

3/4 DIGEST



a monthly review of relevant news, cases and articles Vol 9 No 10 November 2003

Michael Crystal QC
 Lord Alexander of Weedon QC
 Christopher Brougham QC
 Gabriel Moss QC
 Simon Mortimore QC
 Stuart Isaacs QC
 Marion Simmons QC
 Richard Adkins QC
 Richard Sheldon QC
 Richard Hacker QC
 Robin St. J Knowles QC
 Mark Phillips QC
 Robin Dicker QC
 William Trower QC
 Martin Pascoe QC
 Fidelis Oditah QC
 Professor Ian Fletcher
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 John Briggs
 David Marks
 David Alexander
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 Lexa Hilliard
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 Felicity Toubé
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 Samantha Knights
 Lucy Frazer
 David Allison
 Daniel Bayfield
 Tom Smith
 Richard Fisher
 Blair Leahy
 Stephen Robins
 Marcus Haywood

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The Court of Appeal has handed down its decision in the case of *Silven Properties Ltd v Royal Bank of Scotland Plc* confirming that a receiver appointed by a mortgagee is under no duty to postpone the exercise of his power of sale in order to take steps to seek to increase the value of the mortgaged property, by seeking planning permissions or lessees or otherwise. Daniel Bayfield appeared on behalf of the receivers.

In an entirely different field, Mark Phillips QC and Daniel Bayfield acted on behalf of Arsenal FC and various players during October defending several disciplinary charges brought by the Football Association. The charges arose out of incidents during and immediately following the match between Manchester United FC and Arsenal FC in September. The Football Association is now reported to be investigating comments subsequently made by Sir Alex Ferguson concerning the sentences imposed.

The Digest is delighted to congratulate Richard Sheldon QC on his appointment as a Deputy High Court judge.

This edition of the Digest was compiled by Stephen Robins.

Richard Fisher

GENERAL NEWS

Recently published insolvency statistics from the Department of Trade and Industry show that there were 3,843 company insolvencies in England and Wales in the second quarter of 2003 on a seasonally adjusted basis. This was an increase of 4.7% on the previous quarter and a decrease of 6.9% on the same period a year ago. The statistics also show that there were 8,662 individual insolvencies in England and Wales in the second quarter of 2003 on a seasonally adjusted basis. This was an increase of 6.3% on the previous quarter and an increase of 14.0% on the same period a year ago.

Recent research from the University of Leeds has revealed that total outstanding consumer debt in the UK amounts to more than £170 billion. This represents

an increase of £30 billion in the last two years. Now that the Bank of England has increased interest rates, causing the cost of borrowing to rise for the first time in nearly four years, many insolvency practitioners are predicting an increase in personal insolvency work.

ARBITRATION

Hesham Amin Hamza El Nasharty v J Sainsbury plc

QBD Commercial Court (Julian Flaux QC). [2003] EWHC 2195 (Comm).

The claimants sold some shares to the defendant. Pursuant to the terms of the share sale agreements, any proceedings "in relation to" the agreements would be subject to arbitration and any claim in relation to any breach of the vendor's warranties could not be made after March

2001. During the course of 2001, one of the vendors purportedly agreed on behalf of all the vendors that the deadline for warranty claims could be extended. In 2003, the defendant gave notice of various claims for breach of warranty. The claimants issued proceedings alleging that the agreement of 2001 purportedly extending the deadline for warranty claims had been made without the claimants' authority and that there was therefore no extension of the warranty deadline so that any claim for breach of warranty was out of time. The defendant applied for a stay of the proceedings under section 9 of the Arbitration Act. It was held that a stay should be imposed and that the dispute should be arbitrated in accordance with the terms of the share sale agreements. The proceedings were "in relation to" the share sale agreements, as this phrase included disputes related to or connected with the share sale agreements as well as disputes arising under it. *Faghirzadeh v Rudolf Wolff* [1977] 1 Lloyd's Rep 630 and *Ashville Investments v Elmer Contractors* [1989] QB 488 applied.

BANKING AND FINANCIAL SERVICES

Linklaters v HSBC Bank and Banco Popular Espanol QBD Commercial Court (Gross J). [2003] EWHC 1113 (Comm).

Previously digested in volume 9, number 6 of the 3/4 South Square Digest. Now reported at [2003] 2 Lloyd's Rep 545

[Fidelis Oditah QC]

Barings plc v Coopers & Lybrand

Ch Div (Evans-Lombe J). [2003] EWHC 2371 (Ch).

At the quantum hearing following the trial of the substantive issues, Evans-Lombe J had to determine, inter alia, (1) which currency damages should be awarded in and (2) what interest rate was appropriate. In respect of the first issue, the claimant argued that judgment should be given in Singaporean Dollars, whilst the defendant argued that judgment should be given in Japanese Yen. Evans-Lombe J applied the decisions of the House of Lords in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 and *The Despina R* [1979] AC 685. He held that the currency which most truly expressed the claimant's loss was Japanese Yen and that the claimant had not discharged the burden of proof in showing that Singaporean Dollars was a more appropriate currency. In respect of the second issue, Evans-Lombe J applied *Miliangos v George Frank (Textiles) Ltd (No 2)* [1977] QB 489, *The Pacific Colocotronis* [1981] 2 Lloyd's Rep 40 and *The Texaco Melbourne* [1994] 1 Lloyd's Rep 473. He held that the rate of interest to be applied was the rate of the currency of the award of damages, and accordingly awarded the Yen LIBOR rate in Singapore plus 1.0%.

Three Rivers DC v Governor & Company of the Bank of England (No 3)

House of Lords (Lords Steyn, Hope, Hutton, Hobhouse and Millett). 18 May 2000, 15-18 January 2001 and 22 March 2001.

Previously digested in volume 7, number 2 of the 3/4 South Square Digest. Now reported at [2003] 2 AC 1.

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

Professor Razeen Sappideen, "Cross-Border Electronic Funds Transfers Through Large Value Transfer Systems and the Persistence of Risk," *Journal of Business Law* (November 2003), pp. 584-602.

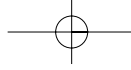
COMPANY LAW

Igroup Ltd v Registrar of Companies

Ch Div (Lightman J).

[2003] EWHC 2431 (Ch).

The claimant delivered a number of forms 395 and 403b to the Registrar of Companies. Various schedules were attached to the forms. The schedules contained some unnecessary (but entirely accurate) personal information about the claimant's customers. The claimant commenced a Part 8 Claim for an order under section 404 of the Companies Act and/or pursuant to the court's inherent jurisdiction that the schedules be removed and/or replaced. The Registrar contended that the court did not have jurisdiction to make such an order



and relied on the statutory duty pursuant to section 707 of the Companies Act to keep the originals of documents delivered to him for 10 years. It was held that the power of rectification granted to the court by section 404 was limited to correcting omissions and misstatements recorded on the register of charges and did not extend to information or particulars entered on forms or contained in schedules to forms. The forms were not part of the register of charges, and that the Companies Act contained no provision for the rectification of such forms. The duty to preserve the forms was inconsistent with any amendment being made to them. Further, it was held, following *Exeter Trust v Screenways* [1991] BCLC 888, that the court did not possess any inherent jurisdiction to order rectification. The existence of the limited statutory jurisdiction was wholly inconsistent with any suggestion that the court had an inherent power of rectification.

CONFLICT OF LAWS

Al-Bassam v Al-Bassam
Ch Div (Lewison J).
[2003] EWHC 2278 (Ch).

The claimant issued proceedings in England for certain declarations as to the domicile of her deceased husband, the effect of his will and for an order that his estate be distributed accordingly. The defendant, who submitted to the jurisdiction, argued that the deceased's domicile at the date of his death

was Saudi Arabia and that Islamic law governed the succession with the result that the will was invalid. The defendant commenced proceedings in Saudi Arabia in which he contended that the will was invalid. The claimant applied to the English courts for an injunction restraining the defendant from continuing the proceedings commenced in Saudi Arabia. Lewison J granted the injunction, holding that the jurisdiction to grant such an injunction derived from section 37 of the Supreme Court Act 1981. He found that the claimant plainly had an arguable case as to the validity of the will under Islamic law and that there was a real possibility that the claimant would not have a fair trial in the Saudi Arabian proceedings. Further, the defendant's conduct had been oppressive. Any advantage that the defendant would gain in the Saudi Arabian proceedings was not one that he would be unjustly deprived of were an injunction granted.

Base Metal Trading Ltd v Shamurin

QBD Commercial Court
(Tomlinson J). [2003] EWHC
2419 (Comm).

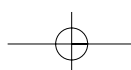
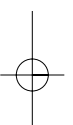
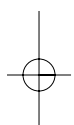
The defendant and two Russian businessmen set up the claimant company ("BMT") as a joint venture. BMT was incorporated in Guernsey but controlled from Russia. The defendant conducted a series of trading transactions on the London Metal Exchange on behalf of BMT in which he sustained

massive losses. BMT brought an action in negligence against the defendant in England and contended that English law governed the claim. The defendant contended that Russian law governed his relationship with BMT. The parties agreed that BMT's action could not succeed under Russian law. The court held that Russian law applied. The parties had always intended that BMT should be controlled from Russia and it was never intended that there should be an office anywhere outside of Russia from which business could be carried on. This set of circumstances fitted the criteria of Article 6(2)(a) and 6(2)(b) of the Rome Convention on the Law Applicable to Contractual Obligations, which was applicable by virtue of the Contracts (Applicable Law) Act 1990.

Adrian Briggs, "On drafting agreements on choice of law," LMCLQ (August 2003), pp. 389-395.

DIRECTORS' DUTIES ***Equitable Life Assurance*** ***Society v Bowley*** QBD Commercial Court (Langley J). [2003] EWHC 2263 (Comm).

The claimant, a mutual life assurance society, claimed against its former directors for negligence and breach of fiduciary duty in failing to take legal advice and/or failing to act on legal advice as to the validity of the differential terminal bonus policies, which the



House of Lords had found to be invalid in *Equitable Life Assurance Society v Hyman* [2000] 3 WLR 529. The defendants applied for summary judgment of the claims arguing that as non-executive directors they were entitled to rely on the wide terms of the articles conferring the power to declare bonuses and the fact that the claimant's appointed actuary considered the bonuses to be valid. Langley J considered *Re D'Jan of London Limited* [1993] BCLC 646 and *Re Barings plc (No 5)* [2000] 1 BCLC 523 and concluded that the claimant's case that the non-executive directors had a duty to understand what was proposed and were negligent in accepting the assurances of the actuary and in not seeking legal advice had a real prospect of success.

Andrew Keay, "Directors taking into account creditors' interests," *Company Lawyer*, volume 24, number 10 (October 2003), pp. 300-306.

Andrew Keay, "Directors' Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over-Protection of Creditors," *Modern Law Review* (September 2003), pp. 665-699.

GUARANTEE AND INDEMNITY

Manx Electricity Authority v J P Morgan Chase Bank
Court of Appeal (Thorpe, Chadwick and Rix LJ).
[2003] EWCA Civ 1324.

The claimant entered into a contract with a subsidiary

of Enron ("Nepco") for the construction of a generating station. Nepco's performance of the contract was supported by a performance guarantee from the defendant bank promising to pay on receipt of a demand in writing stating that Nepco was in breach of its obligations. Enron collapsed, and Nepco repudiated the contract. The claimant made a formal demand on the performance guarantee. The bank claimed that the demand was defective and invalid. The claimant entered into a new agreement with Nepco ("the STA") pursuant to which Nepco was released from any claims in respect of the contract but without prejudice to the claimant's rights under the performance guarantee in respect of the breaches mentioned in the demand. The claimant then served a second demand on the bank in order to cure the alleged defects of the first demand. The second demand referred to the same breaches as the first demand. The claimant commenced proceedings in respect of the first and second demands. The defendant applied to strike out the claim insofar as it related to the second demand arguing that Nepco was not "in breach of its obligations" at the time of the second demand as a result of the STA. The judge struck out the part of the claim which relied on the second demand and held that Nepco's breach before the STA had been purely anticipatory, so that it was impossible to find any accrued or existing breach

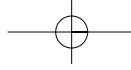
as at the date of the second demand when the contract had ceased to exist as a result of the STA. The claimant appealed. The Court of Appeal allowed the appeal and held that the judge had been incorrect in his analysis of the legal position. Firstly, it was plainly arguable that Nepco had been in actual repudiatory breach of its contract and that the claimant had accepted the repudiatory breach as putting an end to the contract. Rix LJ and Chadwick LJ stressed that it would be extraordinary if a performance guarantee were intended to cease to operate in exactly the situation in which its beneficiary most needed the security that it was to provide – that is to say, where there was a total failure by the principle to perform its contractual obligations.

INSOLVENCY – CORPORATE

Re OT Computers
(in administration)

Ch Div (Sir Richard Scott V-C). [2003] All ER (D) 144.

A company sold computers with extended warranties and insured its liabilities under the warranties with underwriters. It was now in administration. Customers claimed that the company's rights against the underwriters had transferred to them under section 1(1) of the Third Party (Rights against Insurers) Act 1930. The claim was dismissed on the basis that the Act did not apply to liabilities to third parties voluntarily incurred (following *Tarbut v Avon Insurance plc* [2001] 2



All ER 503), and that the company's liabilities to its customers under the warranties were voluntarily incurred. It was also held that the company's liabilities under the warranties were not liabilities in the capacity of insurer under a contract of insurance, so as to exclude them from the Act by virtue of section 1(5).

[Barry Isaacs]

Vanessa Finch, "Re-Invigorating Corporate Rescue," *Journal of Business Law* (November 2003), pp. 527-557

INSOLVENCY – PERSONAL

**John Lewis Plc v Pearson
Burton**

**Ch Div (Pumfrey J). [2003]
All ER (D) 140 (Oct).**

On the wording of section 266(3) of the Insolvency Act 1986, the court has an unfettered discretion as to whether or not it should dismiss a bankruptcy petition. However, a court should not dismiss a petition on the basis that bankruptcy was an excessive and disproportional response if the petition debt exceeded the bankruptcy limit of £750. Nor was it a sufficient ground to dismiss a petition where all statutory requirements had been fulfilled on the grounds that there were other remedial avenues available to the creditor. The insolvency scheme did not provide that a creditor need prove that all other avenues of recourse had failed. In the circumstances, the petition was restored.

[Richard Fisher]

**Mulkerrins v
PricewaterhouseCoopers
House of Lords (Lords
Bingham of Cornhill,
Nicholls of Birkenhead,
Millet, Scott of Foscote and
Walker of Gestingthorpe).**
[2003] UKHL 41.

Previously digested in volume 9, number 8 of the 3/4 South Square Digest. Now reported at [2003] 4 All ER 1.

**[Robin Knowles QC and
John Briggs]**

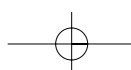
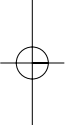
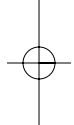
**Re a Debtor (No 97/SD/2003)
Ch Div. [2003] All ER (D) 392
(Oct).**

The debtor was the tenant of a flat of which the two creditor companies were, inter alia, service providers. The companies obtained a judgment against the debtor and another person in respect of arrears of service charges. Subsequently, a further judgment was entered against the debtor alone in respect of mesne profits. Those judgments were still in force. The companies issued statutory demands for the judgment debts and the debtor applied to set them aside. Both applications were dismissed pursuant to paragraph 12.3 of the Practice Direction on Insolvency Proceedings. Paragraph 12.3 provided, inter alia, that the court would not go behind a judgment or order and inquire into the validity of the debt. The debtor appealed contending, inter alia, that the companies were committing abuses of process against her. The appeal was dismissed. It was held that there was no basis on which the appeal could succeed.

[Daniel Bayfield]

**Robert v Pinnacle
Entertainment Ltd
Ch Div (Evans-Lombe J).
[2003] EWHC 2394.**

A bankrupt proposed to enter into an individual voluntary arrangement ("IVA"). The proposals stated that Pinnacle Entertainment Ltd ("Pinnacle") was a creditor in the sum of £135,290. Pinnacle submitted a proxy form to the nominee opposing the IVA. The proxy did not state the size of Pinnacle's claim or any particulars of the debt. At the creditors' meeting, the nominee rejected the proxy on the grounds that it did not state the size of the claim. The IVA was approved. Pinnacle appealed to the district judge, who concluded that the disallowance of Pinnacle's vote was a material irregularity. The district judge revoked the approval that the meeting had purported to give. The nominee appealed. Evans-Lombe J upheld the district judge's decision. Applying *Re Hoare* [1997] BPIR 683, he held that a chairman of a creditors' meeting must be satisfied as to the amount in respect of which the creditor's vote was permitted to be cast. However, the nominee in the instant case was in possession of evidence showing that the debtor admitted his indebtedness to Pinnacle in the sum of £135,290. Accordingly, Pinnacle's proxy should not have been rejected.



PARTNERSHIP**Bank of Scotland v Henry Butcher & Co****Court of Appeal (Aldous, Chadwick and Munby LJ). [2003] EWCA Civ 67.**

Previously digested in volume 9, number 3 of the 3/4 South Square Digest. Now reported at [2003] 2 All ER (Comm) 557.

[Antony Zacaroli]**PROCEDURE****Westminster Oil & Gas Ltd v ING Bank NV****QBD Commercial Court (Thomas LJ). [2003] EWHC 2244 (Comm).**

On 27 October 1995, the claimant began proceedings against the defendant alleging breach of an oral agreement made in 1994 to pay the claimant commission in relation to services to be performed in Angola. As the proceedings did not come before a Judge between 26 April 1999 and 25 April 2000, the proceedings were automatically stayed by reason of the provisions of Part 51 of the CPR and the Practice Direction thereto. On 21 February 2003 the claimant applied to lift the stay. Thomas LJ held that the court must take into account the provisions of rule 3.9 of the CPR when determining whether to lift the automatic stay. He also reviewed the principles set out in *Audergon v La Bagette* [2002] EWCA Civ 10 and *Woodhouse v Consignia plc* [2002] EWCA 275. He held that the claimant's inaction was probably intentional and that there was no good reason for the delay. He also

held that the prejudice caused to the claimant by refusing to lift the stay would be outweighed by the prejudice caused to the defendant by lifting the stay. In particular, the issue as to whether there was an agreement would turn entirely on oral evidence as to events that occurred ten years previously. An attempt to try this type of claim ten years after the alleged events would not be in the interests of justice or result in a fair trial. Accordingly, the stay would not be lifted.

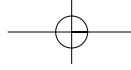
RECEIVERSHIP**Silven Properties Ltd v Royal Bank of Scotland plc Court of Appeal (Aldous LJ, Tuckey LJ and Lightman J). [2003] EWCA Civ 1409, The Times, 27 October 2003.**

The claimants brought claims for damages against the first defendant bank ("RBS") and the second and third defendant receivers appointed by RBS arising from the alleged sale of properties mortgaged by the claimants to RBS at an undervalue. By the terms of the mortgages, the receivers were appointed as agents of the claimants. The claimants contended that, in respect of six properties, the defendants had been under a duty to pursue planning applications for the development of the properties in order to obtain the best price obtainable and, in respect of two of the properties, to complete the grant of leases. Patten J dismissed the claims. He concluded that a receiver appointed by a mortgagee has the same obligations

to the mortgagor as the mortgagee and that he is not required to incur expense in the improvement of the property in order to sell it at a higher price. The claimants appealed. The Court of Appeal held that there is no duty on a mortgagee to postpone exercising the power of sale until after the further pursuit of an application for planning permission or the grant of a lease. Having regard to the fact that a receiver's primary duty is to bring about a situation where the secured debt is repaid, as a matter of principle the receiver has to be entitled to sell the property in the condition in which it was at the time of appointment the in same way as the lender could, and in particular without awaiting or effecting any increase in value or improvement in the property.

[Daniel Bayfield]**RESTITUTION****Niru Battery Manufacturing Co v Milestone Trading Ltd Court of Appeal (Dame Elizabeth Butler-Sloss P, Clarke LJ and Sedley LJ). [2003] EWCA Civ 1446.**

The claimant brought proceedings against CAI claiming restitution of monies paid. The trial judge found in favour of the claimant. He held that, whilst CAI had not been dishonest and had paid the monies away, the defence of change of position was not available in the circumstances. CAI appealed. It was argued that the payment away of the monies and the absence of dishonesty entitled



CAI to succeed in raising a defence of change of position. The Court of Appeal dismissed the appeal and upheld the judge's findings. Clarke LJ reviewed the authorities, including *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, and summarised the relevant principles as follows: (1) the question is whether it would be unjust to allow restitution; (2) it will be unjust to allow restitution where an innocent defendant's position has so changed that the injustice of requiring him to repay outweighs the injustice of denying the claimant restitution; (3) the defence of change of position is not available to a defendant who has changed his position in bad faith, as where he has paid away the money with knowledge of the facts entitling the claimant to restitution; (4) the defence of change of position is not available to a wrongdoer; (5) in general terms, the defence is available to a defendant whose position has so changed that it would be inequitable to require him to make restitution in full. Accordingly, it is not necessary to show that a recipient of money was dishonest in order to defeat a defence of change of position in response to a claim for restitution of money paid under a mistake of fact. Rather, the essential question is whether on the facts of a particular case it would in all the circumstances be inequitable or unconscionable to allow the recipient of money paid under a mistake of fact to deny restitution to the payer.

Jennifer Payne, "Unjust Enrichment, Trusts and Recipient Liability for Unlawful Dividends," *Law Quarterly Review* (October 2003), pp. 583-607.

SPORTS LAW

Sunderland AFC v Manchester United FC

Mark Phillips QC and Daniel Bayfield advised Sunderland AFC in relation to a compensation claim brought by the club against Manchester United FC following the signing by United of the former Sunderland forward, David Bellion. The claim, which was due to be heard by the Football League Appeals Committee, was settled on the basis that United would pay Sunderland compensation of £2m (rising to £3m depending on appearances) together with a sell-on clause.

[Mark Phillips QC, Daniel Bayfield]

Football Association v Campbell

Mark Phillips QC acted for Sol Campbell of Arsenal FC on his charge of misconduct following his kick on Djemba Djemba during the Charity Shield match. Campbell escaped a ban and was fined £20,000.

[Mark Phillips QC]

Football Association v Arsenal FC and others

Mark Phillips QC and Daniel Bayfield acted for Arsenal FC, Vieira, Cole, Keown, Lauren, Parlour, Lehmann and Wenger in relation to the incidents at the match between Manchester

United FC and Arsenal FC on 21 September 2003. No charges were brought against Wenger following an explanation to the Football Association of his remarks after the match. The charge against Lehmann was withdrawn. Following a disciplinary hearing, Arsenal was fined £175,000, Vieira was banned for one match and fined £20,000, Cole was fined £10,000, Keown was banned for 3 matches and fined £20,000, Lauren was banned for 4 matches and fined £40,000 and Parlour was banned for one match and fined £10,000.

[Mark Phillips QC, Daniel Bayfield]

TRUSTS

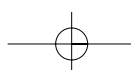
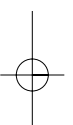
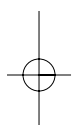
Professor Sir Roy Goode QC, "Are tangible assets fungible?" *LMCLQ* (August 2003), pp. 379-388.

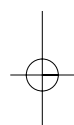
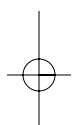
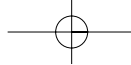
CORRECTION

In the last edition of the Digest, we reported in relation to the case of *Daisytek ISA* in the French Court of Appeal that the French office holder, wrongfully appointed by the French court, was ordered to pay all the costs of the proceedings.

This was an error in that the Court made no order as to the parties' respective costs, holding that it would be inequitable in the circumstances to do so.

We are grateful to Simon Lowe of Lefèvre Pelletier & Associés for pointing out this mistake.





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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For further information please contact Sue Brown at 3/4 South Square on tel 020 7696 9900 or fax 020 7696 9911. E-mail may be sent to digest@southsquare.com.

3/4 South Square, Gray's Inn
London WC1R 5HP

Telephone

+44 (0)20 7696 9900

Facsimile

+44 (0)20 7696 9911

E-mail

clerks@southsquare.com

Document Exchange

LDE 338

Website

www.southsquare.com

