported at [2001] BCC 373.

[Mark Phillips QC, Felicity Toube]

A Smith and M Neill: "The Insolvency Act 2000", *Tolley's Insolvency Law and Practice* Vol.17, No.3.

H Anderson: "Insolvent Insolvencies", *Tolley's Insolvency Law and Practice* Vol.17, No.3.

R Tateossian: "Dot.coms – dealing with third parties and asset recovery", *Tolley's Insolvency Law and Practice* Vol.17, No.3.

L Sealy, "Company Charges: New Bullas overruled – but is this the end of the story?", *CCH Company Newsletter* Issue 76.

F Oditah, "Fixed Charges over book debts after Brumark", *Insolvency Intelligence*, Vol. 14, No. 7.

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## COSTS

**Amber v Stacey** CA (Simon Brown LJ and Sir Anthony Evans). [2001] 1 WLR 1225.

Under the CPR the court retained a discretion to depart from the general rule and to deprive a successful claimant of his costs and even to order him to pay the defendant's costs in whole or in part where it was just to make such an order. However, CPR Part 36 required an offer by a defendant to settle to be made by way of payment into court. Therefore the failure by a claimant to beat an offer to settle did not have the same automatic costs consequences as the failure to beat a payment into court and it was wrong to hold that a claimant who failed to beat a written offer should automatically have to pay the Defendant's costs for the period following that offer.

**Classic Catering Ltd v Donnington Park Leisure Ltd** Ch Div (Judge Weeks). [2001] 2 BCLC 537.

The test for determining whether the court should order security for costs against an allegedly impecunious company was two-fold. Firstly, the court had to ask whether there was reason to believe that the claimant company would be unable to pay the defendant's costs if it lost and was ordered to pay the costs. Secondly, the court had to ask itself whether having regards to all the circumstances of the case it was just to make such an order.

**Firle Investments Ltd v Datapoint International Ltd**

CA (Schiemann and Kay LJJ, Sir Murray Stuart-Smith). *New Law Online*, 25 June 2001.

Under CPR r44.3 the general rule was that the unsuccessful party would be ordered to pay the successful party's costs; but different orders could be made. Relevant factors were payments in, offers to settle, the conduct of the parties and whether a party had lost an issue. However, the court would resist the temptation to speculate whether offers to settle which had not in fact been made would have been accepted.

**McPhilemy v Times Newspapers Ltd and others (No 4)** CA (Simon Brown, Chadwick and Longmore LJJ).

*The Times*, 20 June 2001.

An indemnity costs order was not of a penal nature and implied no condemnation of the defendant's conduct and so would not be unjust where the defendant had not behaved unreasonably in continuing litigation after the claimant's offer to settle.

**Hamilton v Al Fayed and Others (No 3)** QB (Morland J). *The Times*, 25 July 2001.

It would rarely be just and reasonable to make an order for costs against a non-party to proceedings who funded one of the parties as an act of charity; but there was no rule which exempted such a person from liability to an order for costs.

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## DAMAGES

**Kuddus v Chief Constable of Leicestershire Constabulary** HL (Lords Slynn, Mackay, Nicholls, Hutton and Scott). *The Times*, 13 June 2001; [2001] 2 WLR 1789; [2001] 3 All ER 193.

The fact that misfeasance in public office was not a tort for which exemplary damages had been awarded before 1964, did not preclude the plaintiff's claim for exemplary damages based on the defendant chief constable's vicarious liability for oppressive, arbitrary or unconstitutional action by a police constable.

**Southampton Container Terminals Ltd v Hansa Schiffahrts GmbH** CA (Thorpe and Clarke LJ, Holland J). *The Times*, 13 June 2001.

In assessing tortious damages for the loss of a chattel such as a working crane, the court was entitled to award only the current resale value of the chattel and not the cost of replacing it if the benefit would be wholly disproportionate to the claimant's loss.

**Hulse and Others v Chambers and Another** QB (Holland J). *The Times*, 13 July 2001.

The quantification of damages was a matter of procedure to be governed by English law although the court was applying a foreign law for questions of substantive law.

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## DIRECTORS AND DISQUALIFICATION

**Secretary of State for Trade and Industry v Crane** Ch. Div. (Ferris J). *The Times*, 4 June 2001.

Subject to statute preventing statements made in directors' disqualification proceedings being received in evidence in subsequent criminal proceedings, there was nothing in either the general law or in the fair trial requirement in the European Convention on Human Rights which made it objectionable for a prosecuting authority to obtain helpful ideas from what was said in other proceedings concerning the same subject matter.

**In re Dennis Hilton Ltd** Ch. Div. (Ferris J). *The Times*, 4 July 2001.

It was not an abuse of process for the Secretary of State for Trade and Industry to commence civil proceedings under the Company Directors Disqualification Act 1986 when no application for a disqualification order had been made when the defendant was tried by a criminal court which had the power to make such an order.

**In re Blackspur Group plc (No 2)** Ch. Div. (Patten J). *The Times*, 5 July 2001.

The Secretary of State for Trade and Industry had the power to make the acceptance of a company director's disqualification undertaking conditional upon the delivery of an accompanying statement setting out the basis on which the director admitted that he was unfit to be concerned with the management of a company.

**Reynard v Secretary of State for Trade and Industry** Ch. Div. (Blackburne J). *The Times*, 10 July 2001.

The deceitful performance in the witness box of a respondent in proceedings under the Company Directors Disqualification Act 1986 might be highly relevant as to whether an allegation of misconduct already relied upon was or was not established to the satisfaction of the court.

However, it could not form a discrete head of misconduct in its own right, nor could it justify making a disqualification order for a longer period than would otherwise have been the case.

**In re Cedarwood Productions Ltd** CA (Chadwick LJ and Rougier J). *The Times*, 12 July 2001.

The making of a disqualification order against a company director by a criminal court on conviction of an indictable offence did not bar disqualification proceedings being brought against the sane director in the companies court. The disqualification order of a criminal court was a penal sanction against the director in person whereas the disqualification order of the companies court was aimed at protecting the public.

**Secretary of State for Trade and Industry v Backhouse** CA

Digested Vol.7, No.3. Now reported at [2001] 1 BCLC 468.

**Re Bradcrown Ltd** Ch Div (Lawrence Collins J). [2001] 1 BCLC 547

The fact that a director had professional advisers who failed to draw attention to the impropriety of transaction might negative a finding of unfitness or be a mitigating factor in the period of disqualification to be imposed. But leaving all relevant judgments to professional advisers did not mean that if there had been a failure to fulfil duties, it could not be a failure sufficient to attract disqualification.

**Re Hopes (Heathrow) Ltd** Ch Div (Neuberger J). [2001] 1 BCLC 575.

It was open to a court to find that a director was at fault in permitting a company to trade by operating a policy of not paying Crown monies even though he did not know that the company was actually insolvent at the time or that he operated such a policy before the company was actually insolvent. Although the appellant's claim that he had not permitted the company to operate a policy of not paying Crown monies was uncontradicted, that did not amount to a denial of the actual allegations made by the Secretary of State, namely that the company paid creditors who

were in a position to put commercial pressure on it rather than pay the Crown because it took a less aggressive attitude.

**Re Blackspur Group Plc** Ch Div (Sir Andrew Morritt V-C). [2001] 1 BCLC 653.

A delay of 10 years since the events in question and eight and ½ since proceedings were commenced did not necessarily breach the requirement of Article 6 for a fair and public hearing within a reasonable time. Although the court had to look critically at the events in the intervening period, there could be good reason for the lapse in time.

**Re Barings plc (No. 5), S/S for Trade and Industry v Baker** CA

Digested at Vol.6, No.7. Now further reported at [2001] BCC 273.

**Re Westminster Property Management Ltd, Official Receiver v Stern** CA

Digested at Vol.6, No.3. Now further reported at [2001] BCC 305.

**Re Pantmaenog Timber Co Ltd** CA (Kennedy, Chadwick LJJ). *New Law Online* 25 July 2001

When the Official Receiver was pursuing disqualification proceedings against a former director, the court could not make an order under s.236 of the 1986 Insolvency Act requiring third parties to disclose documents and provide information to him if the sole purpose of the application was to obtain evidence for use in the disqualification proceedings.

A Walters, "Directors' Disqualification after the Insolvency Act 2000: The New Regime", [2001] *Insolvency Lawyer* Issue 3.

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## INTERNATIONAL INSOLVENCY

**Re Southern Equities Corp Ltd, England v Smith** CA

Digested at Vol.6, No.3. Now further reported at [2001] Ch 419.

[Gabriel Moss QC]

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## LIMITATION

**First Roodhill Leasing Ltd v Gillingham Operating Co** Ch Div (Lightman J). *New Law Online*, 5 July 2001.

In respect of a claim for restitution based on mistake of law, the limitation period of six years began to run

from the date of the accrual of cause of action or, if the mistake had not been discovered, from the date when the mistake was discovered or could with reasonable diligence have been discovered. In assessing when a mistake was discovered it was not necessary for a party to know of a mistake as a certainty.

**Clark (executor of the will of Francis Bacon, deceased) v Marlborough Fine Art (London) Ltd and Another** Ch. Div. (Patten J). *The Times*, 5 July 2001.

Whether a claim brought against a constructive trustee was subject to the Limitation Acts depended upon the existence of trust property.

While an obligation to keep monies or other property separate was necessary to convert a contractual obligation to account into a claim for a constructive trust, it was not necessary where it was clear that a relationship of trust had always existed in relation to the property.

**Markfield Investments Limited v Evans** CA (Simon Brown, Mummery and Latham LJJ). [2001] 1 WLR 1321

Where proceedings for the recovery of land had been dismissed for want of prosecution, but the party holding the legal title subsequently brought a fresh action for the recovery of the land, the issue of the writ in the first action did not, for the purposes of the second action, prevent time running in favour of the person in adverse possession under section 15 of the Limitation Act 1980.

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## PROCEDURE

**Bank of China v NBM LLC** QBD (Comm Ct) (David Steel J). *New Law Online*, 4 July 2001.

A freezing order should generally include a proviso protecting the position of a third party bank present in the jurisdiction in relation to assets held by it in foreign countries and should allow the bank to comply with its contractual and other obligations in those countries.

**Re Barings plc** Ch Div (Sir Andrew Morritt V-C). *Unreported*, 13 June 2001.

Deloitte & Touche (Singapore) ("D&T(S)"), one of the defendants in two actions for negligence brought by Barings companies related to the collapse of the Barings group, sought an order that no member of the public be excluded from the hearing of certain applications in the liquidation of the Barings plc which were due to be heard by the Court. The application by D&T(S) was made on two grounds: first, that as a general rule a hearing is to be in public; CPR 39.2(g); and, secondly, that anyone who wanted to inspect the Court file may do so if the purpose is neither improper nor illegitimate. The application was opposed by the

Liquidators (supported by all the creditors) on the grounds that it was in the interests of justice that the hearing should be in private and that the interpretation put on the Insolvency Rules 1986 relied on by D&T(S) was misconceived. The Vice-Chancellor accepted these arguments. It should also be noted that the Vice-Chancellor rejected a further argument made by one creditor in opposition to the application that the hearing involved confidential information within the meaning of CPR 39.2(c) on the grounds that the confidential information referred to therein is of a restricted nature essentially concerning property rights.

**[Simon Mortimore QC, Stuart Isaacs QC, Sandra Bristol, Hilary Stonefrost]**

**Re a company No. 006303 of 1996** Ch Div (Sir Andrew Morritt V-C). *Unreported*, 27 July 2001.

The Vice-Chancellor held that it would not be a breach of Article 6 which requires that "In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing... Judgment shall be pronounced publicly..." for him to give judgment on this application for directions brought before the Court by the liquidators because the application did not seek the determination of anyone's rights or obligations.

**[Simon Mortimore QC, Stuart Isaacs QC, Sandra Bristol, Hilary Stonefrost]**

**Foenander v Bond Lewis & Co** CA (Brooke, Sedley and Dyson LJ). [2001] All ER 2 1019.

Section 54(4) of the Access to Justice Act 1999, which prohibits an appeal against a decision of a court under that section to refuse permission to appeal, is based on the principle that if both a lower court and an appeal court at a lower level of the judicial hierarchy have decided that a proposed appeal has no prospect of success, and there is no other compelling reason why the appeal should be heard, that must be the end of the matter. That principle does not, however, apply to the order of a High Court judge refusing an application to extend time for an appeal from decision of a lower court. Such an order can, with permission, be appealed to the Court of Appeal as can any other order made by a High Court judge.

**Kirin Amgen Inc v Transkaryotic Therapies Inc.** Ch Div (Neuberger J). *The Times*, 1 June 2001.

The court had jurisdiction to review and change its mind on a conclusion reached in a judgment at any time before the order was drawn up. That was unaffected by rule 52.4 of the CPR which changed the date from which the time for appealing started to run.

**Petroleo Brasileiro SA v Mellitus Shipping Inc** CA Digested at Vol. 7, No. 3. Now reported at [2001] All ER (Comm) 993.

**Steele v Steele** Ch. Div. (Neuberger J). *The Times*, 5 June 2001.

Factors relevant when the court was considering whether to order the determination of a preliminary issue were suggested by Mr Justice Neuberger.

**Haq v Singh and Another** CA (Pill and Arden LJ). *The Times*, 10 July 2001; [2001] 1 WLR 1594.

An alteration in capacity, with reference to amending pleadings, was an alteration from one representative capacity to another, or from a representative capacity to a personal capacity.

Accordingly, where defendants pleaded that the claimant had no entitlement to sue because her cause of action was vested in her trustee in bankruptcy but the cause of action was subsequently assigned to the claimant, the claimant was not entitled to amend her statement of case under Rule 17.4(4) of the CPR on the ground that her capacity had altered because both before and after the assignment she was purporting to sue in a personal capacity.

**BOC Ltd and Another v Barlow and another** CA (Mummery and Kay LJ). *The Times*, 10 July 2001.

Information obtained from a prosecuting authority by a party to civil proceedings was admissible in proceedings for an asset-freezing order and a disclosure order, although it had been acquired by the authority as a result of letters of request under the Criminal Justice (International Cooperation) Act 1990. Restrictions in that Act on the use of material contained in a response to a letter of request applied only to use of the material in criminal investigations and proceedings.

**Fieldman and Another v Markovitch** CA (Sir Andrew Morritt VC). *The Times*, 31 July 2001.

Where an appeal court had granted limited permission to appeal but the substantive appeal was heard by a different tribunal, the court hearing the actual appeal had no jurisdiction to consider issues above and beyond that for which permission had been given.

**Solo Industries UK Ltd v Canara Bank** CA (Potter and Mance LJ, Sir Martin Nourse). *The Times*, 31 July 2001; [2001] 2 All ER (Comm) 217

The beneficiary of a performance guarantee or bond might be refused summary judgment on a claim for payment against the issuing bank where the bank had a real or reasonable prospect of justifying its avoidance on the ground that the bond had been obtained by fraud.

**SEA Assets Ltd v PT Garuda Indonesia** QBD (Commercial Court) (Thomas J). *Unreported*, 27 June 2001.

A stay of execution of a judgment would be granted where the debtor company is insolvent and a scheme of arrangement has been set on foot for the benefit of the main body of creditors and has a reasonable prospect of succeeding. This does not require the debtor to have finalised the proposal for the scheme or issued the application for directions to call scheme meetings. *Booth v Waltons Manufacturing Co* [1909] 2 KB 369, which held that the court had no jurisdiction to grant

such a stay under the Companies Act, does not prevent the court from doing so under RSC Ord 47(1).

[Robin Dicker QC, Andreas Gledhill]

**Jay Benning Peltz (a firm) v Deutsch** Ch Div (Neuberger J). [2001] BPIR 510.

A district judge set aside a statutory demand and dismissed a petition when nobody attended a hearing. The parties had, however, agreed directions subject to the court's approval.

The order of the district judge was set aside. The court should be wary of making orders which discourage people from instructing representatives not to attend hearings in case the court is not happy with what has been agreed in advance. The thrust of the current climate is to encourage parties to agree as much as possible with a view to avoiding the need for them or their representatives to attend.

**St Merryn Meat Ltd & Ors v Hawkins** Ch Div (Geoffrey Vos QC sitting as a deputy high court judge). *New Law Online* 29 June 2001

The failure to disclose the method by which information has been obtained where it was obtained in breach of article 8 constitutes a material non-disclosure such that a freezing and search order will be discharged.

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## PROPERTY

**Bland v Ingrams Estates Ltd** CA

Digested Vol. 6, No. 3. Now reported at [2001] 2 WLR 1638.

**Poplar Housing and Regeneration Community Association Ltd v Donoghue** CA (Lord Woolf CJ, May and Jonathan Parker LJJ). *The Times*, 21 June 2001.

The requirement in section 21(4) of the Housing Act 1988 that a court had to make an order for possession of a dwelling house let on a periodic assured shorthold tenancy if the statutory conditions were satisfied, did not contravene a tenant's right to family life and home.

**Fuller v Happy Shopper Markets Ltd** Ch Div.

Digested at Vol.7. No. 3. Now reported at [2001] 2 Lloyd's Rep 49.

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## RESTITUTION

**Scottish Equitable plc v Derby** CA (Simon Brown, Robert Walker and Keene LJJ). [2001] 2 All ER (Comm) 274

The defence of change of position requires 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.

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## TORT

**Electra Private Equity Partners v KPMG Peat Marwick** CA.

Digested at Vol.6, No.6. Now further reported at [2001] 2 BCLC 589.

**Hooper v Fynmores (a Firm)** Ch Div (Pumfrey J). *The Times*, 19 July 2001.

The duty of care owed by a solicitor to intended beneficiaries under a will was similar to that owed to the testator and was in no way qualified by the particular circumstances of the intended beneficiary or the magnitude of the gift to that beneficiary.

**Merrett v Babb** CA

Digested Vol.7, No.3. Now reported [2001] 3 WLR 1.

**Noel v Poland** Comm Ct (Toulson J). *New Law Online* 14 June 2001

The directors of a agency which placed the Claimant on a loss making Lloyd's syndicate could not be made personally liable for in tort for any statement made to the Claimant in the course of operating the company's business unless they had assumed an additional personal responsibility to the Claimant.

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

Digested at Vol 6, No 9. Now reported at [2001] Lloyd's Reinsurance Reports 531.

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## TRUSTS

See **Clark v Malborough Fine Art (London) Ltd** digested under Limitation, above.

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

Digested at Vol. 6, No. 6. Now further reported at [2001] Ch 437.

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

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## SEMINARS/ APPOINTMENTS

Chambers congratulates Roxanne Ismail who was admitted to the Hong Kong Bar on 21 July 2001.

**[Roxanne Ismail]**

Mark Phillips QC, William Trower QC, Felicity Toube, Jeremy Goldring and Lucy Frazer gave a talk to Linklaters & Alliance on 12 June 2001 on various aspects of insolvency law and practice.

**[Mark Phillips QC, William Trower QC, Felicity Toube, Jeremy Goldring, Lucy Frazer]**

Marion Simmons QC gave a talk at the Insolvency Seminar "Insolvency Lawyers Challenges of the Twenty-First Century" held at the Law Society on 28th June 2001 on "The Human Rights Act 1998".

**[Marion Simmons 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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