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COMMERCIAL FRAUD

CIVIL LIABILITY, HUMAN RIGHTS,
AND MONEY LAUNDERING

Janet Ulph

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Civil Liability, Human Rights,
and Money Laundering

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PREFACE

Originally, the objective of this text was to consider the extent to which English private law responded to the problems posed by fraud. This would have involved an analysis of issues such as liability at common law for the tort of deceit and liability in equity for dishonest assistance. However, during its lengthy period of incubation, the focus became far wider due to a number of different factors. It became apparent that, in order to determine the extent to which problems presented by fraud have affected the development of the law, it would be necessary to provide an overview of the whole area of law in question. This was done and the civil law aspects of fraud can be found in Parts B and C of this text. But it also became clear that the Proceeds of Crime Act 2002, with its wide ranging provisions relating to money laundering offences and the pursuit of criminal proceeds, was too important to omit in a work which was intended to deal with fraud. Furthermore, in order to analyse the law properly—particularly the Proceeds of Crime Act 2002—a detailed exposition of the relevant aspects of human rights law was necessary. Finally, the civil law position is complicated by the fact that, in the latter half of the twentieth century, regulatory proceedings have become more significant. International conventions are also influencing, both directly and indirectly, the direction of domestic law in areas such as corruption and money laundering. The civil law applicable to individuals cannot realistically be studied in isolation. These matters are therefore dealt with in Part A. The result is a text which attempts to straddle many disparate areas of law and to find links between them.

Despite its breadth, this text does not aspire to cover every area in which fraudulent activity can be found. Unfortunately, fraud is forever with us. New laws may be passed to counter a particular type of misconduct but some form of deceit will then arise in a new form. The text is confined, as the title suggests, to fraud in commercial dealings. Even here, the boundaries have been difficult to draw. In this first edition, there is no discussion of the defences of undue influence, duress, and illegality; these subjects are admirably dealt with in existing texts, such as Andrew Burrows, *Law of Restitution* (2002). Furthermore, although the law of unjust enrichment is considered, it was impossible, given the scope of the text, to pursue issues in great detail. I am consoled by the fact that there are a number of outstanding texts, such as Goff and Jones, *The Law of Restitution* (2002) and P Birks, *Unjust Enrichment* (2003), as well as numerous

first rate articles to be found in the Restitution Law Review and other journals; the Restitution Discussion Group website, organised by Stephen Hedley, can be found at: <<http://www.ucc.ie/law/restitution/rdg>>.

I have tried to provide a straightforward and accessible account of complex areas of law. To this end, I have used an Engineering student, Anna Barwell, to proof read the chapters. I am grateful to Anna for her hard work. I would thank Lily Tomlinson for proof reading. I would also like to thank the team from Oxford University Press for their patience, hard work, and efficiency at the editing stage: Annabelle Macris, Senior Commissioning Editor, Meg Zawadzki, Commissioning Editor, Darcy Ahl, Production Editor, and Matt Smith, Editorial Assistant.

In order to expedite the completion of this text, Jamie Glister stepped in to write Chapter 9 relating to remedies. Jamie is a colleague in the Department of Law at the University of Durham and I am grateful for his contribution; he, in turn, would like to thank another colleague, Sarah Williams, for her advice and comments.

I would like to thank Wolfson College, Cambridge University, for a Visiting Scholarship and the Faculty of Law at Cambridge University for making me feel very welcome whilst I undertook some preliminary research in relation to this text. In particular, thanks are due to Gareth Jones, Graham Virgo, Kevin Gray, Richard Hooley, Malcolm Clarke, and Richard Nolan who all contributed to making my stay an enjoyable one. There are too many other academics to thank who have offered encouragement and advice over the years but I would particularly express my gratitude towards Michael Bridge, Ewan McKendrick, Roy Goode, Norman Palmer, Francis Rose, and Sarah Worthington. This type of book could not have been written without the good humour and support of staff within the Department of Law at Durham University and I would like to mention, in particular, Chris Riley, Tom Allen, Colin Warbrick, Bob Sullivan, and Nigel Sternberg. I am also grateful to Judy McKinnell and Anne Farrow, librarians at the Palace Green library of Durham University, for their assistance.

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This book is a tribute to Peter Birks, Regius Professor of Civil Law, University of Oxford. In his Obituary in *The Reporter* of the Society of Legal Scholars in the winter of 2004, it was noted that he was 'a source of constant inspiration and encouragement' to others. As Honorary Secretary of the Society of Legal Scholars (formerly the SPTL), Peter enthusiastically organized a number of conferences, a number of which I attended. The seeds for this text can be seen in

those early seminars such as *The Frontiers of Liability* (the papers of which were subsequently edited by Peter and published by OUP in 1994). Michael Tugendhat gave a paper at a later conference on *Restitution and Banking Law* (the papers of which were subsequently edited by Francis Rose and published by Mansfield Press, Oxford in 1998). Michael's paper on 'Assisting a Breach of Duty by a Fiduciary, the Common Law and Money-Laundering' captures the spirit of this text which is to think across traditional boundaries between subjects in order to consider issues in a new light. Michael has offered unwavering support for this project over the years and has kindly read and commented upon the whole of this text. However, all opinions and errors remain the responsibility of the authors.

Jamie and I have attempted to state the law as of 17 June 2005 but where possible we have incorporated references to more recent developments in our respective chapters. The problems presented by theft, corruption, and money laundering are challenging. Governments across the world are rightly tackling the criminal and regulatory aspects; it is hoped that this text will provide additional intellectual support in this endeavour.

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TABLE OF CASES

A v B Plc; Sub Nom: A v B (A Firm); B and C v A [2002] EWCA Civ 337; [2003] QB 195	96, 110
A v France (A/277-B) (1994) 17 EHRR 462, ECHR	98
A v Secretary of State for the Home Department; Sub Nom: X v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 WLR 87; [2005] HRLR 1; 17 BHRC 496; (2005) 155 NLJ 23; (2005) 149 SJLB 28; The Times, 17 December 2004; Independent, 21 December 2004, HL	43, 121
A'Court v Cross (1825) 3 Bing 329	713
AB v South West Water Services Ltd; Gibbons v South West Water Services Ltd [1993] QB 507, CA	579
Abbey National Plc v Sayer Moore [1999] EGCS 114; The Times, 30 August 1999, Ch D	716
Abbey National Plc v Solicitors Indemnity Fund Ltd [1997] PNLR 306, QBD	425
Abbey National v Wilkin & Chapman, 7 October 1997	716
Aberdeen Railway v Blaikie Bros [1843–60] All ER Rep 249, HL	285
Abermeadow Ltd (No.2), <i>Re</i> ; Sub Nom: Berry v Secretary of State for Trade and Industry [2001] BCC 724; [2000] 2 BCLC 824, Ch D	71
Abigail v Lapin [1934] AC 491, PC (Aus)	656
Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA [2003] UKHL 17; [2003] 2 AC 541; [2003] 2 WLR 1060	12, 661, 765
Adam v Newbigging; Sub Nom: Newbigging v Adam (1888) LR 13 App. Cas. 308, HL; affirming (1887) LR 34 Ch D 582, CA	581, 591
Adams v Cape Industries Plc [1990] Ch 433, CA	349
Adams v Scottish Ministers; Sub Nom: Adams, Petitioner; Adams v Lord Advocate; Adams v Advocate General for Scotland 2004 SC 665; 2004 GWD 18–384, IH (2 Div); affirming in part 2003 SC 171; 2003 SLT 366; 2002 SCLR 881; [2002] UKHRR 1189; 2002 GWD 26–879; The Times, 8 August 2002, OH	47
Addis v Gramophone Co Ltd [1909] AC 488, HL	576
Adolf v Austria (A/49) (1982) 4 EHRR 313, ECHR	76
AG Securities v Vaughan; Antoniadis v Villiers [1990] 1 AC 417, HL	309
Agip (Africa) Ltd v Jackson [1991] Ch 547; [1991] 3 WLR 116; [1992] 4 All ER 451; (1991) 135 SJ 117; The Times, 9 January 1991; Financial Times, 18 January 1991, CA (Civ Div); affirming [1990] Ch 265	336, 337, 338, 339, 346, 347, 348, 350, 351, 352, 418, 419, 420, 427, 428, 612, 613, 614, 616, 637, 741
AGOSI v United Kingdom see Allgemeine Gold- und Silberscheideanstalt AG v United Kingdom	
Agricultural Credit Corp of Saskatchewan v Pettyjohn (1991) 79 DLR (4th) 22	638
Agricultural Mortgage Corp Plc v Woodward [1994] BCC 688; [1995] 1 BCLC 1; [1996] 1 FLR 226, CA	311, 317
Agriplant Services Ltd (In Liquidation), <i>Re</i> [1997] BCC 842; [1997] 2 BCLC 598, Ch D ..	322
Agrosin Pty Ltd v Highway Shipping Co Ltd (The Mata K) [1998] 2 Lloyd's Rep. 614 ...	492
Ahrens Ltd v George Cohen and Sons Co Ltd [1934] TLR 411	686, 688
Air Canada v United Kingdom (A/316) (1995) 20 EHRR 150; The Times, 13 May 1995, ECHR	55, 59, 73, 74, 92, 119, 202
AJ Bekhor & Co Ltd v Bilton [1981] QB 923, CA	542

Table of Cases

Akenzua v Secretary of State for the Home Department [2002] EWCA Civ 1470, CA	276
Akerhielm v De Mare; Sub Nom: Baron Uno Carl Samuel Akerhielm v Rolf de Mare [1959] AC 789, PC	385, 386
AL Underwood Ltd v Bank of Liverpool and Martins; AL Underwood Ltd v Barclays Bank [1924] 1 KB 775, CA	451
Alati v Kruger 94 CLR 216	582
Albert v Belgium (A/58); Le Compte v Belgium (A/58) (1983) 5 EHRR 533, ECHR	80, 81
Albion Insurance Co Ltd v Government Insurance Office of NSW (1969) 121 CLR 342, HC Aus	585
Alderson v Temple (1768) 4 Burr. 2235	320
Alexander v Cambridge Credit Corp (1987) 9 NSWLR 310	379
Alexander v Southey (1821) 5 B & Ald 247	326
Al-Fayed v United Kingdom (A/294-B) (1994) 18 EHRR 393, ECHR	67, 88
Ali v Al-Basri [2004] EWHC 2608, QBD	355
Alimport v Soubert Shipping Co Ltd [2000] 2 Lloyd's Rep. 447, QBD (Comm)	493
Al-Kishtaini v Shanshal; Sub Nom: Shanshal v Al-Kishtaini [2001] EWCA Civ 264	46
Allan v Nolan; Sub Nom: Allan v Rea Bros Trustees Ltd [2002] EWCA Civ 85	763, 764, 772
Allan v Rea Bros Trustees Ltd see Allan v Nolan	
Allan v United Kingdom (2003) 36 EHRR 143	86, 111, 114, 115, 212
Allen v Flood; Sub Nom: Flood v Jackson [1898] AC 1, HL	382
Allen v Hyatt [1914] 30 TLR 444	283
Allgemeine Gold und Silberscheideanstalt AG v United Kingdom (A/108); Sub Nom: Allgemeine Gold und Silberscheideanstalt AG v United Kingdom (9118/80) (1987) 9 EHRR 1, ECHR	57, 74, 92, 199, 202, 225
Alliance & Leicester Building Society v Edgestop Ltd (Application for Leave); Alliance & Leicester Building Society v Dhanoa; Alliance & Leicester Building Society v Samra; Mercantile Credit Co Ltd v Lancaster; Alliance & Leicester Building Society v Hamptons [1993] 1 WLR 1462	387
Alpahclub, (UK) Ltd, <i>Re</i> [2002] EWCA Civ 135, CA	7
Al-Saudi Banque v Clarke Pixley (A Firm) [1990] Ch 313	379
Amadio Pty Ltd v Russell Fraser Henderson (1998) 81 FCR 149, Fed Ct Aus	587
Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit [2003] EWHC 703; [2003] 1 WLR 2711	151, 152
Amand v Secretary of State for the Home Department; Sub Nom: R v Secretary of State for Home Affairs Ex p. Amand; Amand v Home Secretary [1943] AC 147, HL	76
Amann v Switzerland (2000) 30 EHRR 843, ECHR	115
Amber Size & Chemical Co Ltd v Menzel [1913] 2 Ch 239, Ch D	299
American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL	30, 520, 541
Ancona v Rogers (1875-76) LR 1 Ex. D 285, CA	667
Anderson v Ryan [1967] IR 34	677
Andrews v United Kingdom (Admissibility) (49584/99) 26 September 2002	57
Anglo Irish Asset Finance v DSG Financial Services [1995] 2 CLY 4491	667, 685
Angus v Clifford [1891] 2 Ch 449, CA	386
Annesley v Muggridge (1816) 1 Madd 593	760
Ansell Rubber Co Pty v Allied Rubber Industries Pty [1972] VR 37, Sup Ct Vic	299
Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55, CA	543, 544
ANZ Banking Group v Westpac Banking Corp (1988) 78 ALR 157	760
AOOT Kalmneft v Denton Wilde Sapte [2002] 1 Lloyd's Rep. 417, QBD (Merc)	548
AP v Switzerland (1998) 26 EHRR 541, ECHR	78, 202
Aquaculture Corp v New Zealand Green Mussel Co Ltd [1990] 3 NZLR 299, CA NZ	577
Arab Bank Plc v Zurich Insurance Co; Banque Bruxelles Lambert SA v Zurich Insurance Co [1999] 1 Lloyd's Rep. 262	363
Arab Monetary Fund v Hashim (No.9) [1996] 1 Lloyd's Rep. 589, CA (Civ Div)	715

Table of Cases

Arab Monetary Fund v Hashim, 29 July 1994	419, 430
Arbuthnot Leasing International Ltd v Havelet Leasing Ltd (No.2) [1990] BCC 636, Ch D	318, 319
Archer v Stone (1898) 78 LT 34	470
Archivent Sales & Developments Ltd v Strathclyde RC 1985 SLT 154; 27 BLR 98, OH ...	685
Arctic Shipping Co Ltd v Mobilia AB (The Tatra) [1990] 2 Lloyd's Rep. 51, QBD (Comm)	653, 658
Arcuri v Italy (54024/99) 5 July 2001	58, 60, 61, 92, 197
Arklow Investments Ltd v Maclean [2000] 1 WLR 594, PC	280, 282, 301
Armagas Ltd v Mundogas SA (The Ocean Frost) [1986] AC 717, CA	431, 449, 461, 463, 465
Armitage v Nurse [1998] Ch 241, CA	236, 368, 420, 425, 720, 730, 771, 772, 773, 781
Armory v Delamirie (1722) 1 Strange 505	329, 603, 604, 609, 634
Armour v Thyssen Edelstahlwerke AG [1991] 2 AC 339, HL	610
Armstrong v Jackson [1917] 2 KB 822, KBD	471
Armstrong v Strain [1952] 1 KB 232, CA	465
Armstrong v United Kingdom (48521/99) (2003) 36 EHRR 30; The Times, 6 August 2002, ECHR	111
Arnhold Karberg & Co v Blythe Green Jourdain & Co; Theodor Schneider & Co v Burgett & Newsam [1916] 1 KB 495, CA	444, 497
Ashingdane v United Kingdom (A/93); Sub Nom: Ashingdane v United Kingdom (8225/78) (1985) 7 EHRR 528, ECHR	42, 49
Ashworth Hospital Authority v MGN Ltd; Sub Nom: Ashworth Security Hospital v MGN Ltd [2002] UKHL 29; [2002] 1 WLR 2033, HL	548
Astley Industrial Trust Ltd v Miller [1968] 2 All ER 36, Assizes (Liverpool)	668, 673
Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank; Sub Nom: Wallbank v Aston Cantlow and Wilmcote with Billesley Parochial Church Council [2003] UKHL 37; [2004] 1 AC 546; [2003] 3 WLR 283; [2003] 3 All ER 1213	40, 46, 48, 49
AT&T Istel Ltd v Tully [1993] AC 45, HL	81, 545, 546
Atari Corp (UK) Ltd v Electronics Boutique Stores (UK) Ltd [1998] QB 539, CA	676, 696
Attorney General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd [1987] AC 114, PC	765
Attorney General of Hong Kong v Reid [1994] 1 AC 324, PC	283, 428, 429, 472, 571, 572, 591, 627, 628, 726
Attorney General of New South Wales v Perpetual Trustee Co [1955] AC 457	391
Attorney General v Alford (1854) 4 De GM & G 843	576, 577
Attorney General v Blake [2001] 1 AC 268; [2000] 3 WLR 625; [2000] 4 All ER 385; [2000] 2 All ER (Comm) 487; [2001] IRLR 36; [2001] Emp. LR 329; [2000] EMLR 949; (2000) 23(12) IPD 23098; (2000) 97(32) LSG 37; (2000) 150 NLJ 1230; (2000) 144 SJLB 242; The Times, 3 August 2000; Independent, 6 November 2000 (C.S), HL; affirming [1998] Ch 439; [1998] 2 WLR 805; [1998] 1 All ER 833; [1998] EMLR 309; (1998) 95(4) LSG 33; (1998) 148 NLJ 15; (1998) 142 SJLB 35; The Times, 22 December 1997; Independent, 19 December 1997, CA (Civ Div); reversing [1997] Ch 84; [1996] 3 WLR 741; [1996] 3 All ER 903, Ch D	161, 282, 332, 391, 568, 572, 574, 575, 576, 620
Attorney General v Guardian Newspapers Ltd (No.2); Attorney General v Observer Ltd (No.2); Attorney General v Times Newspapers Ltd (No.2) [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545	38, 96, 620
Attorney General v Malta (16641/90) 10 December 1991	84
Attorney General v Times Newspapers Ltd; Sub Nom: Attorney General v Observer and Guardian Newspapers; Attorney General v Newspaper Publishing Plc; Attorney General v Growfar; Attorney General v Sunday Telegraph [1992] 1 AC 191, HL	546

Table of Cases

Attorney General's Reference (No.1 of 1985), <i>Re</i> [1986] QB 491, CA	572
Attorney General's Reference (No.2 of 1982), <i>Re</i> ; Sub Nom: Attorney General's Reference (No.2 of 1983), <i>Re</i> [1984] QB 624	17, 363, 406
Attorney General's Reference (No.2 of 2001), <i>Re</i> ; Sub Nom: <i>R v J</i> (Unreasonable Delay) [2003] UKHL 68; [2004] 2 AC 72	66, 67
Attorney General's Reference (No.25 of 2001), <i>Re</i> ; Sub Nom: <i>R v Moran</i> ; <i>Moran, Re</i> [2001] EWCA Crim 1770; [2002] 1 WLR 253; [2001] STC 1309	176, 177
Attorney General's Reference (No.3 of 1999), <i>Re</i> ; Sub Nom: <i>R v B</i> [2001] 2 AC 91; [2001] 2 WLR 56	33, 64
Attorney General's Reference (No.4 of 2003), <i>Re</i> ; Sub Nom: <i>R v Suchedina</i> (Hasnain Mohammed); Attorney General's Reference (No.4 of 2003), <i>Re</i> [2004] EWCA Crim 1944	136
Attorney General's Reference (No.5 of 2002) (Reference under s 36 of the Criminal Justice Act 1972), <i>Re</i> ; Sub Nom: <i>R v W</i> ; Attorney General's Reference (No.5 of 2003), <i>Re</i> [2004] UKHL 40; [2005] 1 AC 167	99, 106, 108, 109, 121, 164
Attorney General's Reference (Nos.114, 115 and 116 of 2002), <i>Re</i> ; Sub Nom: <i>R v Flowers</i> ; <i>R v Graver</i> ; <i>R v Cunningham</i> ; <i>R v Smith</i> ; <i>R v Bradley</i> ; Attorney General's Reference (Nos.144 and 145 of 2002), <i>Re</i> [2003] EWCA Crim 3374	164, 166, 167
<i>Atwood v Merryweather</i> (1867) LR 5 Eq 464	767
<i>Aubanel and Alabaster v Aubanel</i> (No.1) (1949) 66 RPC 343	296
<i>Aubry v Editions Vice-Versa Inc</i> [1998] 1 SCR 591	110
<i>Aurangzeb Iqbal & Co v Legal Services Commission</i> [2004] All ER (D) 54	714
<i>Australia & New Zealand Group Ltd v Westpac Banking Corp</i> (1988) 62 AJLR 202	338
<i>Australia & New Zealand Group Ltd v Westpac Banking Corp</i> (1988) 78 ALR 157	742
<i>Aveling Barford Ltd v Perion</i> [1989] BCLC 626	260
<i>Avon CC v Howlett</i> [1983] 1 WLR 605	757, 758
<i>Avon Insurance Plc v Swire Fraser Ltd</i> [2000] 1 All ER (Comm) 573; [2000] CLC 665; [2000] Lloyd's Rep. IR 535, QBD (Comm)	384
<i>Axa General Insurance Ltd v Gottlieb</i> ; Sub Nom: <i>Gottlieb v Axa General Insurance Ltd</i> [2005] EWCA Civ 112, CA	530
<i>Ayala Holdings Ltd</i> (No.2), <i>Re</i> [1996] 1 BCLC 467, Ch D	322
<i>Azinas v Cyprus</i> (56679/00) (2005) 40 EHRR 8, ECHR	47, 61
<i>B v Auckland District Law Society</i> ; Sub Nom: <i>Russell McVeagh McKenzie Bartleet & Co v Auckland District Law Society</i> [2003] UKPC 38; [2003] 2 AC 736	154
<i>B v Chief Constable of Avon and Somerset</i> [2001] 1 WLR 340	76, 77, 223
<i>Babanaft International Co SA v Bassatne</i> [1990] Ch 13, CA	541
<i>Babcock v Lawson</i> (1880) 5 QBD 284	676
<i>Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA</i> [1973] 2 Lloyd's Rep. 437, CA	519
<i>Baden v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA</i> [1993] 1 WLR 509	351, 352, 417, 420, 421
<i>Bahin v Hughes</i> (1886) LR 31 Ch D 390, CA	254
<i>Bairstow v Queens Moat Houses Plc</i> ; <i>Marcus v Queens Moat Houses Plc</i> ; <i>Hersey v Queens Moat Houses Plc</i> ; <i>Porter v Queens Moat Houses Plc</i> [2001] EWCA Civ 712; [2002] BCC 91; [2001] 2 BCLC 531, CA (Civ Div)	558, 559, 560, 774, 775
<i>Baklanov v Russia</i> (68443/01) 9 June 2005	195
<i>Balabel v Air India</i> [1988] Ch 317	154
<i>Balfour Beatty Civil Engineering (t/a Balfour Beatty/Costain (Cardiff Bay Barrage) Joint Venture) v Technical & General Guarantee Co Ltd</i> [2000] CLC 252; 68 Con LR 180, CA (Civ Div)	512, 523, 524
<i>Balston Ltd v Headline Filters Ltd</i> (No.2) [1990] FSR 385, Ch D	294, 295
<i>Bamford v Bamford</i> [1970] Ch 212, CA	767
<i>Bamford v Shuttleworth</i> (1840) 11 Ad & El 926	760

Banca Carige SpA Cassa di Risparmio di Genova e Imperio v Banco Nacional de Cuba; Sub Nom: Banca Carige SpA Cassa di Risparmio di Genova e Imperia v Banco Nacional de Cuba; Banco Nacional de Cuba, <i>Re</i> ; Banca Carige SpA v Banco Nacional de Cuba [2001] 1 WLR 2039; [2001] 3 All ER 923; [2001] 2 Lloyd's Rep. 147	317, 318
Bank Gesellschaft Berlin International SA v Raif Zihnali, 16 July 2001	411
Bank Mellat v Nikpour [1982] Com LR 158; [1985] FSR 87, CA (Civ Div)	544
Bank Melli Iran v Barclays Bank (Dominion Colonial & Overseas) [1951] 2 Lloyd's Rep. 367	503, 507
Bank of America v Arnell [1999] Lloyd's Rep. Bank. 399, QBD (Comm) ..	354, 356, 612, 614
Bank of Credit & Commerce International (Overseas) Ltd (In Liquidation) v Jan, 17 November 1999	724, 730
Bank of Credit and Commerce International (Overseas) Ltd (In Liquidation) v Price Waterhouse (No.2) [1998] Lloyd's Rep. Bank. 85	377
Bank of Credit and Commerce International (Overseas) Ltd v Akindele; Sub Nom: BCCI v Chief Labode Onadimaki Akindele [2001] Ch 437; [2000] 3 WLR 1423; [2000] 4 All ER 221, CA	342, 354, 355, 357, 360, 436, 741
Bank of Credit and Commerce International SA (In Liquidation) (No.9), <i>Re</i> ; Sub Nom: Morris v Mahfouz; Mahfouz v Morris; Bank of Credit and Commerce International SA (Overseas), <i>Re</i> [1994] 1 WLR 708, CA	542
Bank of India v Morris [2005] EWCA Civ 693, CA (Civ Div)	240, 241, 243
Bank of Ireland v Evans Charities Trustees (1855) 5 HL Cas. 389	657
Bank of New South Wales v Palmer [1970] 2 NSWLR 532	688
Bank of New Zealand v New Zealand Guardian Trust Co Ltd [1999] 1 NZLR 213, HC NZ	562
Bank of Nova Scotia v Angelica-Whitewear 36 DLR (4th) 161 (1987)	529
Bank of Scotland v A Ltd [2001] 1 WLR 752, CA	143, 151, 152, 156, 343, 353
Bank of Tokyo Ltd v Karoon [1987] AC 45, CA	308
Bank Tejerat v Hong Kong and Shanghai Banking Corp Ltd and Shanghai Bank Trustee (Jersey) Ltd [1995] 1 Lloyd's Rep. 239	614
Bankers Trust Co v Shapira [1980] 1 WLR 1274, CA	548
Bankers Trust Co v State Bank of India [1991] 2 Lloyd's Rep. 443	506
Bankgesellschaft Berlin AG v Makris, Lexis, 22 January 1999	419, 427
Banque Belge pour l'Etranger v Hambrouck [1921] 1 KB 321, CA	339, 611
Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] QB 711	503
Banque Financiere de la Cite SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co (formerly Hodge General & Mercantile Co Ltd); Sub Nom: Banque Keyser Ullmann SA v Skandia (UK) Insurance Co; Skandia (UK) Insurance Co v Chemical Bank; Skandia (UK) Insurance Co v Credit Lyonnais Bank Nederland NV [1991] 2 AC 249; [1990] 3 WLR 364; [1990] 2 All ER 947; [1990] 2 Lloyd's Rep. 377; (1990) 87(35) LSG 36; (1990) 140 NLJ 1074; (1990) 134 SJ 1265, HL; affirming [1990] 1 QB 665	9
Banque Financiere de la Cite SA v Parc (Battersea) Ltd [1999] 1 AC 221, HL	334, 637
Banton v CIBC Trust Corp (1999) 182 DLR (4th) 486	632
Barber v Meyerstein (1870) LR 4 HL 317	482
Barbera v Spain (A/146); Sub Nom: Barbera, Messegue, Jabardo v Spain; Barbera v Spain (10588/83); Messegue v Spain (10589/83); Jabardo v Spain (10590/83); Messegue v Spain (A/146); Jabardo v Spain (A/146) (1989) 11 EHRR 360, ECHR	82
Barclays Bank Ltd v Customs and Excise Commissioners [1963] 1 Lloyd's Rep. 81, QBD (Comm)	484
Barclays Bank Ltd v Quistclose Investments Ltd; Sub Nom: Quistclose Investments Ltd v Rolls Razor Ltd (In Voluntary Liquidation) [1970] AC 567, HL	619
Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd [1980] QB 677	336, 337, 744, 746

Table of Cases

Barclays Bank Plc v Eustice [1995] 1 WLR 1238; [1995] 4 All ER 511; [1995] BCC 978; [1995] 2 BCLC 630, CA	319
Barclays Bank Plc v O'Brien [1994] 1 AC 180	617, 738
Barclays Bank Plc v Quincecare Ltd [1992] 4 All ER 363	340, 341
Baring v Corrie (1818) 2 B. & Ald. 137	664
Barings Plc (In Administration) v Coopers & Lybrand [1997] BCC 498; [1997] 1 BCLC 427	378
Barings Plc (In Liquidation) v Coopers & Lybrand (No.4); Barings Futures (Singapore) Pte Ltd (In Liquidation) v Mattar (No.3) [2002] 2 BCLC 364	378
Barings Plc (In Liquidation) v Coopers & Lybrand (No.5); Barings Futures (Singapore) Pte Ltd (In Liquidation) v Mattar (No.4) [2002] EWHC 461; [2002] 2 BCLC 410	380, 386
Barings Plc (In Liquidation) v Coopers & Lybrand (No.7); Barings Futures (Singapore) PTE Ltd (In Liquidation) v Mattar (No.4) [2003] EWHC 1319	380, 431, 774
Barings Plc (No.1), <i>Re</i> see Secretary of State for Trade and Industry v Baker	
Barings Plc (No.5), <i>Re</i> see Secretary of State for Trade and Industry v Baker	
Barings Plc (No.6), <i>Re</i> see Secretary of State for Trade and Industry v Baker	
Barings Plc v Coopers & Lybrand [2003] All ER (D) 142	362
Barker v Bell [1971] 1 WLR 983	704
Barlow Clowes International Ltd (In Liquidation) v Vaughan; Sub Nom: Vaughan v Barlow Clowes International Ltd [1992] 4 All ER 22, CA	640, 641
Barnes v Addy (1873–74) LR 9 Ch App 244, CA	418
Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428	564
Barrett v Duckett [1995] BCC 362; [1995] 1 BCLC 243	767
Barrington v Lee [1972] 1 QB 326, CA	760
Barros Mattos Junior v MacDaniels Ltd; Sub Nom: Mattos Junior v MacDaniels Ltd; Barros Mattos Junior v General Securities & Finance Co Ltd [2004] EWHC 1188; [2005] 1 WLR 247; [2004] 3 All ER 299	334, 744, 754
Barrow Lane & Ballard Ltd v Phillip Phillips & Co Ltd [1929] 1 KB 574	679
Bartlett v Barclays Bank Trust Co Ltd (No.2) [1980] Ch 515	254
Barton Manufacturing Co Ltd, <i>Re</i> [1998] BCC 827; [1999] 1 BCLC 740, Ch D	311, 312, 315, 316
Base Metal Trading Ltd v Shamurin [2004] EWCA Civ 1316	346, 596
Bates v Lord Hailsham of St Marylebone [1972] 1 WLR 1373	541
Bates v United Kingdom (26280/95) 16 January 1996	84
Bath Glass, <i>Re</i> (1988) 4 BCC 130; [1988] BCLC 329, Ch D (Companies Ct)	251
Batut v Hartley (1872) 26 LT (NS) 968	598
Batut v Hartley (1872) LR QB 594	325
Baud Corp NV v Brook (1974) 40 DLR (3d) 418	600
Bavins & Sims v London & South Western Bank Ltd [1900] 1 QB 270, CA	348
BCCI SA v Bank of India see Morris v Bank of India	
Beam Technologies v Standard Chartered Bank [2003] 1 SLR 597	517
Beaman v ARTS [1949] 1 KB 550, CA	324
Beaulane Properties Ltd [2005] All ER (D) 413	51, 714
Beck v Norway (26390/95) unreported 26 June 2001	69
Beckenham MC Ltd v Centralex Ltd [2004] EWHC 1287; [2004] 2 BCLC 764; [2004] BPIR 1112, Ch D	317
Beckwith v Corral (1826) 3 Bing 444	673
Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil [1985] QB 966	457, 458
Belgian Grain & Produce Co Ltd v Cox & Co (France) Ltd (Form of Order) (1919) 1 Ll. L. Rep. 546, CA	502
Bell Davies Trading Ltd v Secretary of State for Trade and Industry see Secretary of State for Trade and Industry v Bell Davies Trading Ltd	

Table of Cases

Bell v Lever Brothers Ltd; Sub Nom: Lever Bros Ltd v Bell [1932] AC 161, HL	9, 286, 295, 296, 679
Bell v Marsh [1903] 1 Ch 528, CA	652, 653, 660, 662
Bellinger v Bellinger [2003] UKHL 21; [2003] 2 AC 467	39
Belmont Finance Corp Ltd v Williams Furniture Ltd [1979] Ch 250	405, 420, 781
Belmont Finance Corp v Williams Furniture Ltd (No.2) [1980] 1 All ER 393, CA (Civ Div)	346, 352, 363, 729
Belvedere Court Management Ltd v Frogmore Developments Ltd [1997] QB 858, CA	309
Belvoir Finance Co Ltd v Harold G Cole & Co Ltd [1969] 1 WLR 1877	666, 668
Bendenoun v France (A/284) (1994) 18 EHRR 54, ECHR	72, 79, 80
Benham v United Kingdom (19380/92) (1996) 22 EHRR 293, ECHR	76
Bents Brewery v Hogan [1945] 2 All ER 570	297, 396
Berg Sons & Co Ltd v Adams [1992] BCC 661	363
Betts v Metropolitan Police District Receiver; Sub Nom: Betts v Receiver for the Metropolitan Police District [1932] 2 KB 595, KBD	330
Beverley Acceptances v Oakley [1982] RTR 417, CA (Civ Div)	658, 667, 668, 670, 671
Beyeler v Italy (33202/96) (No.1) (2001) 33 EHRR 52, ECHR	46
Bhullar v Bhullar; Sub Nom: Bhullar Bros Ltd, <i>Re</i> [2003] EWCA Civ 424; [2003] BCC 711; [2003] 2 BCLC 241, CA	286, 296
Biddell Bros v E Clemens Horst Co; Sub Nom: E Clement Horst Co v Biddell Bros [1912] AC 18, HL; reversing [1911] 1 KB 934, CA; reversing [1911] 1 KB 214, KBD	444
Biggs v Evans [1894] 1 QB 88, QBD	668, 672
Biggs v Sotnicks [2001] EWCA Civ 1356, CA	721, 723
Birkett v James [1978] AC 297, HL	713
Birse Construction Ltd v Haiste Ltd [1996] 1 WLR 675, Ca	586
Bishopsgate Investment Management Ltd (In Liquidation) v Homan [1995] Ch 211; [1994] 3 WLR 1270; [1995] 1 All ER 347; [1994] BCC 868; (1994) 91(36) LSG 37; (1994) 138 SJLB 176	634, 635, 638
Bishopsgate Investment Management Ltd (In Liquidation) v Maxwell (No.1) [1994] 1 All ER 261, CA	265, 284, 585
Bishopsgate Motor Finance Corp v Transport Brakes [1949] 1 KB 322, CA	649, 654, 673
Black v Davies [2005] EWCA Civ 531, CA (Civ Div)	389
Black v Freedman & Co (1910) 12 CLR 105	622
Blackspur Group Plc (No.2), <i>Re</i> ; Sub Nom: Secretary of State for Trade and Industry v Davies (No.2); Atlantic Computer Systems Plc, <i>Re</i> ; Secretary of State for Trade and Industry v Ashman [1998] 1 WLR 422; [1998] BCC 11; [1998] 1 BCLC 676, CA	246, 256
Blackspur Group Plc (No.3), <i>Re</i> ; Sub Nom: Secretary of State for Trade and Industry v Davies (No.3); Secretary of State for Trade and Industry v Eastaway (Undertakings) [2001] EWCA Civ 1595; [2004] BCC 839; [2002] 2 BCLC 263, CA (Civ Div)	256
Blackwell v Blackwell; Sub Nom: Blackwell, <i>Re</i> [1929] AC 318	12
Blake v Lanyon (1795) 6 Term 221	390
Blakeville International Ltd v Allied Irish Banks, 3 May 1996, CA	341
Blundell, <i>Re</i> ; Sub Nom: Blundell v Blundell (1889) LR 40 Ch D 370, Ch D	355
Blunt v Blunt [1943] AC 517, HL	541
Boardman v Phipps; Sub Nom: Phipps v Boardman [1967] 2 AC 46, HL	278, 285, 286, 291, 297, 302, 303, 343, 471, 570, 571, 573, 583, 591, 620, 763, 771
Bocotra Construction Pte Ltd v Attorney General (No 2) [1995] 2 SLR 733	529
Bolivinter Oil SA v Chase Manhattan Bank NA [1984] 1 WLR 392; [1984] 1 Lloyd's Rep. 251, CA	519, 521
Bolkiah v KPMG; Sub Nom: HRH Prince Jefri Bolkiah v KPMG [1999] 2 AC 222, HL	293
Bond House Systems Ltd v Customs and Excise Commissioners [2004] V&DR 125, Ch D [2003] BVC 2319	408

Table of Cases

Bonner v Tottenham and Edmonton Permanent Investment Building Society [1899]	
1 QB 161, CA	584
Boodram v Attorney General of Trinidad and Tobago; Chadee v Attorney General of Trinidad and Tobago [1996] AC 842	54
Borden (UK) Ltd v Scottish Timber Products Ltd [1981] Ch 25, CA	608
Borders (UK) Ltd v Commissioner of Police for the Metropolis [2005] EWCA Civ 197	578
Borealis AB (formerly Borealis Petrokemi AB and Statoil Petrokemi AB) v Stargas Ltd (The Berge Sisar) [2001] UKHL 17; [2002] 2 AC 205, HL	480
Boscawen v Bajwa; Abbey National Plc v Boscawen [1996] 1 WLR 328, CA	305, 595, 598, 615, 616, 636, 637, 745
Boulting v Association of Cinematograph Television and Allied Technicians [1963] 2 QB 606, CA	291, 294, 396, 763
Boulton v Jones (1857) 2 H & N 564	679
Bourgoin SA v Ministry of Agriculture, Fisheries and Food [1986] QB 716, CA	275
Bowes v Shand; Sub Nom: Shand v Bowes (1876–77) LR 2 App. Cas. 455, HL	514
Bowman v Fels [2005] EWCA Civ 226, CA	140, 142, 146, 153, 784
Box v Barclays Bank Plc Brown v Barclays Bank Plc; Jacobs v Barclays Bank Plc [1998] Lloyd's Rep. Bank. 185	377, 437, 619, 625, 636
Boxfoldia v National Graphical Association (1982) (NGA) [1988] ICR 752; [1988] IRLR 383, EAT	391
Boyson v Coles (1817) 6 M & S 14	652
Brabon, <i>Re</i> ; Sub Nom: Treharne v Brabon [2000] BCC 1171; [2001] 1 BCLC 11	310, 311, 317, 318
Bracken Partners Ltd v Gutteridge; Sub Nom: Smalley v Bracken Partners Ltd [2003] EWCA Civ 1875; [2004] 1 BCLC 377, CA	624
Bradcrown Ltd, <i>Re</i> see Official Receiver v Ireland	
Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 205, HL	384, 385, 386
Bradstock Trustee Services Ltd v Nabarro Nathanson [1995] 1 WLR 1405	599
Brake Bros Ltd v Ungless [2004] EWHC 2799, QBD	299
Bramelid v Sweden (8588/79); Malmstrom v Sweden (8589/79) (1983) 5 EHRR 249	46, 52
Brandeis Brokers Ltd v Black [2001] 2 All ER (Comm) 980; [2001] 2 Lloyd's Rep. 359, QBD (Comm)	303
Brandon v Leckie (1972) 29 DLR (3d) 633	701
Brandstetter v Austria (A/211) (1993) 15 EHRR 378, ECHR	104
Brandt v Liverpool Brazil & River Plate Steam Navigation Co Ltd; Sub Nom: Brandt & Co v River Plate Steam Navigation Co Ltd [1924] 1 KB 575, CA	492
Bray v Ford [1896] AC 44, HL	278, 569
Brazilian Rubber Plantations & Estates Ltd, <i>Re</i> [1911] 1 Ch 425, Ch D	262, 264, 273, 774
Bremer Handels GmbH v Vanden-Avenne Izegem PVBA [1978] 2 Lloyd's Rep. 109, HL	444
Brian D Pierson (Contractors) Ltd, <i>Re</i> ; Sub Nom: Penn v Pierson [1999] BCC 26; [2001] 1 BCLC 275	245, 246, 264, 321, 775, 777
Brickenden v London Loan & Savings Co [1934] 3 DLR 465, PC (Can)	279
Briess v Woolley; Sub Nom: Briess v Rosher [1954] AC 333, HL	283
Brimelow v Casson [1924] 1 Ch 302, Ch D	401, 402
Brinks Ltd v Abu-Saleh (No.1) [1995] 1 WLR 1478; [1995] 4 All ER 65	608, 616, 634
Brinks Ltd v Abu-Saleh (No.3) [1996] CLC 133; The Times, 23 October 1995, Ch D	282, 427, 428
Brink's-MAT Ltd v Elcombe [1988] 1 WLR 1350, CA	542
Brink's-MAT Ltd v Noye [1991] 1 Bank LR 68, CA	329, 436, 437, 599, 602, 607
Bristol and West Building Society v May May & Merrimans (No.1) [1996] 2 All ER 801	292
Bristol and West Building Society v Mothew (t/a Stapley & Co); Sub Nom: Mothew v Bristol and West Building Society [1998] Ch 1, CA	263, 277, 280, 282, 291, 292, 471, 555, 561, 625, 669, 681, 725, 763

Table of Cases

Bristol and West of England Bank v Midland Railway Co [1891] 2 QB 653, CA	598
British American Continental Bank v British Bank for Foreign Trade [1926] 1 KB 328, CA	339
British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) [1983] 2 Lloyd's Rep. 9, HL	450
British Industrial Plastics Ltd v Ferguson [1940] 1 All ER 479, HL	392
British Midland Tool Ltd v Midland International Tooling Ltd [2003] EWHC 466; [2003] 2 BCLC 523, Ch D	296, 407, 413
British Motor Trade Association v Salvadori [1949] Ch 556	394, 434
British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No.2) [1912] AC 673, HL	391
Britten Norman Ltd v State Ownership Fund of Romania, 6 July 2000, Ch D	521, 527
Brocklesby v Temperance Permanent Building Society [1895] AC 173, HL	448, 656
Brodie v Brodie [1916–1917] All ER Rep. 237	458
Brook v Hook (1870–71) LR 6 Ex. 89, Ex Ct	458, 459
Brooks v Commissioner of Police of the Metropolis [2005] UKHL 24, HL	374
Broome v Cassell & Co Ltd (No.1) [1972] AC 1027, HL	578
Brotherton v Aseguradora Colseguros SA (No.2); Sub Nom: Brotherton v La Previsora SA Compania de Seguros [2003] EWCA Civ 705, CA	532
Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd [1957] 2 QB 621, CA	494
Brown v Bennett [1999] BCC 525; [1999] 1 BCLC 649, CA (Civ Div)	342
Brown v KMR Services Ltd; Sword Daniels v Pitel [1995] 4 All ER 598, CA	567
Brown v Raphael [1958] Ch 636, CA	385
Brown v Stott; Sub Nom: Stott (Procurator Fiscal) v Brown [2003] 1 AC 681; [2001] 2 WLR 817	42, 62, 64, 85, 86, 90, 212
Brown v United Kingdom (1998) 28 EHRR CD 233	80
Brown v United Kingdom (Admissibility) (44223/98) (2002) 35 EHRR CD197, ECHR	84
Brown v Westminster Bank Ltd [1964] 2 Lloyd's Rep. 187, QBD (Comm)	454
Brydges v Branfill (1841) 12 Sim 369	338
Buchan v Secretary of State for Employment; Ivey v Secretary of State for Employment [1997] BCC 145, EAT	236
Buckley v Gross (1863) 3 B & S 566	54, 332, 603
Budberg v Jerwood and Ward (1934) 51 TLR 99	666
Buller v Harrison (1777) 2 Cowp. 565	338, 761
Bullivant v Attorney General of Victoria; Sub Nom: R v Bullivant [1901] AC 196, HL	368, 781
Bullman v Berkeley Homes (Essex) Ltd [2003] All ER (D) 132	409, 410
Bunge Corp v Tradax Export SA [1981] 1 WLR 711, HL	442
Bunge Corp v Vegetable Vitamin Foods (Pte) Ltd [1985] 1 Lloyd's Rep. 613	501
Bunkate v Netherlands (A/248-B) (1995) 19 EHRR 477, ECHR	69
Burdis v Livsey; Clark v Ardington Electrical Services see Lagden v O'Connor	
Burke v Cory (1959) 19 DLR (2nd) 252, CA Ont	563
Burt v Claude Cousins & Co [1971] 2 QB 426, CA	760
Butler v Broadhead [1975] Ch 97	360
Butler v United Kingdom (41661/98) 27 June 2002	55, 59, 60, 74, 92, 197
C (Restraint order: disclosure) <i>Re</i> , 4 September 2000	93
C Evans & Son Ltd v Spritebrand Ltd [1983] QB 310; [1985] 1 WLR 317	433
C v S (Money Laundering: Discovery of Documents) (Practice Note); Sub Nom: Practice Note (CA: Money Laundering: Discovery of Documents) [1999] 1 WLR 1551	143, 151
CA Pacific Finance Ltd (In Liquidation), <i>Re</i> [2000] 1 BCLC 494, CFI (HK)	612
Cadogan Finance Ltd v Keith Lavery [1982] RTR 417	658, 659
Cahn v Pockett's Bristol Channel Steam Packet Co Ltd [1899] 1 QB 643, CA	498, 683, 685, 695, 697

Table of Cases

Caja de Ahorros del Mediterraneo v Gold Coast Ltd; Sub Nom: Gold Coast Ltd v Caja de Ahorros del Mediterraneo [2001] EWCA Civ 1806, CA	528
Camden Nominees Ltd v Forcey [1940] Ch 352, Ch D	402
Campbell and Fell v United Kingdom (A/80) (1985) 7 EHRR 165, ECHR	80
Campbell Discount Co Ltd v Gall [1961] 1 QB 431, CA	657, 676
Campbell v Mirror Group Newspapers Ltd; Sub Nom: Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457	41, 95, 96, 110, 120, 300
Campden Hill Ltd v Chakrani [2005] EWHC 911; [2005] N.P.C. 65, Ch D	615, 642, 751
Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamship Co Ltd [1947] AC 46, PC	654, 757
Canadian Aero Service v O'Malley (1973) 40 DLR (3d) 371	287
Canadian Laboratory Supplies Ltd v Engelhard Industries Ltd [1980] 2 SCR 450	655
Canadian Land Reclaiming & Colonizing Co, <i>Re</i> ; Sub Nom: Coventry & Dixon's Case (1880) LR 14 Ch D 660, CA	257
Canadian National Railways v Norsk Pacific Pacific Steamship Co 91 DLR (4th) 289	373
Candler v Crane Christmas & Co [1951] 2 KB 164, CA	373, 379
Canson Enterprises Ltd v Boughton & Co [1991] 3 SCR 534; (1991) 86 DLR (4th) 129	549, 553, 556, 557, 558, 563
Caparo Industries Plc v Dickman [1990] 2 AC 605, HL	373, 374, 375, 377, 379, 660
Cape Asbestos Co v Lloyds Bank [1921] W.N. 274	500
Capewell v Customs and Excise Commissioners [2004] All ER (D) 29, CA	207
Capital and Counties Bank Ltd v Warriner (1896) 12 TLR 216	667, 691
Car & Universal Finance Co Ltd v Caldwell [1965] 1 QB 525, CA	581, 595, 676, 677, 678
Cardiff Savings Bank, <i>Re</i> ; Sub Nom: Marquis of Bute's Case [1892] 2 Ch 100, Ch D	263
Carecraft Construction Co Ltd, <i>Re</i> [1994] 1 WLR 172	256
Cargill International SA v Bangladesh Sugar & Food Industries Corp [1998] 1 WLR 461; [1998] 2 All ER 406; [1998] CLC 399; (1998) 95(3) LSG 25; (1998) 142 SJLB 14; The Times, 10 December 1997, CA (Civ Div); affirming [1996] 4 All ER 563; [1996] 2 Lloyd's Rep. 524, QBD (Comm)	510
Carl Zeiss Stiftung v Herbert Smith & Co (No.2) [1969] 2 Ch 276	355
Carlyle Finance Ltd v Pallas Industrial Finance Ltd [1999] 1 All ER (Comm) 659; [1999] RTR 281	706
Carr v London & North Western Railway Co (1874–75) LR 10 C.P. 307, CCP	653, 660, 662
Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd (In Liquidation) [1985] Ch 207	619
Carter v Boehm (1766) 3 Burr 1905, 1909, 1911	9, 530
Carter v Toussaint (1822) 5 B & Ald 855	689
Cartledge v E Jopling & Sons Ltd [1963] AC 758, HL	715
Casio Computer Co Ltd v Sayo (No.3) [2001] EWCA Civ 661, CA	419, 434
Castle v Sworder (1861) 6 H & N 828	689
Cave v Cave (1880) LR 15 Ch D 639, Ch D	643
Cave v Robinson Jarvis & Rolf; Sub Nom: Robinson Jarvis & Rolf v Cave; Cave v Robinson Jarvis & Rolfe [2002] UKHL 18; [2003] 1 AC 384; [2002] 2 WLR 1107; [2002] 2 All ER 641, HL	713, 721, 723
CBS Songs Ltd v Amstrad Consumer Electronics Plc [1988] AC 1013, HL	406
Cedarwood Productions Ltd, <i>Re</i> ; Sub Nom: Secretary of State for Trade and Industry v Rayna; Secretary of State for Trade and Industry v Newstead Inter City Print & Finishing Ltd, <i>Re</i> ; Secretary of State for Trade and Industry v Murfitt [2001] EWCA Civ 1083; [2004] BCC 65; (2001) 98(30) LSG 37; The Times, 12 July 2001, CA (Civ Div); affirming [2001] 2 BCLC 48	247
Central Newbury Car Auctions v Unity Finance [1957] 1 QB 371, CA	654, 656, 663, 667, 669, 672, 673, 674, 697
Century Credit Corp v Richard (1962) 34 DLR (2d) 291, Ont CA	699, 701
Ceres Orchard Partnership v Fiatagri Australia Pty Ltd [1995] 1 NZLR 112	709

Ceval Alimentos SA v Agrimpex Trading Co Ltd (The Northern Progress) (No.2) [1996] 2 Lloyd's Rep. 319	736
Chaigley Farms Ltd v Crawford Kaye & Grayshire Ltd (t/a Leylands) [1996] BCC 957, QBD	608
Chan v Zacharia 154 CLR 178, HC (Aus)	286, 418
Chappell v United Kingdom (A/152); Sub Nom: Chappell v United Kingdom (10461/83) (1990) 12 EHRR 1, ECHR	544
Chartered Bank of India Australia and China v British India Steam Navigation Co Ltd [1909] AC 369, PC (Straits Settlements)	485
Chartered Trust Plc v Commissioner of Police for the Metropolis, 26 May 1999, CA	706
Chase Manhattan Bank NA v Israel-British Bank (London) Ltd [1981] Ch 105	618
Chaudhry v Prabhakar [1989] 1 WLR 29, CA	470
Cheese v Thomas [1994] 1 WLR 129, CA	582
Cheltenham & Gloucester Plc v Appleyard [2004] EWCA Civ 291	637, 731
Chester v Afshar [2004] UKHL 41; [2005] 1 AC 134; [2004] 3 WLR 927; [2004] 4 All ER 587, HL	373
Chesworth v Farrar [1967] 1 QB 407; [1966] 2 WLR 1073; [1966] 2 All ER 107; 110 SJ 307, QBD	333, 719
Chief Constable of Kent v V [1983] QB 34, CA	540
Chillingworth v Chambers [1896] 1 Ch 685, CA	765
China-Pacific SA v Food Corp of India (The Winson) [1982] AC 939; [1981] 3 WLR 860; [1981] 3 All ER 688, HL	448
Chohan v Saggar [1994] BCC 134; [1994] 1 BCLC 706; [1993] EGCS 194; [1993] NPC 154; Independent, 27 December 1993 (CS), CA (Civ Div); reversing [1992] BCC 306	317, 319
Cia de Seguros Imperio v Heath (REBX) Ltd (formerly CE Heath & Co (America) Ltd); Sub Nom: Companhia de Seguros Imperio v Heath (REBX) Ltd [2001] 1 WLR 112, CA	617, 619, 725, 732
CIBC Mellon Trust Co v Stolzenberg (Sanctions: Non-compliance) [2004] EWCA Civ 827	363, 405, 412
Cie Commerciale Sucres et Denrees v C Czarnikow Ltd (The Naxos) [1990] 1 WLR 1337, HL	442
Ciro Citterio Menswear Plc v Thakrar; Sub Nom: Ciro Citterio Menswear Plc (In Administration), <i>Re</i> [2002] EWHC 662; [2002] 1 WLR 2217	310, 625
Citadel General Insurance Co v Lloyd's Bank Canada [1997] 152 DLR (4th) 411, SCC 342, 346	
City Equitable Fire Insurance Co Ltd, <i>Re</i> [1925] Ch 407, CA	262, 264, 273, 774
City Fur Manufacturing Co Ltd v Fureenbond (Brokers) London Ltd [1937] 1 All ER 799, KBD	668, 683, 685
Clark Boyce v Mouat [1994] 1 AC 428, PC	288, 291, 292, 293
Clark v Cutland [2003] EWCA Civ 810; [2004] 1 WLR 783; [2003] 4 All ER 733, CA	623, 766
Clark v Urquhart; Sub Nom: Urquhart v Clark; Urquhart v Stracey; Stracey v Urquhart [1930] AC 28	389
Clarke v Shee and Johnson (1774) 1 Cowp. 197	335
Clarkson Booker v Andjel [1964] 2 QB 775, CA	468
Clarkson v Davies [1923] AC 100, PC (Can)	763
Clayton v Le Roy [1911] 2 KB 1031, CA	327, 650
Clayton's Case; Sub Nom: Devaynes v Noble [1814-23] All ER Rep. 1; (1816) 1 Mer. 572	217, 639, 640, 641, 642
Cliberry v Allan; Sub Nom: Cliberry v Allan [2002] EWCA Civ 45; [2002] Fam. 261	156
Close Asset Finance v Care Graphics Machinery Ltd [2000] CCLR 43; (2000) 97(12) LSG 42; (2000) 144 SJLB 134; The Times, 21 March 2000, QBD	695, 704
Clough Mill Ltd v Martin [1985] 1 WLR 111	609
Clough v London & North Western Railway Co (1871-72) LR 7 Ex. 26, Ex Chamber	581