

# 3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 8 No 1 January 2002

The Digest welcomes its readers back with a new look for the new year. It is hoped that the new format and reorganisation of contents will make the Digest more user friendly.

The Barings litigation continued to keep members of chambers busy in December with two important applications in front of the Vice-Chancellor.

As regards 2002 it promises to be an interesting year with the European Convention on Insolvency Proceedings due to come into force in May. The buzzword for the year as far as insolvency law goes appears to be rescue. To this end there are various proposals to reform insolvency law and practice contained in the Enterprise Bill passing through Parliament. In addition and in line with the aim of promoting a rescue culture, the government intends to lay proposals before Parliament in the summer of 2002 to reform the TUPE regulations to deal with transfers of insolvent undertakings. In the meantime the Digest wishes all its readers a happy new year and best wishes for the coming year.

This edition of the Digest was compiled by Richard Fisher.

**Tom Smith**

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## GENERAL NEWS

### **Societas Europaea becomes a reality**

The event which many thought would never occur finally happened on 8 October 2001 when the EU Council of Ministers adopted, after some 30 years of negotiations, the regulation for a European Company Statute. The regulation is intended to allow a company operating throughout the EC to be established as a company under European Law with the advantage that it has only to comply with one set of rules and reporting requirements. The regulation comes into force on 8 October 2004.

### **Threatened Directors and Privacy**

On 3 October 2001 the DTI published draft regulations which would enable directors to apply to prevent their home address appearing on the public records at Companies House. In order to avail

themselves of these regulations, directors would have to show that they or someone with whom they live may be at risk of violence or intimidation if their address was to be publicly available.

### **Financial Services and Markets Act**

There is probably no need for a reminder, but the FSMA finally came into force on 1 December 2001. Stephen Oliver QC was appointed President of the new Financial Services and Markets Tribunal (FINSMAT), the body which will replace the Financial Services Tribunal, the Banking Appeal Tribunal, the Building Societies Appeal Tribunal and the Friendly Societies Appeal Tribunal.

## ARBITRATION

C. Ambrose, "English arbitration law 2000" [2001] LMCLQ 476.

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**BANKING****Director General of Fair Trading v National First Bank plc****HL (Lords Bingham, Steyn, Hope, Millett and Rodger).****The Times, 1 November 2001; [2001] 2 All ER (Comm) 1000.**

A term in a bank's standard form of regulated credit agreement to the effect that interest would be charged until the payment in full of the borrower's outstanding balance is a default condition and not one which governs the adequacy of the interest earned by the bank as remuneration for the loan. Therefore such a term falls outside the scope of regulation 3(2)(b) of the Unfair Terms in Consumer Contracts Regulations 1994 and must instead comply with the requirement of fairness contained in regulation 4. The present term was fair when considered in the context of the agreement as a whole.

**Montrod Ltd v Grundkotter Fleischvertriebs GmbH****CA (Thorpe and Potter LJ, Sir Martin Nourse). New Law Online, 20 December 2001.**

An issuing bank is not entitled to refuse payment on presentation of a document which is a nullity for reasons which were not known to the beneficiary or issuing bank at the time of presentation. It would be wrong to extend the common law exception for fraud to allow the issuing bank to escape liability in circumstances where there is no fraud on the part of the beneficiary. The exception should not extend to a case where a document, as presented conforms on its face with the credit, but is subsequently said to be fraudulent for reasons outside the knowledge of the demanding party and the issuing bank at the time of presentation.

Furthermore, no duty of care is imposed on a beneficiary in respect of the presentation of documents in the absence of a voluntary assumption of responsibility.

Professor A. Arora, "Banking Law annual round-up" (2001) *The Company Lawyer* Vol.22, No.10, 298.

G Mitchell QC, "Undue Influence" [2001] *JIBL* 283.

H. Parry, "Hedge Funds, Hot Markets and the High Net Worth Investor: A case for greater protection?" [2001] *JIBL* 255.

**COMPANY****Currencies Direct Ltd v Ellis****QBD (Gage J).****The Times, 27 November 2001.**

Section 330(2)(a) of the Companies Act 1985 prohibits a company from making a loan to a director of the company and section 342 made it a criminal offence to breach section 330. Public policy does not, however, prevent a company from recovering a loan to a director made in breach of section 330. Section 341 provides that a transaction made in contravention of section 330 is voidable at the instance of the company and therefore implies that such a loan may be recoverable.

P. Fidler, "Wrongful Trading after Continental Assurance" [2001] *Tolley's Insolvency Law and Practice* 212.

I. Moore, "Fiduciary duties owed to shareholders: the Court of Appeal applies the brakes – comment on *Peskin v Anderson*" [2001] *LMCLQ* 456

S. Sheikh, "Company Law of the 21st Century" [2001] *ICCLR* 311.

A. Walters, "Wrongful Trading: Two recent cases" (Comment on *Re Continental Assurance and O.R. v Doshi*), (2001) *Insolvency Lawyer* 211

S. Worthington, "Shares and shareholders: Property, power and entitlement" (2001) *The Company Lawyer* Vol.22, No.10, 307.

**CONFLICT OF LAWS****Knauf UK GmbH v British Gypsum Ltd****CA (Henry, Robert Walker and Rix LJ).****The Times, 15 November 2001; [2001] 2 All ER (Comm) 960.**

There can be no good reason for ordering service to be effected on a foreign defendant in England by an alternative method in circumstances where such an order subverts and is intended to subvert the principles on which service and jurisdiction are regulated by agreement between the United Kingdom and its Convention partners.

**Samscrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd****CA (Thorpe and Potter LJ).****New Law Online,****21 December 2001.**

The deletion of a choice of law clause in a standard form contract and the failure of the parties to elect an alternative indicated for the purpose of assessing the proper law of the contract that the parties had chosen no law at all. Under a contract of guarantee, the obligation characteristic of performance is the payment of money by the guarantor and under Article 4 of the Rome Convention a presumption of the proper law of the contract therefore arises. However, the intention

of the Convention would be subverted if a court were to require a preponderance of contrary connecting factors before it would displace that presumption. The fact that the centre of gravity of the contract and its factual matrix were located in another country should be sufficient to rebut the presumption contained in Article 4.

#### **Turner v Grovit**

**HL (Lords Nicholls, Hoffmann, Hobhouse, Millett and Scott). New Law Online, 13 December 2001.**

The application of Article 21 of the Brussels Convention (concerning the jurisdiction of a court where proceedings have already been commenced in another Convention state) is a matter for the relevant foreign court. However, in principle, it is acceptable for an English court to try to prevent the abuse of its process and the court has the power in a suitable case to make an anti-suit injunction against an individual. Such an order operates entirely *in personam* and does not require any finding as to the jurisdiction of the foreign court. It followed in this case that the anti-suit injunction which been made by the court was directed at the unconscionable conduct of the defendants and not at any jurisdictional error by the foreign court and as such it did not appear to be inconsistent with the Convention. However, as the matter was not *acte clair* a reference would be made to the ECJ.

**Union Discount Co Ltd v Zoller CA (Lord Phillips MR, Schiemann and May LJ). The Times, 10 December 2001; New Law Online, 21 November 2001.**

Where a party to a contract, in breach of an exclusive jurisdiction

clause, litigated in a jurisdiction which did not award costs in a strike-out application then justice required that the other party be able to recover the damages for the loss he had reasonably expended on the strike-out proceedings.

#### **CONTRACT**

**World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc**

**Ch Div (Jacob J). The Times, 13 November 2001.**

A restraint imposed by the settlement of an intellectual property dispute should only be regarded as falling within the doctrine which barred contracts in restraint of trade if the restrainee could show that it actually imposed a real fetter on his trade and went beyond any reasonably arguable scope of the intellectual right in issue.

J Chuah, "The Factual Matrix in the Construction of Commercial Contracts – The House of Lords Clarifies" [2001] ICCLR 294.

A Tettenborn, "Prohibitions on Assignment again – Comment on *Foamcrete v Thrust Engineering*" [2001] LMCLQ 472.

#### **DIRECTORS DISQUALIFICATION**

**Secretary of State for Trade and Industry v Creegan**

**CA (Ward and Potter LJ, Sir Martin Nourse). New Law Online, 27 November 2001.**

It is well established that causing a company to trade while it was insolvent and without a reasonable prospect of meeting creditors' claims was likely to constitute incompetence of sufficient seriousness to ground a disqualification order. However, it is necessary for two elements to be satisfied: that

the director knew or should have known that the company was insolvent and knew or should have known that there was no reasonable prospect of meeting creditors' claims.

A. Walters, "Bare Undertakings in directors disqualification proceedings: the Insolvency Act 2000, Blackspur and beyond" (2001) *The Company Lawyer* Vol.22, No.10, 290.

#### **EUROPEAN LAW**

**Zino Davidoff SA v A and G Imports Ltd, Levi Strauss v Tesco Stores Ltd**

**ECJ. The Times, 23 November 2001.**

For the purpose of the rule that a trade mark proprietor's right to control the initial marketing in the European Economic Area of marked goods previously marked elsewhere with his consent could only be extinguished if he consented to marketing in the EEA, consent could in certain circumstances be implied but could not be inferred from silence on the proprietor's part or an absence of explicit indications that marketing of the goods in the EEA was prohibited.

#### **FINANCIAL SERVICES**

**Financial Services Authority v Rouke**

**Ch Div (Neuberger J). The Times, 12 November 2001.**

There was nothing to prevent the court in civil proceedings from granting a declaration stating that, on the balance of probabilities, the defendant had contravened provisions of the Banking Act 1987, notwithstanding that those facts could give rise to criminal liability.

R Ford, "Will the Financial Service and Markets Act 2000 Sound the Death Knell for European Master Trust Structures?" [2001] JIBL 265.

E Steward, "The Four Horsemen of the Apocalypse – the Financial Services Authority and its Statutory Objective" [2001] Business Law Review 258.

## INJUNCTIONS

**Bank of China v NBM LLC CA (Pill, Tuckey and Jonathan Parker LJ).** *New Law Online*, 18 December 2001.

The limits of the court's territorial jurisdiction and the principle of comity require that the effectiveness of freezing orders abroad should normally derive only from their recognition and enforcement by local courts. Third parties would therefore normally be entitled to the Baltic proviso in all freezing orders (the onus being on the claimant to obtain local enforcement) and it therefore should be added to the standard form injunction.

**Sunderland Association Football Club Ltd v Uruguay Montevideo FC**

**QBD (Blofeld J).** [2001] 2 All ER (Comm) 828.

A claimant seeking the grant or continuation of an injunction restraining a guarantor from performing a guarantee on the ground of fraud was required to show that there was a seriously arguable case that fraud was the only realistic inference to be drawn from the behaviour of the defendant. That would require strong corroborative evidence, usually in the form of contemporary documents, and for the party against whom the allegation was made to have failed to

provide an adequate answer to the allegation in circumstances where such an explanation could probably have been expected.

## INSOLVENCY – BANKRUPTCY

**Cartwright v Cartwright**

**Ch Div (Rimer J).** *New Law Online*, 21 November 2001.

A debt based on an order made in family proceedings in Hong Kong could form the basis of a bankruptcy petition in England since, as a matter of statutory construction, an order made in Hong Kong does not fall within the definition of business assigned to the Family Division of the High Court. Therefore such a debt does not fall within Section 281(8) of the Insolvency Act 1986 and is provable in a bankruptcy.

**Inland Revenue Commissioners v Hashmi**

**Ch Div (Hart J).** *The Times*, 2 November 2001.

The execution of a deed of trust transferring a beneficial interest in business premises from a father to his son in consideration of "natural love and affection" could be a transaction at an undervalue within the meaning of Section 423 of the Insolvency Act 1986.

**Re Mounthey**

**Ch Div (Stanley Burnton J).** *New Law Online*, 21 December 2001.

Following the presentation of a divorce petition, an order was made pursuant to Section 24(1)(a) of the Matrimonial Causes Act 1973 for all of a husband's interest in the matrimonial home to be transferred to his wife. The husband was adjudged bankrupt before transferring his interest. In these circumstances the beneficial

interest in the property vested in the husband's trustee since the order in the matrimonial proceedings was insufficient by itself to vest an interest in W. Furthermore, the order did not take effect against the trustee under Section 283(5) of the Insolvency Act 1986.

**National Westminster Bank v Jones**

**CA (Judge and Mummery LJ, Sir Martin Nourse).** *The Times*, 24 October 2001.

In considering whether a transaction was at an undervalue within the meaning of Section 423 of the Insolvency Act 1986, it is appropriate to consider whether the value of the consideration provided by the one party was significantly less than the value provided by the other party to the transaction. In the circumstances of the case it was right to conclude that the transaction had been at an undervalue notwithstanding that the transaction had not diminished the debtors' assets and the creditors as a whole had not been disadvantaged.

**Solomons v Williams**

**Ch Div (Pumfrey J).** [2001] BPIR 1123.

When considering an application for permission by a trustee in bankruptcy to serve out of time a notice claiming after-acquired property, the court will have regard to (i) the period of delay both in serving the notice and seeking an extension; (ii) the merits of the application having regard to the overall position of the bankruptcy; (iii) the prejudice caused to the bankrupt; and (iv) the reasons for the delay.

**[David Marks]**

## **INSOLVENCY – CORPORATE**

### **Re AY Bank plc**

**Ch Div (Pumfrey J). Unreported, 14 December 2001.**

There is good reason to permit an administrator to make a payment to an unsecured creditor where (1) the purpose for which the administration order was made was for the survival of the company or possibly for a better realisation than would be achieved on a liquidation, (2) the court is satisfied that the making of the payment will help achieve the purposes of the administration and (3) in the event of the company going into liquidation the recipient of any payment will be treated no more advantageously than they would otherwise have been if the payment had not been made.

**[Mark Phillips QC, Tom Smith]**

### **Re Barings plc**

**Ch Div (Sir Andrew Morritt V-C). Unreported, 14 December 2001.**

In deciding whether and in what amount to make a distribution to creditors pursuant to Rule 4.180 of the Insolvency Rules 1986, a liquidator must have regard to the future expenses of the liquidation as well as the actual existing expenses. Such future expenses include liabilities which are not yet actual liabilities but in respect of which there is a moral certainty that they will become actual liabilities, if only contingent ones, in the future.

**[Simon Mortimore QC, Antony Zacaroli, Sandra Bristol]**

### **Re Barings plc**

**Ch Div (Sir Andrew Morritt V-C). Unreported, 13 December 2001.**

In considering the exercise of its discretion to approve a com-

promise of proceedings brought by the liquidator of a company, the court would adopt the approach set out in *Re Greenhaven Motors Ltd* [1999] 1 BCLC 635 and would accordingly consider whether the interests of those (whether creditors or contributories) who have a real interest in the assets of the company were likely to be best served by permitting or not permitting the company to enter into the compromise. On the facts of this case, the preference shareholders (who objected to the compromise) had no real or tangible interest in the assets of the company and therefore the compromise would be approved.

**[Simon Mortimore QC, Sandra Bristol]**

### **Re Beck Foods Ltd**

**CA (Pill and Jonathan Parker LJ). New Law Online, 20 December 2001.**

Administrative receivers appointed under a valid debenture over a company's undertaking are not in rateable occupation of the company's premises either before or after the company goes into liquidation.

**[Gabriel Moss QC, Robin Knowles QC, Hilary Stonefrost, Lucy Frazer]**

### **Isoval Contracts Ltd v**

#### **ABB Building Technologies**

**Ch Div (Steven Berry QC).**

**New Law Online, 30 November 2001.**

Summary judgment in favour of a company in administrative receivership should not be stayed simply on the basis that the defendant was awaiting determination of its own Part 20 claim against the company. Staying summary judgment should only be ordered

in exceptional cases. To allow a stay in this case would be effectively to order a set-off, thereby extending the scope of Rule 4.90 of the Insolvency Rules 1986 in a manner for which there was no ground in law or justice.

### **Jeeves v Official Receiver**

**Ch Div (Burton J). New Law Online, 22 November 2001.**

The wording of Section 133 of the Insolvency Act 1986 is mandatory such that, where an application is made by the official receiver for a public examination, the court must make an order. However, the court is not bound to continue or uphold that order when there is an application under Rule 7.47 of the Insolvency Rules 1986. On that application, there would be a balancing exercise giving adequate weight to the mandatory nature of the original order and the special role and duties of the Official Receiver under Section 132. The onus to show why the section 133 order should be discharged is on the applicant.

### **Re Wanda Modes Ltd**

**Ch Div (Park J). New Law Online, 21 December 2001.**

Where a winding up petition is brought against a company and that company disputes the debt on the basis that it has a genuine and serious cross-claim, the petition should be dismissed even if the motivation for making the cross-claim was the anticipated winding up. The fact that the Company could have litigated the cross-claim at an earlier time and did not do so does not prevent the cross-claim from being genuine and serious; *Re Bayoil* distinguished and the decision of Rimer J in *Re a Debtor* (No 87 of 1999) followed.

S. Elwes, "Charges – fixed or floating?" (2001) *Tolley's Insolvency Law and Practice* 221.

K Gaines, "Applying the May 2002 European Regulation on Insolvency Proceedings" (2001) *Insolvency Lawyer* 201.

D Milman, "Floating Charges: a further unexpected setback?" (2001) *Insolvency Lawyer* 163.

D Milman, "The Phoenix Syndrome" (2001) *Insolvency Lawyer* 199.

M Simmons QC, "Human Rights and Insolvency: an update" (2001) *Tolley's Insolvency Law & Practice* 203.

**[Marion Simmons QC]**

J Tribe, "The Privy Council and Brumark: a lingering shadow over book debts?" (2001) *The Company Lawyer* Vol.22, No.10, 318.

## **INSOLVENCY – VOLUNTARY ARRANGEMENTS**

**Coutts & Co v Clarke**  
QBD (HHJ Zucker QC).  
Unreported,  
21 December 2001.

The obtaining of a charging order absolute over a debtor's property is a continuation of legal process against the debtor's property. Accordingly, the making of a charging order absolute against a debtor's property at a time after which an interim order has been made in relation to the debtor is restricted by Section 252 of the Insolvency Act 1986. However, where a charging order is made absolute by the court in ignorance of the interim order then the charging order absolute will be voidable and not void.

Accordingly, on any application to set aside the charging order absolute the court may exercise its discretion. On the facts of this case the court would not exercise its discretion to set aside the charging order absolute.

**[Tom Smith]**

## **INSURANCE**

**Tarback v Avon Insurance plc**  
QBD (Toulson J).  
[2001] 3 WLR 1502

The words "liabilities to third parties which he may incur" in Section 1 of the Third Parties (Rights Against Insurers) Act 1930 refer to and are limited to liabilities which may be imposed on an insured by operation of law, whether for breach of contract or in tort and do not include liabilities voluntarily undertaken by that person, such as the payment of contract debts. Therefore Section 1 does not enable a solicitor to recover his costs and disbursements directly from the insurers upon the bankruptcy of his client.

## **LIMITATION**

**DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy (No.3), Gwembe Valley Development Co Ltd v Same (No.3)**

**Ch Div (Rimer J). The Times, 10 December 2001.**

In order to identify what, if any, limitation period applied to a claim for an account of profits against a director it was necessary to consider the basis on which the particular claim arose. Where there was a deliberate non-disclosure of an interest and that was part of a dishonest breach of trust involving the misapplication of company assets to the director the claim against the director came within Section 21(1)(b)

of the Limitation Act 1980 and there is therefore no applicable limitation period.

## **PARTNERSHIP**

**AIB Group (UK) Ltd v Martin HL (Lords Irvine, Hutton, Millett, Scott and Rodger).**  
**The Times, 17 December 2001.**

Where a joint mortgage had been taken out by business partners and monies had been forwarded to only one, the partners rendered themselves jointly and severally liable for the debt in circumstances where the terms of the agreement so allowed. The court should not adopt a 'distributive' construction which would prevent the second partner from being liable for the debts of the first.

## **PROCEDURE**

**Coll v Tattum**

**Ch Div (Neuberger J). The Times, 21 November 2001.**

Where a defendant failed to serve an acknowledgment of service or a defence within the time limits prescribed by the CPR and the claimant sought judgment in default, then the defendant required the Court's permission to serve an acknowledgment of service or defence out of time. Whether permission was granted was a matter for the Court's discretion but it would normally be exercised in favour of extending time.

## **PROPERTY**

**Ashworth Frazer Ltd v Gloucester City Council HL (Lords Bingham, Browne-Wilkinson, Hoffmann, Scott and Rodger). The Times, 12 November 2001.**

The question of whether a landlord has unreasonably withheld consent to an assignment of a lease falls to be decided in each

case on its particular facts. The court neither could nor should formulate strict rules as to how a landlord should exercise his power of refusal. There was accordingly no proposition of law that a landlord's refusal of consent was unreasonable where it was solely based on his belief that the intended use by the proposed assignee would be in breach of a user covenant of the lease.

### **Bank of Ireland Home Mortgages v Bell**

**CA (Peter Gibson LJ and Sir Christopher Staughton). [2001] 2 All ER (Comm) 920.**

On an application by a mortgagee under Section 14 of the Trusts of Land and Appointment of Trustees Act 1996, the court has a general discretion as to whether to make an order for sale. However, a powerful consideration in all cases was whether the creditor was receiving proper recompense for being kept out of his money, payment of which was overdue. Where there is little or no equity in the property which would be realised for the mortgagor upon a sale, the fact that the bank would take almost all of the proceeds was a material factor in favour of a sale.

### **Robaigealach v Allied Irish Bank plc**

**CA (Hale and Rix LJ). New Law Online, 12 November 2001.**

The Court has jurisdiction to make a charging order nisi into an absolute order even if an order for payment by instalment has been made since the hearing of the order nisi application. There is nothing wrong with a charging order and an order for payment by instalment existing at the same time. The charging order

took effect from the date of the order nisi and there was therefore a charging order in existence which pre-dated the instalment order.

J R McDonough, H. Roberts and D Rawson, "It's my property (and I'll trace it if I want to); vindicating proprietary rights; tracing property after Foskett v McKeown" (2001) Tolley's Insolvency Law and Practice 216.

J. Ulph, "Retaining Proprietary Rights at common law through mixtures and changes – comment on *Glencore v MTI*" [2001] LMLQR 449.

## **RESTITUTION**

### **Esso Petroleum Co Ltd v Niad Ltd**

**Ch Div (Sir Andrew Morritt V-C). New Law Online, 22 November 2001.**

In breach of a contract with Esso, Niad Ltd sold petrol at a higher price than had been agreed. In these circumstances not only did Esso have a claim for breach of contract but was also entitled to a restitutionary remedy in respect of the profits earned by Niad as a result of the breach. Niad had been enriched to the extent that it had charged prices in excess of the agreed prices and the enrichment was unjust because it had been obtained in breach of contract.

## **TAX**

### **Inland Revenue Commissioners v Fry**

**Ch Div (Jacob J). The Times, 10 December 2001.**

A liability for income tax was not extinguished when the Inland Revenue, following negotiations with the taxpayer, cashed a cheque for a substantially lesser amount than was demanded and which was tendered by the taxpayer on

the basis that presentation to the bank would be taken as acceptance of the offer in full and final settlement.

## **TORT**

### **Consignia plc v Hays plc Ch Div (Jacob J). New Law Online, 11 December 2001.**

The Post Office Act 1953 does not give rise to a right to a party to bring civil proceedings claiming damages for breach of the provisions of the Act. The Act constitutes a complete code and in the absence of any express provision entitling a party to redress in the civil courts it was inconceivable to think that Parliament could have intended to create any such right.

**[Robin Knowles QC]**

## **BOOK WATCH**

Human Rights and Civil Practice (Sweet & Maxwell 2001) was launched in November focusing on the impact of the Human Rights Act 1998 on all aspects of civil practice and procedure. Samantha Knights was author of the chapters on "Companies and Financial Services" and "Insolvency".

**[Samantha Knights]**

## **SEMINARS AND APPOINTMENTS**

Professor Ian Fletcher has been elected as an international fellow of the American College of Bankruptcy. This is an organisation founded in 1989 for the purposes of "honouring and recognising bankruptcy professionals who have distinguished themselves both in their practice and in contributing to the insolvency process". The ceremonial induction of fellows is performed annually at the United States Supreme Court.

**[Ian Fletcher]**

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 contents 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.  
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