

3/4 Digest

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In Three Rivers District Council v Bank of England the House of Lords held that a claim by depositors who had lost their money, when BCCI collapsed, against the Bank of England for misfeasance in public office in granting BCCI a licence and/or subsequently failing properly to supervise it or to close it down had been adequately pleaded, could not be said to have no real prospect of success and would not be struck out as an abuse of the process of the court.

The Digest congratulates Gabriel Moss QC upon being authorised by the Lord Chancellor to sit as a Deputy High Court Judge.

The Digest also congratulates William Trower QC upon his appointment as Queen's Counsel.

This edition of the Digest contains cases reported up to 31 March 2001 and was compiled by Tom Smith.

David Allison

GENERAL NEWS

Insolvency Act 2000

Various provisions of the new Insolvency Act 2000 came into force on 2 April 2001. These included sections 5,6,7,8 (relating to the disqualification of directors), section 9 (relating to administration orders and reversing the decision in Razzaq v Pala [1997] 1 WLR 1336 that a landlord's right of peaceable right of

re-entry was not a security interest and therefore not subject to the statutory moratorium), section 10 (relating to the investigation and prosecution of malpractice), section 11 (restricting the use of answers obtained under compulsion), section 12 (relating to the insolvent estates of deceased persons) and section 13 (bankruptcy: interest on sums held in Insolvency Services Account). The provisions relating to voluntary arrangements (sections 1 to 4) have yet to come into force.

Company Law Review

The Company Law Review has produced its penultimate report which essentially builds on the proposals which have already been the subject of consultation. Important proposals include removing share capital maintenance requirements (in particular with regard to financial assistance and reduction of capital) and a new clarification of the duties of directors including extending the basic duty beyond that of maximising shareholder wealth. It is also noteworthy that the Review has not made any proposals in to remove the restrictions on unfair prejudice petitions placed by the House of Lords in **O'Neill v Phillips** [1999] 1 WLR 1092.

ADMINISTRATION

In re Maxwell Fleet and Facilities Management Ltd

Ch Div.

Digested at Vol.6, No.3. Now further reported at [2001] 1 WLR 323.

Re UCT (UK) Ltd Ch Div.

Digested at Vol.6, No.7. Now further reported at [2001] 1 WLR 436

[Felicity Toube]

ARBITRATION

LG Caltex Gas Ltd v China National Petroleum Corp QBD (Comm Ct).

Digested at Vol.7, No.1. Now further reported at *The Times*, 23 February 2001.

BANKING

Bank of Scotland v A Ltd CA (Lord Woolf CJ, Judge and Robert Walker LJJ). *The Times*, 6 February 2001.

A bank could apply in private for an interim declaration where, as a result of information received from the criminal intelligence services concerning money laundering, it feared that if it paid out money from a customer's account it could be liable to third parties as a constructive trustee and that, if it did not pay out, anti-tipping-off legislation would prevent it from being able to defend itself in an action brought by the customer.

First National Bank Plc v Walker CA (Sir Andrew Morritt V-C, Chadwick and Rix LJJ). *The Times*, 13 February 2001.

A claim against a bank to set aside a charge and the loan which it secured for the undue influence of one joint and several debtor over the other was secondary to and parasitic on the existence of such a claim by one debtor against the other. Where a woman sought to set aside a charge on the ground that it had been procured by her husband's undue influence of which the lender had notice, it was not acceptable for her to pursue a claim for ancillary relief on the footing that the charge was valid and to defend a claim for possession on another footing that it was voidable.

Three Rivers District Council v Bank of England

(No 3) HL (Lords Steyn, Hope, Hutton, Hobhouse and Millett). *The Times*, 23rd March 2001

A claim by depositors who had lost their money, when BCCI collapsed, against the Bank of England for misfeasance in public office in granting BCCI a licence and/or subsequently failing properly to supervise it or to close it down had been adequately pleaded, could not be said to have no real prospect of success and would not be struck out as an abuse of the process of the court. The House of Lords so held (Lord Hobhouse and Lord Millett dissenting) in allowing an appeal by the depositors.

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

Adam Johnson and Stuart Paterson, "Fraud and Documentary Credits" [2001] JIBL 2.

Nicholas Creed, "The Governing Law of Letter of Credit Transactions" [2001] JIBL 2.

BANKRUPTCY AND IVAS

Ashurst v Pollard CA

Digested at Vol.6, No.10. Now further reported at [2001] 2 WLR 722; [2001] 2 All ER 75

[David Marks]

Re Brabon Ch Div.

Digested at Vol.6, No.3. Now further reported at [2001] 1 BCLC 11.

[David Marks, Stephen Atherton]

Cadbury Schweppes plc v Somji CA.

Digested at Vol.6, No.10. Now further reported at [2001] 1 WLR 615.

[Mark Phillips QC, Fidelis Oditah]

Chohan v Times Newspapers Ltd Ch Div (Anthony Mann QC). [2001] 1 WLR 184.

For the purposes of Section 24 of the Limitation Act 1980 an order for costs became enforceable and time started to run when the costs were quantified and certified by the process of assessment, and accordingly a bankruptcy petition in respect of a costs order was not statute-barred if served within 6 years of the costs having been certified. Furthermore, the debtor's application to set aside the statutory demand did not constitute a valid application outstanding at the time of the petition within the meaning of Section 267(2)(d) of the Insolvency Act 1986 since the application was not made within the prescribed time limit.

Cork v Rawlings CA (Peter Gibson, Chadwick and Pill LJ). [2001] *New Law Online*, 2 February 2001; *The Times*, 15 March 2001.

Prior to his bankruptcy, a bankrupt had taken out insurance policies payable upon death, permanent disability or diagnosis of specified conditions. In 1993, the bankrupt had an accident in the course of his business and was unable to work thereafter, and submitted a claim under the policies. The cause of action was not personal to the bankrupt as the policy constituted assets purchased by the bankrupt through premiums which would otherwise have formed part of his estate. The money had not been paid in satisfaction of the test of pain and suffering, but in satisfaction of a contractual test of employability. **Ord v Upton** [2000] 2 WLR 755 provided no assistance because this was not a claim for damages for pain and suffering, but a contractual claim for money. Accordingly, the money from the policy vested in the trustee.

Dear v Reeves CA (May and Mummery LJ). *The Times*, 22 March 2001.

A right of pre-emption was "property" within the meaning of section 436 of the Insolvency Act 1986.

Haig v Aitken Ch Div.

Digested at Vol.6, No.7. Now further reported at [2001] Ch 110.

Levy v Legal Services Commission CA

Digested at Vol.7, No.1. Now further reported at [2001] 1 All ER 895.

National Westminster Bank plc v Jones Ch Div (Neuberger J). [2001] 1 BCLC 98.

The grant of a tenancy and the sale of certain assets were transactions at an undervalue for the purposes of Section 423 of the Insolvency Act 1986 notwithstanding that the defendant's overall asset position was not reduced and the creditors as a whole were not prejudiced since Section 423 could be invoked where a single creditor was the intended victim of the transaction.

Smith v Ian Simpson & Co CA

Digested at Vol.6, No.5. Now further reported at [2001] 1 Ch 239

COMPANY

Allied Carpets Group plc v Nethercott QBD.

Digested at Vol.6, No.2. Now further reported at [2001] BCC 81.

Killick v PricewaterhouseCoopers Ch Div (Neuberger J). [2001] 1 BCLC 65.

An accountant appointed by the directors of a company to value its shares for the purpose of setting the price at which shares owned by a shareholder were to be compulsorily acquired pursuant to the company's articles owed a duty of care to the shareholder in the conduct of the valuation.

In re Premier Electronics (GB) Ltd Ch Div (Pumfrey J). *The Times*, 27 February 2001.

Notwithstanding the balance of convenience in any given case, the court had no jurisdiction to make a freezing order against directors of a company pursuant to section 459 of the Companies Act 1985 unless the petition contained allegations which could be said to constitute a cause of action against those directors.

Re Nottingham Forest plc Ch. Div.

Digested at Vol.6, No.10. Now further reported at [2001] 1 All ER 954

Re Sedgfield Steeplechase Co (1927) Ltd, Scotto v Petch CA (Nourse, Chadwick and Hale LJ). *The Times*, 8 February 2001.

Artificial contractual arrangements by members of a private company holding 75 per cent of its share capital succeeded in circumventing pre-emption rights under the company's articles of association so as to enable a sale of the company to take place notwithstanding objection from the remaining member.

Trustor AB v Smallbone Ch Div. (Sir Andrew Morritt V-C). *The Times*, 27 March 2001

Where a person formed a company of which he was the controlling mind and which was merely a façade for receiving moneys obtained by him in breach of his duty as a company director, the court was permitted to pierce the corporate veil and recognise the receipt of the moneys by the company as the receipt by that person too.

CONFLICT OF LAWS

Casio Computer Co Ltd v Sayo Ch Div (Anthony Mann QC). *The Times*, 6 February 2001.

An English court had jurisdiction to hear a case where the defendant was domiciled in Spain on the ground that there had been an act of knowing assistance which involved transferring misappropriated funds through a bank account in England.

Glencore International AG v Metro Trading International Inc QBD (Comm Ct).

Digested at Vol.6, No.1. Now further reported at [2001] 1 Lloyd's Rep 283.

Kuwait Airways Corporation v Iraq Airways Co [2001] Lloyd's Rep 161. CA (Henry, Brooke and Rix LJ).

There was no reason why the English courts should give effect to foreign legislation which sought to affect the status of a company beyond the border of the legislating state. Once public policy required that a foreign law or act should not be recognised at all then it was impossible to have regard to it for any purpose; it was as though it did not exist. Therefore such laws would not be effective to transfer title to property.

See also **Tort** below.

Media Most Capital and Management Ltd v DB Overseas Holdings Ltd QBD (Comm Ct) (Toulson J). *Unreported*, 29 March 2001.

The Claimants (Gibraltar companies) and the Second Defendant, a Cypriot company, agreed in a settlement agreement governed by Russian law that the Second Defendant would enter into a bilateral marketing agreement with the First Defendant (an English company) for the sale of shares in a Russian TV company owned by the Claimants. The bilateral agreement had to conform to certain terms in the Settlement Agreement. No time or place for entering into the bilateral agreement was specified. A bilateral agreement was entered into, apparently in London, which did not appear to conform. The Claimants obtained leave to serve out against the Second Defendant on the grounds that there had been a breach within the jurisdiction and sued the First Defendant for procuring the breach.

Leave to serve out was set aside and the claim against the First Defendant was dismissed on the grounds that there had been no breach: any repudiation by means of the non-conforming bilateral agreement had not been accepted by the Claimants as terminating the Settlement Agreement and any subsequent breach by failing thereafter to enter a conforming agreement had not occurred in England and had not been procured by the First Defendant.

[**Gabriel Moss QC**]

Raffaissen Zentralbank Osterreich AG v Five Star General Trading LLC CA (Aldous and Mance LJ, Charles J). *The Times*, 21 February 2001.

The issue whether, following the assignment of the benefit of a marine insurance policy, the insurer had to pay the proceeds of insurance to the assignee rather than the assignor was a contractual issue for the purposes of the application of article 12 of the Convention on the Law Applicable to Contractual Obligations (1980) and therefore fell to be determined according to the law governing the obligation assigned, namely English law.

United States Government v Montgomery HL (Lords Hoffmann, Cooke, Hutton, Hobhouse and Scott). *The Times*, 6 February 2001.

The High Court had power to grant a restraining order prohibiting a person from dealing with realisable property in enforcing an order for the confiscation of proceeds of crime made in a designated foreign state, notwithstanding that such confiscation order had been made before that state had been designated.

CONTRACT

Baird Textile Holdings Ltd v Marks & Spencer Plc CA (Sir Andrew Morritt V-C, Judge and Mance LJ). *New Law Online*, 28 February 2001.

B claimed that M&S was prevented by contract and estoppel from terminating the arrangements between them without reasonable notice. Held that a contract would only be implied from conduct if the implication was necessary. The allegation that M&S deliberately abstained from concluding an express contract was not determinative since the crucial issue was certainty: the alleged obligation was insufficiently certain to found any contractual obligation because there were no objective criteria by which the court could assess what would be reasonable as to the terms of the implied contract. Furthermore, the allegation that M&S was estopped from denying that the relationship between B and M&S could only be determined by the giving of reasonable notice did not lead to the relief sought. For that purpose it was necessary to establish an obligation by estoppel that M&S would acquire garments from B in quantities and at prices which were reasonable. English law did not recognise the creation by estoppel of such an enforceable right. Such an obligation had to be sufficiently certain and the alleged obligation was not. Furthermore **Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd** [1982] QB 84 was authority for the proposition that an estoppel by convention could not create a cause of action. The fact that the law of estoppel might be developed or corrected by the House

of Lords was not a compelling reason for a trial in this case.

BCCI v Ali HL (Lords Bingham, Browne-Wilkinson, Nicholls, Hoffmann and Clyde). *The Times*, 6 March 2001; [2001] 1 All ER 961.

Although a party could, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he was not, and could not, be aware, the court would be slow to infer that he had done so in the absence of clear language to that effect.

City Alliance Ltd v Oxford Forecasting Services Ltd CA (Sir Andrew Morritt V-C, Chadwick and Latham LJ). [2001] All ER (Comm) 233.

It was not for a party seeking to rely upon the words actually used in a contract to establish that those words effected a sensible commercial purpose. It ought to be assumed as a starting point that the parties understood the purpose which was effected by the words and that they had used the words because to them that was a sensible commercial purpose. It followed that the before the court might introduce words which had not been used it had to be satisfied (i) that the words actually used produced a result which was so commercially nonsensical that the parties could not have intended it and (ii) that the parties had intended some other commercial purpose which could with confidence be identified.

Far Eastern Shipping Co Public Ltd v Scales Trading Ltd Privy Council

(Lords Clyde, Saville, Scott, Sir Andrew Leggatt and Sir Anthony Evans). [2001] 1 All ER (Comm) 319.

A guarantor under a guarantee was entitled to cancel that guarantee on the grounds of misrepresentation by non-disclosure by the creditor. The Privy Council held that on the facts of the case it was not open to the court to impose liability on the guarantor under the guarantee pursuant to the discretion of the court. However, the Privy Council left open the general question of whether liability could ever be imposed by the court in such circumstances.

On Demand Information Plc v Michael Gerson (Finance) Plc CA.

Digested at Vol.6, No.9. Now further reported at [2001] 1 WLR 155.

[Fidelis Oditah]

CORPORATE INSOLVENCY

Bank of Ireland v Hollicourt (Contracts) Ltd CA.

Digested at Vol.6, No.9. Now further reported at [2001] 2 WLR 290; [2001] 1 BCLC 233; [2001] 1 All ER (Comm) 357.

[Gabriel Moss QC, David Marks]

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

Digested at Vol.6, No.3. Now further reported at [2001] 1 BCLC 91.

[Robin Dicker QC]

Commissioners of Inland Revenue v Adam and Partners Ltd CA (Peter Gibson, Mummery and Latham LJ). [2001] 1 BCLC 222

A voluntary arrangement which provided for a three year moratorium on the prosecution of creditors' claims against the company, and an estimated dividend of 0p in the pound for preferential and non-preferential creditors did not amount to a "composition in satisfaction of the debts" of the company within section 1(1) of the Insolvency Act 1986 and had no effect as such even though approved by the creditors' meeting. The proposal was, however, for a scheme of arrangement within section 1(1) because on its proper construction it involved a moratorium on creditors' claims. This moratorium did not prevent the creditors from subsequently asserting their claims after the moratorium ended and therefore the scheme had the necessary give and take between creditors so as to qualify as a "scheme of arrangement".

Re a Debtor (No 101 of 1999) Ch Div (Ferris J). [2001] 1 BCLC 54.

The existence of differential treatment in a voluntary arrangement which was not assented to by a creditor who considered that he was less favourably treated was not by itself sufficient to prove unfair prejudice under Section 262 of the Insolvency Act 1986, since in deciding whether the interests of a creditor were unfairly prejudiced the court had to consider all the circumstances of the case.

Re Buxton Engineering Company Limited Ch. Div. (Etherton J). *Unreported*, 3 April 2001.

Where, on its application for a validation order, the Company's evidence of profitable trading during the currency of the order sought was inadequate, the Court would do its best to balance the potential prejudice to creditors of the Company failing to break even whilst continuing to trade, against the potential prejudice caused to the Company by it being forced to cease trading, frustrating CVA proposals due to be considered by creditors at a meeting summoned for a date 3 weeks later. Doing its best to carry out that

balancing exercise, the Court granted a validation order enabling the Company to continue trading but attached conditions to ensure, so far as was possible, that the potential prejudice to creditors was minimised.

[Daniel Bayfield]

Re Continental Assurance Co of London Plc Ch Div (Park J). *Unreported*, 27 April 2001.

Park J dismissed applications brought against the former directors of an insurance company which had gone into insolvent liquidation for wrongful trading under Section 214 of the Insolvency Act 1986 and for misfeasance. He held that:

(1) It was unusual for liability to be imposed under Section 214 where it was claimed that the directors ought to have known that the company was insolvent as opposed to situations where they knew that it was insolvent or had closed their eyes to the obvious. Generally, non-executive directors were normally entitled to rely on the executive directors and auditors of a company, though they could not completely abdicate their responsibility.

(2) In determining liability for wrongful trading, it was important to bear in mind that directors might be criticised for placing a company into liquidation too early as well as for allowing it to trade whilst insolvent.

(3) Having determined in a preliminary ruling that the normal measure of loss for wrongful trading was the increase in net deficiency between the date when it said the company should have gone into liquidation and the date when it did, the onus was on the applicants to explain the source of the increase in net deficiency.

(4) Although it was not necessary to determine whether it was necessary to import general principles of causation into Section 214, it was necessary for there to be some nexus beyond the 'but for' test between the directors' conduct and the loss before liability would be imposed. Furthermore, in principle, the starting point under Section 214 is that liability should be several rather than joint and several.

(5) The test of causation laid down in **Galoo v Bright Grahame Murray** [1995] 1 All ER 16 applies to claims brought against directors for breach of duties to exercise care and skill. Furthermore, payments to creditors made by directors when they knew the company to be insolvent but which had the effect of discharging corresponding liabilities were not actionable as misfeasances since the company had suffered no loss.

Park J also made a number of further findings relating to the operation of the Insurance Companies (Winding-up) Rules 1985.

[Stephen Atherton, Tom Smith]

Phillips v Brewin Dolphin Bell Lawrie Ltd HL
Digested at Vol.7, No.1. Now further reported at [2001] 1 WLR 143; [2001] 1 BCLC 145; [2001] All ER 673.

Walker Morris v Khalastchi Ch Div.
Digested at Vol.6, No.7. Now further reported at [2001] 1 BCLC 1.

[Gabriel Moss QC, Hilary Stonefrost]

Mark Fennessy and David Allison, "Not Simply a Case of 'the Luck of the Irish'", [2001] *Insolvency Lawyer*, Issue 1.

[David Allison]

Andrew Keay, "Disputing Debts Relied on by Petitioning Creditors Seeking Winding-up Orders", *The Company Lawyer*, Vol.22, No.2.

Edwin Mujih, "Legitimising Charge-Backs", [2001] *Insolvency Lawyer*, Issue 1.

Tim Pope and Mike Woollard, "The Balance of Power in the Expenses Regime – Part 1 – Leyland DAF", *Insolvency Intelligence*, Vol.14, No.2.

Nicholas Pike, "The Human Rights Act 1998 and its Impact on Insolvency Practitioners", [2001] *Insolvency Lawyer*, Issue 1.

Marion Simmons QC, "Wrongful Trading", *Insolvency Intelligence*, Vol.14, No.2.

[Marion Simmons QC]

New publication: Moss and Others on Cross-Frontier Insolvency of Insurance Companies. A survey of cross frontier insurance insolvency law in the principal jurisdictions of England, US and Bermuda and in a number of other common law, civil law and other jurisdictions. The co-authors of the chapter on English law include Gabriel Moss and Tom Smith. The book is due to be published by Sweet & Maxwell in May. Further information can be obtained from anita.gaspar@sweetandmaxwell.co.uk

COSTS

Smith v UIC Insurance Co Ltd QBD (Comm Ct).
Digested at Vol.6, No.1. Now further reported at [2001] BCC 11.

[Lloyd Tamlyn]

DIRECTORS AND DISQUALIFICATION

Secretary of State for Trade and Industry v Backhouse CA (Aldous and Mance LJJ, Charles J). *The Times*, 23 February 2001; *The Independent*, 9 February 2001.

A costs order against a company director, a non-party, on the winding-up of two companies he controlled was properly made because he had treated the companies as an extension of himself and the money earned as his own, and had defended the petitions to protect his personal reputation and position without seriously considering the interests of the companies and their creditors.

Re Brian D Pierson Ch Div.
Digested at Vol.5, No.1. Now further reported at [2001] 1 BCLC 275

Re Stephenson Cobbold Ltd Ch Div.
Digested at Vol.7, No.1. Now further reported at [2001] BCC 38.

Re Westminster Property Management Ltd, Official Receiver v Stern Ch. Div; CA.
Digested at Vol.6, No.2 and Vol.6, No.3. Now further reported at [2001] 1 All ER 633.

EUROPEAN UNION

Bayer AG v Commission of the European Communities (T-41/96) ECJ. *The Times*, 9 February 2001.

The central ingredient of the concept of an "agreement" in article 85(1) of the EC Treaty (now article 81(1) EC) which prohibited anti-competitive agreements between undertakings was a concurrence of wills between at least two parties, the form in which it was manifested being unimportant so long as it constituted the faithful expression of the parties' intention.

INSURANCE

Agnew v Lansforsakringsbolagens AB HL
Digested at Vol.6, No.3. Now further reported at [2001] 1 AC 223.

Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd HL
Digested at Vol.7, No.1. Now further reported at [2001] 2 WLR 170, [2001] 1 All ER 743 and [2001] All ER (Comm) 193.

LIMITATION

Hampton v Minns Ch Div. (Kevin Garnett QC). *The Times*, 27 March 2001.

An action brought by one co-surety against another for a contribution towards an amount paid to the bank to settle a debt was not caught by the Civil Liability (Contribution) Act 1978 and was not therefore subject to a two year limitation period under section 10 of the Limitation Act 1980.

Savings and Investment Bank Ltd (in liquidation) v Fincken Ch Div. (Lightman J). *The Times*, 2 March 2001.

The critical question in deciding whether a proposed amendment to pleadings constituted the addition or substitution of a new cause of action for the purposes of section 35 of the Limitation Act 1980, involved identifying the degree of abstraction at which the cause of action was to be defined. Typically it would be necessary to examine the duty alleged, the nature and extent of the breach alleged and the nature and extent of the damage claimed.

PARTNERSHIP

Dubai Aluminium Co Ltd v Salaam CA.
Digested at Vol.6, No.5. Now further reported at [2001] QB 113.

Hurst v Bennett CA (Sir Christopher Staughton, Peter Gibson and Arden LJJ). *The Times*, 15 March 2001.

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

Khan v Miah HL.
Digested at Vol.6, No.10. Now further reported at [2001] 1 All ER (Comm) 282.

Walker v Stones CA
Digested at Vol.6, No.8. Now further reported at [2001] 2 WLR 623

PROCEDURE

Barings plc (in liquidation) v Coopers and Lybrand; Barings Futures (Singapore) (PTE) Ltd (in liquidation) v Mattar Ch Div. (Evans-Lombe J). *The Times*, 7 March 2001.

Expert evidence was admissible in any case where the court accepted that there existed a recognised expertise governed by recognised standards and rules of conduct capable of influencing the court's decision on any of the issues which it had to decide, if the witness to be called satisfied the court that he had the necessary expertise to give potentially helpful evidence.

Evidence meeting that test would still be excluded if the court concluded that calling such evidence would not be helpful in resolving any issue in the case justly, for example where the issue to be decided was one of law or was one on which the court could reach a fully informed decision without the hearing of such evidence.

Bermuda International Securities Ltd v KPMG (a firm) CA (Waller, Clarke and Rix LJJ). *The Times*, 14 March 2001.

The Court of Appeal dismissed an appeal against an order made for pre-action disclosure in a case of alleged professional negligence. Although the Court of Appeal declined to give guidance as to the exercise of the power to order pre-action disclosure, the Court pointed out that pre-action disclosure can only be ordered where the tribunal can say that the documents asked for will be documents that will have to be produced at the standard disclosure stage if proceedings commenced. It follows, the Court held, that it must be clear to the tribunal asked to make an order for pre-action disclosure what the issues in the litigation are likely to be, ie what case the claimant is likely to be making and what defence is likely to be run, so as to make sure the documents being asked for are ones which will adversely affect the case of a party, or support the case of a party. The tribunal will then consider whether the case is one in which pre-action disclosure is desirable.

On costs, the Court refused the appeal against the order of the Judge concerning the costs of the application for pre-action disclosure, but allowed an appeal in relation to the costs of compliance with the order for disclosure. As to the latter, the Court stated that it was important that it was recognised that in relation to pre-action disclosure the costs of the actual exercise of disclosure will be paid by the applicant for that disclosure.

[Robin Knowles QC, David Allison]

Heaton v AXA Equity and Law Life Assurance Society Plc CA.

Digested at Vol.6, No.7. Now further reported at [2001] Ch 173.

Johnson v Gore Wood & Co HL.

Digested at Vol.7, No.1. Now further reported at [2001] 1 All ER 481.

LCL Trustees v Schapira & Swaden Ch Div (HH Judge Rich QC). *Unreported*, 16 March 2001.

A consent order agreed on in proceedings which stipulated that property in debts was to remain in an assignee provided that there was to be "no accounting" between the parties after the date of the order, did not operate to divest the assignee of its proprietary entitlement to all such debts except with regard to debts where payment was mistakenly or accidentally made by a debtor to the assignor after the date of the order where a demand for payment had been made by the assignee.

The enforcement of a costs order in favour of a successful party on a preliminary issue could be stayed if there were doubts over that party's ability to meet an adverse costs order in the eventual action.

[David Marks]

Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg Ch Div. (Neuberger J). *The Times*, 9 March 2001.

A person who had had a close personal and professional relationship with a litigant was not precluded as a matter of law from being called as an expert witness by that litigant.

Morris v Banque Arabe et Internationale d'Investissement SA Ch Div.

Digested at Vol.6, No.1. Now further reported at [2001] 1 BCLC 263.

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

Pugh v Cantor Fitzgerald International CA (Ward LJ, Evans-Lombe J). *The Times*, 20 March 2001.

The replacement of RSC Ord. 13, r 9 with CPR r 13.3(1) did not have the effect that the fact finding exercise involved in determining the merits of the case for the purpose of setting aside a judgment was necessarily a determination giving rise to an estoppel. The central question was whether the same issue was being raised as had been raised in holding that there was no reasonable prospect of establishing a defence to the claim.

Re Medicaments and Related Classes of Goods (No 2) CA (Lord Phillips MR, Brooke and Robert Walker LJJ). *The Times*, 2 February 2001.

A court considering whether material circumstances gave rise to a reasonable apprehension of bias in an inferior court, had to apply an objective test to the circumstances, not passing judgment on the likelihood that the particular tribunal under review was in fact biased. The test of "real danger" of bias was in effect no different from the test of "real possibility" of bias.

R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner QBD (Buxton LJ and Penry-Davey J). [2001] 1 All ER 535.

On its true construction Section 20 of the Taxes Management Act 1970 authorised an inspector of taxes to issue a notice requiring a taxpayer to disclose material subject to legal professional privilege. Moreover, although interference by the state with material subject to legal professional privilege engaged Article 8 of the ECHR in principle, there was nothing either in authority or in principle to lead the court to think that the convention jurisprudence would forbid that interference on the facts of the present case.

Securum Finance Ltd v Ashton CA

Digested at Vol.6, No.8. Now further reported at [2001] 1 Ch 291

Stevens v School of Oriental and African Studies Ch Div (Pumfrey J). *The Times*, 2 February 2001.

The reasonable exercise of the court's power to stay proceedings, which were in substance a re-litigation of earlier proceedings which had been struck out, until the party initiating the second proceedings had satisfied the costs order made against him in the earlier proceedings arose from the inherent jurisdiction of the court to regulate its own procedure and did not infringe the right of a litigant to a fair trial pursuant to article 6 of the European Convention on Human Rights.

Sumitomo Corp v Credit Lyonnais Rouse Ltd QBD (Comm Ct) (Andrew Smith J). *New Law Online*, 14 February 2001.

In principle, translations of unprivileged documents were to be treated in the same way as copies of unprivileged documents which did not attract privilege. The fact that documents had been selected for translation by S's lawyers did not mean that they were within the exception to the principle that copies of originals in the possession of the litigant should be disclosed. The exception (based on **Lyell v Kennedy** (No 3) (1884) 27 Ch D 1) was confined to cases where it was claimed that the selection of the documents would "betray the trend of the advice" of the lawyers and S had not made such a claim in this case.

Practice Note (Court of Appeal: Listing) [2001] 1 WLR 479

PROPERTY

Fluor Daniel Properties Ltd v Shortlands Investments Ltd Ch Div (Blackburne J). *The Times*, 21 February 2001.

Where a lease imposed a repairing obligation upon a landlord but obliged the tenant to meet the cost of the repairs it was for the landlord to choose, within reason, how the repairs were to be carried out. While the landlord was not to be criticised merely because it could be shown that the relevant materials works or services could have been provided at a lower cost, the standard of work could not exceed that for which the tenants, having regard to their interest in the property, could reasonably be expected to pay.

Fuller v Happy Shopper Markets Ltd Ch Div. (Lightman J). *The Times*, 6 March 2001; *New Law Online*, 14 February 2001.

A tenant was entitled to rely on the doctrine of equitable set off to set off the right to repayment of previous overpayments of rent against the landlord's right to levy distress for unpaid rent since both claims arose out of the same transaction (the lease) and were so closely related that it would be inequitable for the landlord to claim the arrears without giving credit for any overpayments.

Gillett v Holt CA

Digested at Vol.6, No.5. Now further reported at [2001] 1 Ch 210

Kingsalton Ltd v Thames Water Developments Ltd

CA (Peter Gibson and Arden LJJ, Sir Christopher Slade). *The Times*, 27 February 2001.

Where a court was exercising its discretion under section 82 of the Land Registration Act 1925 whether to rectify the land register, the fact that the registered proprietor was in possession was a factor to be given special weight.

Platt v London Underground Ch Div. (Neuberger J). *The Times*, 13 March 2001.

Where a landlord leased two business premises to the same tenant and wrongfully restricted access by members of the public to the first but in so doing increased the trade of the second, the court was permitted to take into account the increased profits of the second premises when assessing damages for derogation from the grant of the first.

Sykes v Harry CA (Butler-Sloss, Potter and Hale LJJ). *The Times*, 27 February 2001; *The Independent*, 7 February 2001.

It was not necessary for a claimant to establish that a landlord had notice, either actual or constructive, of the defect which had caused his personal injury. He merely had to show a failure on the part of the landlord to take such care as was reasonable in all the circumstances to see that the claimant was safe from personal injury.

PUBLIC LAW

R v Secretary of State for the Home Department ex parte Javed QBD (Turner J). *The Times*, 9 February 2001.

Although historically reluctant to evaluate evidence when reviewing decisions of the executive, since the Human Rights Act 1998 the court had a positive duty to give effect to the European Convention on Human Rights and to ensure that there was an effective remedy in cases of suspected breach of Convention rights so that, where an executive decision needed to be reviewed on the facts, the court was competent to carry out that exercise once the relevant material was placed before it.

TORT

J. Jarvis and Sons Ltd v Castle Wharf Developments Ltd CA (Peter Gibson and Arden LJJ, Collins J). *The Times*, 28 February 2001.

There was no reason in principle why the professional agent of an employer could not become liable to a contractor for negligent misstatements made by the agent to a contractor to induce him to tender.

Kuwait Airways Corporation v Iraq Airways Co CA (Henry, Brooke and Rix LJJ). [2001] Lloyd's Rep 161.

Conversion is a tort of strict liability and in addition to whatever value might be attributed to the value of the converted goods, the claimant was prima facie entitled to recover all losses flowing naturally and directly from the defendant's act of conversion provided that they were not too remote. As the law now stood in conversion cases a court had to ask whether at the time of the conversion the type of loss that occurred was reasonably foreseeable.

See also **Conflict of laws** above.

Merrett v Babb CA (Aldous and May LJJ, Wilson J). *The Independent*, 23 February 2001.

A valuer instructed by a prospective mortgagee to carry out a valuation of a modest house, for the purpose of deciding whether or not to grant a mortgage on it, owed a duty to the mortgagor to exercise reasonable care and skill in carrying out the valuation, if he was aware that the mortgagor would probably buy the house in reliance on the valuation without an independent survey.

Michaels v Taylor Woodrow Developments Ltd Ch Div (Laddie J). [2001] 2 WLR 224.

In a claim for conspiracy to injure by unlawful means, those means must be actionable in their own right against at least some of the conspirators. Where a wrongful act consisted of a breach of the provisions of a statute or of subordinate legislation, it would only

support such an actionable conspiracy if that were determined to have been the intention of the legislature by way of reinforcement of the statutory provisions.

Standard Chartered Bank v Pakistan National Shipping Corporation CA.

Digested at Vol.6, No.3. Now further reported at [2001] QB 167.

TRUSTS

Foskett v McKeown HL.

Digested at Vol. 6, No. 6. Now further reported at [2001] AC 102.

SEMINARS/ APPOINTMENTS

Professor Muir Hunter QC has been awarded an honorary doctorate of law by Bournemouth University

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