

3-4 DIGEST



a monthly review of relevant news, cases and articles Vol 13 No 10 April 2008

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 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 CBE QC
 Mark Phillips QC
 Robin Dicker QC
 William Trower QC
 Martin Pascoe QC
 Fidelis Oditah QC
 David Alexander QC
 Antony Zacaroli QC
 Stephen Atherton QC
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 Felicity Toubé
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 David Allison
 Daniel Bayfield
 Tom Smith
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 Hannah Thornley
 Simon Fuller
 William Willson
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Academic Members
 Professor Muir Hunter QC
 Professor Ian Fletcher
 Professor Sarah Worthington
 Dr Riz Mokhal

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After 24 years as head of chambers Michael Crystal QC wishes to step down, and will be doing so as from 1 May 2008. However, as the senior QC in chambers, he will continue in practice full time, both in the UK and overseas, as a member of chambers.

During Michael's tenure 3-4 South Square has grown to become a leading set of chambers in the field of business law, combining pre-eminent expertise in our core area of domestic and international insolvency with a wealth of expertise in many related areas. Chambers has also grown considerably in size, and now consists of 18 silks and 27 juniors. Michael's dynamism and vision over many years have made an immeasurable contribution to the success and reputation which 3-4 South Square currently enjoys. We are extremely grateful for all that he has done for chambers.

We have taken this opportunity to review chambers' management structure and to ensure that it fits our clients' and chambers' needs. Accordingly, from 1 May, William Trower QC will, as chair of the executive committee, be responsible for overseeing the running of chambers and Gabriel Moss QC and Robin Dicker QC will be appointed joint directors of policy and strategy in order to spearhead the further development of chambers.

We aim to ensure that 3-4 South Square is well-placed to meet the demands and challenges of a changing legal landscape, including the increasingly international nature of much of the work undertaken by members of chambers. We believe that our new structure will help us to draw on the skills of all members of chambers, so as to maximise their ability to maintain and further develop the breadth and quality of service that they offer across the range of areas of work undertaken.

William Trower QC, Gabriel Moss QC, Robin Dicker QC

This month has seen members of chambers involved in a number of important decisions. In *Re HIH Casualty & General Insurance Ltd* the House of Lords has considered the scope of the English Court's jurisdiction to remit assets when faced with a request to do so by a foreign court. The following members of chambers appeared at the hearing: Simon Mortimore QC, William Trower QC, Jeremy Goldring and Tom Smith.

Meanwhile, in *Hague and PricewaterhouseCoopers v Nam Tai Electronics* the Privy Council held that absent some special relationship, a liquidator owes no common law duty of care to unsecured creditors in relation to his conduct of the liquidation. Richard Hacker QC and Richard Fisher acted for David Hague and PricewaterhouseCoopers.

In *Parmalat Capital Finance v Food Holdings Limited and Dairy Holdings Limited* the Privy Council held that where parties had assigned their debts by way of security to a third party this did not deprive of them of their ability to present a winding up petition under the Cayman Islands Companies Law. Michael Crystal QC, Gabriel Moss QC and Jeremy Goldring all appeared at the hearing.

This edition of the Digest was compiled by Georgina Peters and edited by Marcus Haywood.

CIVIL PROCEDURE**Phoenix Acquisitions Limited v Jafari-Fini Unreported, 10 April 2008 Ch D (Lewison J)**

The debtor (J) appealed against a bankruptcy order. The respondent (P) had been awarded a final costs certificate against J in relation to litigation commenced by J arising out of the collapse of a takeover of Chesterton estate agents. Before judgment was given in the matter, J sent further written submissions to the Registrar. P then responded and a further hearing took place at which judgment was handed down. On this occasion, the Registrar refused to consider further evidence produced by J. Held that in determining whether a decision was unjust, a court had to have regard to the effects of that decision on every party to the proceedings. J had been given ample time to marshal his evidence. The purpose of the further hearing was to hand down judgment. It would have been manifestly unfair to P for the registrar to have allowed J a further opportunity to submit surprise evidence. In any event, the further evidence went to the existence of an alleged cross-claim of J against P arising out of payment allegedly made by J under a guarantee of P's liability to a creditor. The cross-claim was hopeless because under the terms of the guarantee J was precluded from claiming against P until the creditor had been paid in full (which it

had not) and, likewise, J could not claim in the liquidation of P because of the rule against double proof.

[Richard Sheldon QC, Tom Smith]

COMPANY LAW**Re Fortuna, Tempo Group Limited v Wynner Group Limited Unreported, Appeal 16 of 2007****Court of Appeal of the Cayman Islands**

Where the parties involved in a shareholder dispute agree to an independent and impartial valuation for the purpose of establishing the price to be paid for a minority shareholding in accordance with the guidance provided in *O'Neil v Phillips* [1999] 1 WLR 1092, the valuer will not be disqualified from acting unless actual want of independence or partiality can be established as a matter of objective fact on the balance of probabilities. The purpose of such a valuation process is speedy and practical resolution of shareholder disputes, so as to limit their commercially-destructive potential. As such, the process may have a rough edge as compared to the more demanding requirements of an arbitral or judicial valuation. Partiality and lack of independence will not be lightly assumed in relation to a professional person. Loss of independence may, however, occur as a result either of "external" factors compromising the valuer's autonomy and

preventing him from exercising his freedom of choice to value as he considers fit, or by "internal" factors such as an earlier possibly inappropriate conclusion on value for a special purpose from which the valuer may not be free to depart. The burden rests on any applicant for disqualification for want of independence to prove that the decision-maker's independence has in fact been compromised, and the elusive concept of "appearance of want of independence" is not of assistance in this context. In these circumstances, the application for a declaration that the valuation produced was not "independent" was rejected.

[Richard Hacker QC, Richard Fisher]

CONTRACT**Renewable Power & Light Plc v Renewable Power & Light Services Inc Unreported, 19 March 2008 Ch D (Lewison J)**

The claimant electrical power producer terminated certain contracts appointing its senior executives and an agreement for the provision of services with a second company. In proceedings for breach of duty and breach of contract, the claimant sought to rely both on confidentiality clauses within that contract stated to survive the 'termination' or 'expiry' of the agreement and on certain post termination arrangements dealing with delivery up of documents and

other property. It was asserted in defence that the contracts had been wrongfully repudiated. Further, that on the true construction of the contractual documents the obligation to surrender confidential information and other property was conditional upon a valid determination of the contract. Injunctions based on the contracts which were alleged to be in place were sought. Thereafter an application for summary judgment was made for final judgment to enforce the obligation of confidentiality as contained in the contract and to enforce the contractual obligation for delivery up of documents and other property. The question whether wrongful repudiation and acceptance would discharge for the future any obligation of confidentiality assumed under the contract fell to be considered. The Court held that the question whether wrongful repudiation of a contract by one party and acceptance of that repudiation discharges for the future any obligation of confidentiality assumed under the contract, is a matter of law and subject to some uncertainty. Where a claim is founded on a contractual obligation of confidentiality and not on a duty arising independently in equity or out of the relationship between the claimant and defendant, there is sufficient uncertainty in the law as to make it undesirable to determine that question on

an application for summary judgment.

**[Stephen Atherton QC,
Jeremy Goldring]**

**KTA Group Ltd v ING Lease
(UK) Ltd
Unreported, 15 February
2008**

Ch D (Henderson J),
The purchaser of a car, ING Lease (UK) Ltd, was entitled to be repaid the purchase price paid by it where there was a total failure of consideration in that the seller did not have title to the car when the sale agreement was made and only acquired title to the car after the purchaser had accepted the seller's repudiatory breach of contract. The purchaser was entitled to repayment notwithstanding that it was unable to return the car to the seller (or to the true owner of the car prior to title passing to the seller) because its customer, with whom it had entered into a hire purchase agreement, appeared to be fictitious and the car had been exported. *Rowland v Divall* [1923] 2 KB 500 applied and *Butterworth v Kingsway Motors Limited* [1954] 1 WLR 1286 considered. Accordingly the purchaser was held to be entitled to petition for the winding up of the seller.

[Daniel Bayfield]

**CROSS-BORDER
INSOLVENCY**

**Re HIH Casualty & General
Insurance Ltd and others,
McGrath v Riddell
[2008] UKHL 21
House of Lords (Lords
Hoffmann, Phillips, Scott,
Walker and Neuberger)**

The appellants appealed against a decision that the Court should not accede to a request from the Australian Court asking that the English provisional liquidators of four insolvent Australian insurance companies be directed to remit the English assets to the Australian liquidators for distribution in accordance with the Australian statutory scheme.

Held that if the country of the principal winding up of an insolvent company was a "relevant country or territory" for the purposes of Section 426 of the Insolvency Act 1986 and the liquidators in that country had requested English liquidators to remit to them the assets collected in England so that they could, pursuant to the insolvency law of that country, implement a universal scheme of *pari passu* distribution to ordinary unsecured creditors, the request was one to which, in principle, the English liquidators ought to accede. Reliance simply on the fact that under the foreign insolvency scheme applicable to the principal winding up there would be a significant class or classes of preferential creditors whose debts would not have priority under the English insolvency scheme is not sufficient to justify a refusal.

Per Lords Hoffmann and Walker: Remission would be ordered at common law. The principle of (modified) universalism is the golden thread of English cross-border insolvency law and required

that English courts should, so far as is consistent with justice and public policy, cooperate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.

[Simon Mortimore QC, William Trower QC, Jeremy Goldring, Tom Smith]

DIRECTORS AND DISQUALIFICATION

ZVONKO STOJEVIC v THE OFFICIAL RECEIVER Unreported, 20 December 2007

Court of Appeal (Tuckey and Rimer LJ),

By a judgment dated 15 November 2002 ("the Toulson Judgment"), Toulson J held that Zvonko Stojevic ("ZS") and Stone & Rolls Ltd ("SR") were liable to the Czech Bank, Komerční Banka A.S. ("the Bank"), in deceit in a sum of approximately US\$94 million.

A winding up order was made against SR on the Bank's petition on 15 January 2003. On 12 January 2005, the Official Receiver commenced disqualification proceedings against ZS qua shadow director of SR. At first instance, His Honour Judge Pelling QC held that:

(1) The statutory framework applicable to disqualification proceedings creates both an express (rule 3(2) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules

1987) and implied exception to the principle in *Hollington v Hewthorn* [1943] KB 587 that judgments of another tribunal are inadmissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties.

(2) The Toulson Judgment was accordingly admissible as prima facie evidence not only of the facts found but also of Toulson J's opinion that ZS was dishonest.

(3) Even absent the Toulson Judgment, there was, however, sufficient evidence before the Court to conclude that ZS was fraudulent as alleged and in consequence was not fit to be concerned in the management of a company within the meaning of s. 6 CDDA 1986.

(4) ZS should be disqualified for a period of 11 years (being the 15 year maximum period under s. 6(4) CDDA 1986 less a period of 4 years when ZS was wrongly bankrupt in England and therefore disqualified in any event).

ZS applied for permission to appeal against both the disqualification order and sentence. His Grounds of Appeal were threefold as follows:

(1) The learned Judge erred in law in admitting the Toulson Judgment as prima facie evidence of dishonesty or fraud on the part of ZS ("Ground 1");

(2) The learned Judge erred in the exercise of his discretion in refusing to admit further material sought to be introduced by ZS and in not

adjourning the trial to enable a proper investigation to take place ("Ground 2");

(3) If contrary to ZS' case, the learned Judge was not wrong to make a disqualification order against ZS, the learned Judge erred in principle in disqualifying ZS for the period of 15 years (less the said allowance of 4 years).

Notwithstanding that the Court of Appeal held that Ground 1, namely whether the Toulson Judgment was admissible in the disqualification proceedings, had a real prospect of success, the Court of Appeal refused permission to appeal against the disqualification order (i.e. on Grounds 1 and 2) on the basis that HHJ Pelling QC had been entitled to conclude that even absent the Toulson Judgment there was sufficient evidence before the Court to determine that ZS was not fit to be concerned in the management of a company within the meaning of s. 6 CDDA 1986. The Court of Appeal did, however, grant ZS permission to appeal against sentence.

[Gabriel Moss QC, Blair Leahy]

CORPORATE INSOLVENCY
Parmalat Capital Finance v Food Holdings Limited and Dairy Holdings Limited [2008] UKPC 23 (On Appeal from the Court of Appeal of the Cayman Islands) Privy Council (Lords Hoffmann, Hope, Walker, Baroness Hale, Lord Mance)

The petitioners were the

contracting parties to certain put agreements and had the right, as against the company, to demand payment. They retained both the legal title to the petition debt and the equity of redemption. The fact that they had assigned the debts by way of security to a third party (N) did not deprive them of their status as creditors within the meaning of section 96 of the Cayman Islands Companies Law. Furthermore, the proceedings had been properly constituted, there having been no need to join N as a party to the petition. The debt was also not disputed on substantial grounds. Finally, it had been properly open to the Grand Court in the Cayman Islands to appoint the liquidators notwithstanding certain complaints raised against them by the appellants.

**[Michael Crystal QC;
Gabriel Moss QC; Jeremy
Goldring]**

**The Liquidators of
Bancredit Cayman Limited
v GFN SA**

**Unreported, 6 December
2007**

**Court of Appeal of the
Cayman Islands (Zacca P,
Taylor JA, Mottley JA)**

The Grand Court of the Cayman Islands had jurisdiction to order security for costs in favour of the liquidators in respect of applications made by third parties to reverse the decision of the liquidators in relation to the admission and rejection of certain proofs of debt.

There was no distinction between the jurisdiction of the Grand Court to order security for costs in favour of a liquidator in respect of a voluntary winding up and a compulsory winding up.

[Michael Crystal QC]

**In re Metronet Rail BCV Ltd
(in PPP administration)
Unreported, 5 February
2008**

Ch D (Patten J)

The PPP Administrators applied for a direction that they be at liberty to enter into, on behalf of the PPP Companies, a number of agreements ancillary to a put option agreement which would have the effect that London Underground Ltd ("LUL") would acquire a secured claim against the PPP Companies in place of the secured claim held by the financial creditors of the PPP Companies. Mr Justice Patten gave the PPP Administrators the direction that they sought. The learned Judge relied on the following matters (i) the requirement of achieving the statutory purpose of a PPP administration, namely the transfer of the relevant activities of the PPP Companies as set out at section 220(2) of the Greater London Authority Act 1999, was inherent in a PPP administration and the consideration of the interests of the creditors was required insofar as this was consistent with the attainment of the statutory purpose of transfer; (ii) the entry into the ancillary

documentation was the best option open to the PPP Administrators with a view to achieving the statutory purpose as soon as reasonably practicable; (iii) the secured financial creditors and LUL supported the relief sought by the PPP Administrators; and (iv) the unsecured creditors would be no worse off as the new security to be granted to LUL would secure no greater debt than the existing security held by the secured financial creditors.

**[Gabriel Moss QC, William
Trower QC, David Allison,
Tom Smith]**

**In re Metronet Rail BCV Ltd
(in PPP administration)
[2008] EWHC 746 (Ch)
Ch D (Briggs J)**

This represents the first judgment of the Court on an application by a PPP administrator for the fixing of his remuneration under the provisions of rule 33(3) of the PPP Administration Order Rules 2007. Mr Justice Briggs fixed the remuneration of the PPP Administrators in the sums claimed, relying on the following matters: (i) there was no opposition to the application; (ii) the only persons who could be affected by the outcome of the application were TfL (who had indemnified the PPP Administrators in respect of their remuneration to the extent that it could not be recovered from the assets of the PPP Companies) and London Underground Ltd ("LUL") (as the secured

creditor of the PPP Companies); (iii) the application was neutral to TfL and LUL who were to be treated as a single commercial entity for the purpose of the application; (iv) the PPP administrations were extremely large, complex and important to London, its public and taxpayers; (v) a similar approach had been taken by Mr Justice Evans-Lombe in *Re Railtrack plc* [2003] EWHC 1526 (Ch) when fixing the remuneration of the administrators of Railtrack plc. The learned Judge stated that in the event that the outcome of the application had been other than neutral to the affected stakeholders, he would have required the assistance of a qualified assessor in order to fix the remuneration of the PPP Administrators.

[Gabriel Moss QC, David Allison]

Mills v Birchall
[2008] EWCA Civ 385
Court of Appeal
(Mummery LJ, Lawrence Collins LJ and Munby J)

There is no general rule that receivers are personally liable for the costs of unsuccessful proceedings brought by them as agents of the mortgagor company, nor were there any factors which justified interference with the exercise of discretion by the Chancellor in the Court below. The normal expectation is that a defendant to proceedings brought by a company in receivership should and will

seek security for the costs of the proceedings.

[Gabriel Moss QC, William Trower QC, Barry Isaacs]

Re Whistlejacket plc
[2008] EWHC 463 (Ch)
Ch D (Etherton J)

After the Company had become unable to pay its debts to Senior Creditors as they fell due, and on the proper construction of the contractual documentation governing the security and Medium Term Notes: (1) The Receivers were obliged to distribute monies received by them *pari passu* to Senior Creditors whose debts were then due for payment, without taking into account amounts not yet due. (2) The Company was obliged to pay the principal on Notes which were outstanding after delivery of the notice of the Company's insolvency 30 days after delivery of the notice.

[Simon Mortimore QC, Stephen Atherton QC, Barry Isaacs]

(1) David Hague (2)
PricewaterhouseCoopers v Nam Tai Electronics
[2008] UKPC 13
Privy Council (Lords Bingham, Scott, Rodger and Neuberger, Baroness Hale)

A culpable failure to collect in assets belonging to a company by a liquidator may diminish the value of the fund available for distribution *pro rata* among the creditors but it is not a breach of a duty owed to each creditor as an

individual. Absent some special relationship, a liquidator owes no common law duty of care to unsecured creditors in relation to his conduct of the liquidation. Any remedy lies in the provisions of the relevant legislation entitling the creditor to complain of the conduct of the liquidator. The statute may permit the commencement of misfeasance proceedings against the office holder but any such proceedings, like derivative proceedings, will be seeking redress for a wrong done to the company (not the individual shareholder). In the circumstances, the creditor's claim in respect of which leave to serve out had been given was misconceived, disclosing no cause of action vesting in *Nam Tai*. As such, leave to serve the proceedings out of the jurisdiction was set aside.

[Richard Hacker QC, Richard Fisher]

Re T.I.C.C. Limited
Unreported, 25 January 2008
Ch D (Norris J)

A company which carried on business as a freight forwarding company entered into creditors' voluntary liquidation on 8 November 2002. A number of guarantors had entered into deferment bonds with HMC&E in respect of the company's obligations to pay duties and taxes on imported goods. Prior to the company entering into liquidation, the guarantors made payments

under these bonds to HMC&E in respect of VAT due on the importation of goods from places outside Member States. Accordingly, the guarantors were entitled to the same priority in the winding-up of the company as HMC&E would have enjoyed if the debt had not been discharged by the guarantors. Section 1(4) of the Value Added Tax Act 1994 (“VATA”) provides that “VAT on the importation of goods from places outside Member States shall be charged and payable as if it were a duty of Customs”. Duties of Customs do not attract preferential status in a winding-up. This has caused HMC&E to treat VAT on the importation of goods from places outside Member States as a non-preferential debt and its position in this regard is set out in para 4.4 of Notice 700/56/02 Insolvency which provides that “customs import duties, including import VAT, also have non-preferential status”. The Joint Liquidators of the company applied for directions as to whether or not VAT on the importation of goods from places outside Member States attracts preferential status in a liquidation pursuant to para 3 of schedule 6 of the Insolvency Act 1986. The Judge found that the debt was a preferential debt, relying on the fact that the words “any value added tax” in para 3 of Schedule 6 are not subject to any express limitation. Accordingly, VAT due on the importation of goods from outside Member

States remained VAT despite the fact that under the provisions of VATA it was to be charged and payable as if it were a duty of Customs.

[David Allison]

PLANNING

GLENMERE PLC v F STOKES & SONS LTD

Unreported, 18 January 2008

Ch D (Stuart Isaacs QC sitting as a Deputy High Court Judge),

The claimant property developer was the assignee of a project development agreement originally made between the defendant property owner and another developer. The agreement provided that the developer would use all reasonable endeavours to make sure that the development was in accordance with the agreement, the planning permission and the “requisite consents”. Full planning permission was obtained in 2005. A dispute arose as to whether the defendant was entitled to terminate the agreement, on the ground that not all requisite consents had been obtained. The issues before the Court were whether various conditions attached to the planning permission were “requisite consents” as defined in the agreement; and, if so, whether fulfilment of the planning conditions was “necessary for the commencement of the construction of the development” within the meaning of the agreement.

The Court held that fulfilment of the relevant planning conditions did not fall within the definition of “requisite consents”; the requirement for those consents having been fulfilled by the granting of full planning permission. The Court, applying the more flexible approach laid down in R (on the application of Hart Aggregates Ltd) v Hartlepool BC (2005) 2 P & CR 31, had to consider on a case by case basis whether a condition was, in truth, a condition precedent, and if so, whether failure to comply with had the effect of engaging the principle in FG Whitley & Sons Co Ltd v Secretary of State for Wales (1992) 64 P & CR 296. Accordingly, the defendant was not entitled to terminate the agreement as it had purported to do.

[Stuart Isaacs QC]

TORTS

Helga Henriette Schwarzschild v Harrods Ltd **[2008] EWHC 521 (QB),** **QBD (Eady J)**

The appellant (A) appealed against an order for summary judgment made in favour of the respondent company (R) in respect of proceedings brought by A alleging that R had committed the tort of conversion in accordance with s 2 (2) of the Torts (Interference with Goods) Act 1977. A had become entitled to jewellery contained in a safe deposit box held by R. However after five years of non-payment of the box rental R opened the box and

made a list of its contents. Six years later R opened the box and made another list, before mixing the jewellery with the contents of other deposit boxes. Three years later a private investigator (D) acting for A sent a letter to R demanding an "immediate commencement of the process to return A's jewellery". R did not respond. A meeting then took place between the parties (which A said was without prejudice), at which there was an inspection of the various mixed items. Eight years later A brought proceedings. The Master granted R summary judgment on the basis that A's claim was time-barred, concluding that D's letter should be construed as an unequivocal demand for delivery up of S's jewellery; and that at or after the meeting A acquired knowledge that the jewellery had been lost, and that a cause of action in conversion had accrued. On appeal to the judge, A submitted that in order to give rise to a cause of action in statutory conversion it was necessary to establish both that the jewellery had been demanded from H and that there had been an unequivocal refusal. S also argued that although the Master had found that D's letter represented an unequivocal demand, at no point in his judgment was an unequivocal refusal identified, whether before the critical date for limitation purposes or otherwise. Held that statutory conversion, corresponding to the common law tort of detinue, required a demand for the goods to be returned and an unequivocal refusal, *Clayton v Le Roy* (1911) 2 KB 1031 CA applied. It was true that there were passing references in some authorities to "neglect"

or "failure" as alternatives to "refusal" but those were not easy to reconcile with the much fuller reasoning in *Clayton*. Inaction or neglect might perhaps in some circumstances be interpreted as an unequivocal response, but that was unlikely to be at all common. It was right that the court should be guided by the decision in *Clayton*. The judge at no point identified an unequivocal refusal and D's letter was at least equivocal. There was therefore no sufficient basis for the judge to conclude that a limitation defence was bound to succeed, and the order for summary judgment should be set aside.

[Stuart Isaacs QC; William Willson]

TALKS

On 13 March 2008 Gabriel Moss QC gave a talk on English insolvency law at NYU (and other law schools, by relay from NYU). On 11 April 2008 he spoke at the Property Litigation Association Conference in Oxford on the effect of the *Powerhouse* case. Forthcoming talks by Gabriel Moss QC are as follows: R3 Conference in Cannes, 2 May 2008 on cross-frontier restructuring; European Academy of Law, Trier, 6 June 2008 on cross-frontier insolvency cases; International Insolvency Institute, Berlin 9 June 2008 on US chapter 15 and UNCITRAL Model Law.

[Gabriel Moss QC]

The digest is a collation of references to reported and unreported cases and other items of relevance to the professional practices of the Barristers at 3-4 South Square, Gray's Inn, London WC1R 5HP. It is not intended to constitute legal advice, and the 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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