

IAN F. FLETCHER

THE LAW OF INSOLVENCY

SWEET & MAXWELL

The Law of Insolvency

FOURTH EDITION

By

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For Daniel and Julian,
Matris pulchrae filii.

PREFACE TO THE FOURTH EDITION

Even during times of general prosperity the annual statistics show that a proportion of companies, and also of individuals, will experience insolvency. This may come about as a consequence of misfortune, miscalculation, mismanagement of their affairs—or through some combination of these and possibly other factors. Unhappily, this fourth edition goes to press at a time when both national and international economic circumstances are extremely adverse, with the inevitable impact on the number and magnitude of insolvencies already starkly apparent. As insolvency rates invariably lag behind the curve of declining economic fortune, the law and procedures which form the subject matter of this book are likely to become sadly familiar to increasing numbers of affected persons in the months and years ahead.

Legal change is an inescapable fact of life in the modern era. Barely had the last edition of this book surfaced in print before the Government took steps to create Parliamentary time for enacting insolvency law reforms based on its White Paper of 2001, by the expedient of attaching them to a Bill otherwise dealing with competition and consumer law. Thus did the Enterprise Act 2002 become the vehicle for effecting major reforms to both corporate and individual insolvency law, including the elimination of the Crown's historic status as a preferential creditor in all insolvencies, a radical remodelling of the company administration procedure, and a corresponding reduction in the role of administrative receivership. Simultaneously, the entry into force of the EC Regulation on Insolvency Proceedings imposed a new series of constraints upon the exercise of insolvency jurisdiction, and obliged all insolvency practitioners to expand their vocabulary to include such terms as “centre of main interests” and “establishment”. A spate of cases ensued, first at national level and subsequently before the European Court of Justice, in which the impact of the new legal regime was road-tested, sometimes in circumstances where national sensitivities were uncomfortably close to the surface. An account of these episodes, including such cases as *Daisytek-ISA Ltd* and *Eurofood IFSC Ltd*, is included in Ch.31 below.

The higher courts have continued to develop the law—sometimes controversially—in areas with which this book is concerned. The House of Lords' judgment in *Leyland Daf Ltd* reversed a doctrinal view of the status of assets comprised in a floating charge that had stood since 1970, and briefly brought about an upwards revision of the economic value of that species of security until the counter-revolution, in the form of s.1282 of the Companies Act 2006, imposing a new and exceedingly complex set of rules governing liquidation expenses. By their ruling in 2005 in the *Spectrum Plus* case, their Lordships reasserted the fundamental principles concerning the distinction between fixed and floating charges in relation to attempts to create fixed security over receivables, while their decision in the *Frid* case in

the previous year had shed light on the complex issues in cases of set-off involving contingent liabilities. The practical effects of the Human Rights Act 1998 on numerous aspects of insolvency law and its enforcement by civil and criminal sanctions continue to be explored. In *Pantmaenog Timber Co Ltd* the House deftly averted an outcome whereby the investigative powers of the office holder—notably that of compulsory examination under s.236 of the Insolvency Act—might have been emasculated in relation to the potential bringing of disqualification proceedings against directors, while the important ruling in *Sheldrake v DPP* on the reverse burden of proof in criminal cases has ensured that many of the criminal offences of strict liability which provide a vital reinforcement of the insolvency process can be maintained without infringement of rights of the accused under art.6 of the European Convention on Human Rights.

Developments in the field of international insolvency have accelerated since the previous edition of this work. In addition to adapting to the effects of the European Regulation, the UK has chosen to enact the UNCITRAL Model Law on Cross-Border Insolvency by means of Regulations which took effect from April 2006. This extension of the active participation by this country in the development of international arrangements for co-operation and assistance in cross-border cases has prompted the addition of a new Ch.32 to the book, in which the Model Law and other, current projects are examined. Alongside these legislative initiatives the courts have also found opportunities to demonstrate the vitality and resourcefulness of the common law. In 2006 the Privy Council showed, in the *Navigator Holdings* case, that useful forms of recognition and assistance of foreign insolvency proceedings can be provided by English courts without the need for any treaty or statutory provisions on which to base them. More recently, in a somewhat equivocal decision by the House of Lords in *McGrath v Riddell*, the virtues of the liberal tradition of international co-operation at common law were emphasised in various ways by three of the five Law Lords. The fall-out from the global financial crisis whose onset began in 2007 will inevitably pose new challenges to courts and legislators to devise improved ways of preserving value and of mitigating the effects of financial failure.

As has been the case ever since the first edition of this book was produced, the author has again benefited from the illuminating discourse of a wide number of colleagues, associates and friends who share his passionate obsession for the subject of insolvency. At the risk of giving unintended slight to those who are not here mentioned by name, I must acknowledge my particular gratitude to those from whom I have derived a special intellectual stimulus through collaboration in teaching insolvency law courses at Masters' level at University College London, including Michael Crystal Q.C., Ron Harmer and Stephen Gale, and through joint participation in other writing and research projects, where the wisdom and experience of Gabriel Moss Q.C., Nick Segal, Professor Jay Westbrook and Professor Bob Wessels have been greatly valued. I am once again grateful to my wife, Letitia Crabb, for revising her chapter on receivers, but more especially I owe her a large and unquantifiable debt of thanks for all her

support and encouragement through the many months when the task of producing this edition claimed an excessive portion of my time and attention. I have tried to state the law as at February 1, 2009, with one or two late additions that were possible during the period when the book was going through the press.

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February 2009

PREFACE TO THE FIRST EDITION

The insolvency law of England and Wales has undergone greater change and development during the past 10 years than it had during the previous 100. The investigative labours of the Cork Committee, culminating in their *Final Report* of 1982, provided the basis for the successive Insolvency Act of 1985 and 1986, whereby the law was first reformed and then consolidated. In consequence, nearly all the statutory provisions concerning both personal and corporate insolvency are for the first time contained within a single Act of Parliament. Simultaneously, fundamental changes have taken place in the work and organisation of insolvency practitioners, who now constitute an identifiable professional grouping in their own right.

These momentous developments make it appropriate to recast the traditional textbook treatment of this area of law, whereby personal bankruptcy and company liquidation have been generally regarded as distinct subjects, and thus have been dealt with in separate legal treatises. In this book, I have adopted the view that insolvency law is essentially a unitary subject. I have accordingly provided an account of each of the collective procedures which may be utilised in the case of insolvency of either an individual or a corporate debtor. Non-collective procedures or remedies, such as receivership, are omitted.

The nature and extent of the recent reforms have necessitated a careful consideration of the appropriate style of treatment to be adopted. Some entirely new procedures have entered the law (such as corporate and individual voluntary arrangements, and company administration orders) on which there is as yet no great abundance of settled case law. On the other hand, the recasting of many provisions relating to the established procedures of bankruptcy and company winding up have made it appropriate to question whether the accumulated body of past judicial decisions can safely be regarded as good law. For my part (save in those instances of clear legislative intention to reverse the former law and to depart from past principles) I have been inclined to make frequent reference to judicial precedent in the course of discussing the current statutory provisions. This reflects my personal belief that it is in the rich legacy of reported case decisions that the true spirit of our insolvency law is to be discovered and appreciated. Only by renewed study of these wellsprings of our legal tradition can we ensure that the best standards, and fundamental principles, are maintained in the process of administering the law of the present day. If hard cases sometimes make bad law, absence of cases invariably makes for dull law, and robs the learning process of its more enjoyable features. I have tried to state the law as at September 30, 1989, with the addition of some references to the effects of the Companies Act 1989, which assumed its final form when the book was in proof.

In my exploration of the fascinating realm of insolvency law I have had the advantage over the years of receiving the active encouragement and

assistance of many wise and respected friends and colleagues. It is not possible here to list the names of all those who have helped to shape my understanding of the subject. Nevertheless, I feel it would be an unpardonable discourtesy if I were to fail to acknowledge openly the special quality of the help and inspiration provided unstintingly by David Graham, Q.C., Professor Douglass Boshkoff, Professor Clive Schmitthoff, Muir Hunter, Q.C., and Philip Pink, formerly Senior Official Receiver. While none of these should be held accountable for any errors or defects in this book (for which I accept full and sole responsibility), they have greatly helped to enhance such worthwhile qualities as it may possess.

By no means for the first time, I find myself quite unable to express in adequate terms the true measure of any indebtedness to my wife and colleague, Letitia Crabb, for all that she has done to enable me to complete the task of writing this book. With her permission, I dedicate it to our two sons, for whom over many months their father's preoccupation has doubtless seemed near akin to a "brooding omnipresence in the sky", producing an almost total eclipse of the sunnier aspects of normal family life. *Fiat Lux.*

Aberystwyth
October 1989

Ian F. Fletcher

TABLE OF CASES

1897 Jubilee Sites Syndicate, Re. <i>See</i> Jubilee (1897) Sites Syndicate, Re	
A Debtor (No.83 of 1988), Re. <i>See</i> Cove (A Debtor), Re	
A Straume (UK) Ltd v Bradlor Developments Ltd [2000] B.C.C. 333; (2000) 2 T.C.L.R. 409, Ch D	16-041
AA Mutual International Insurance Co Ltd, Re [2004] EWHC 2430 (Ch); [2005] 2 B.C.L.C. 8	16-024
AB & Co (No.2), Re [1900] 2 Q.B. 429, CA	6-040
ABC Coupler and Engineering Co (No.3), Re [1970] 1 W.L.R. 702; [1970] 1 All E.R. 650; (1970) 114 S.J. 242, Ch D	24-050
A&BC Chewing Gum, Re; sub nom. Topps Chewing Gum Inc v Coakley [1975] 1 W.L.R. 579; [1975] 1 All E.R. 1017; (1974) 119 S.J. 233, Ch D	21-052
A&C Supplies Ltd, Re; sub nom. Sutton (Removal of Liquidator), Re [1998] B.C.C. 708; [1998] 1 B.C.L.C. 603; [1998] B.P.I.R. 303; (1997) 94(43) L.S.G. 29, Ch D	14-063
AE Realisations (1985) Ltd, Re [1988] 1 W.L.R. 200; [1987] 3 All E.R. 83; (1987) 3 B.C.C. 136; [1987] B.C.L.C. 486; [1988] P.C.C. 48; (1988) 85(2) L.S.G. 35; (1988) 132 S.J. 51, Ch D	8-131, 24-011
AI Levy (Holdings) Ltd, Re [1964] Ch. 19; [1963] 2 W.L.R. 1464; [1963] 2 All E.R. 556; (1963) 107 S.J. 416, Ch D	22-006, 26-007, 26-015
AIB Finance Ltd v Alsop; sub nom. AIB Finance Ltd v Debtors [1998] 2 All E.R. 929; [1998] Lloyd's Rep. Bank. 102; [1998] B.C.C. 780; [1998] 1 B.C.L.C. 665; [1998] B.P.I.R. 533; (1998) 95(14) L.S.G. 22; (1998) 142 S.J.L.B. 108, CA (Civ Div)	6-077, 14-098
AMEC Properties v Planning Research & Systems [1992] B.C.L.C. 1149; [1992] 1 E.G.L.R. 70; [1992] 13 E.G. 109, CA (Civ Div)	14-075
AMF International Ltd, Re [1995] B.C.C. 439; [1995] 2 B.C.L.C. 529, Ch D	18-008
AMF International Ltd (No.2), Re; sub nom. Cohen v Ellis [1996] 1 W.L.R. 77; [1996] B.C.C. 335; [1996] 2 B.C.L.C. 9, Ch D	18-008
ARMS (Multiple Sclerosis Research) Ltd, Re; sub nom. Alleyne v Attorney General [1997] 1 W.L.R. 877; [1997] 2 All E.R. 679; [1997] B.C.C. 370; [1997] 1 B.C.L.C. 157, Ch D	25-013
ARV Aviation Ltd, Re (1988) 4 B.C.C. 708; [1989] B.C.L.C. 664, Ch D	16-099
AT&T Istel Ltd v Tully [1993] A.C. 45; [1992] 3 W.L.R. 344; [1992] 3 All E.R. 523; (1992) 142 N.L.J. 1088; [1992] 136 S.J.L.B. 227, HL	22-033
AW Brierley, Re 145 B.R. 151 (Bankr.S.D.N.Y. 1992)	31-018
Abouloff v Oppenheimer & Co (1882-83) L.R. 10 Q.B.D. 295, CA	29-007, 29-049
Adam & Partners Ltd, Re. <i>See</i> IRC v Adam & Partners Ltd	
Adams Ex p. Culley, Re (1878) L.R. 9 Ch. D. 307, CA	6-008
Adams, Re (1879) 12 Ch.D. 480	6-036
Adams v Cape Industries Plc [1990] Ch. 433; [1990] 2 W.L.R. 657; [1991] 1 All E.R. 929; [1990] B.C.C. 786; [1990] B.C.L.C. 479, CA (Civ Div)	29-007
Adams v National Bank of Greece and Athens SA; sub nom. Prudential Assurance Co Ltd v National Bank of Greece and Athens SA; Darling v National Bank of Greece SA [1961] A.C. 255; [1960] 3 W.L.R. 8; [1960] 2 All E.R. 421; (1960) 104 S.J. 489, HL	30-007, 30-053, 30-061
Adebayo v Official Receiver of Nigeria [1954] 1 W.L.R. 681; [1954] 2 All E.R. 197; (1954) 98 S.J. 286, PC (West Africa)	18-011
Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd [1934] A.C. 122, HL	28-008, 30-062
Adlards Motor Group Holding, Re [1990] B.C.L.C. 68, Ch D	22-028
Advisor (188) Ltd, Re. <i>See</i> Bishopsgate Investment Management Ltd, Ex. p Trachtenberg	
Affleck v Hammond [1912] 3 K.B. 162, CA	8-043
Agricultural Industries, Re [1952] 1 All E.R. 1188; [1952] W.N. 209, CA	22-063

Agricultural Mortgage Corp Plc v Woodward [1994] B.C.C. 688; [1995] 1 B.C.L.C. 1; [1996] 1 F.L.R. 226; [1996] 2 F.C.R. 796; (1995) 70 P. & C.R. 53; [1995] 1 E.G.L.R. 1; [1995] 04 E.G. 143; [1996] Fam. Law 149; [1994] E.G. 98 (C.S.), CA (Civ Div)	8-118
Agriplant Services Ltd (In Liquidation), Re [1997] B.C.C. 842; [1997] 2 B.C.L.C. 598, Ch D	26-049
Aiden Shipping Co Ltd v Interbulk Ltd (The Vimeira) (No.2) [1986] A.C. 965; [1986] 2 W.L.R. 1051; [1986] 2 All E.R. 409; [1986] 2 Lloyd's Rep. 117; (1986) 130 S.J. 429, HL	21-048
Air Ecosse Ltd v Civil Aviation Authority 1987 S.C. 285; 1987 S.L.T. 751; (1987) 3 B.C.C. 492, IH (2 Div)	16-041, 16-043
Air Express Foods Pty Ltd, Re [1977] Qd.R. 107	30-069
Airbase (UK) Ltd, Re. See Thorniley v Revenue and Customs Commissioners	
Airbus Industrie GIE v Patel [1999] 1 A.C. 119; [1998] 2 W.L.R. 686; [1998] 2 All E.R. 257; [1998] 1 Lloyd's Rep. 631; [1998] C.L.C. 702; [1999] I.L.Pr. 238; (1998) 95(18) L.S.G. 32; (1998) 148 N.L.J. 551; (1998) 142 S.J.L.B. 139, HL	30-049
Airlines Airspares v Handley Page [1970] Ch. 193; [1970] 2 W.L.R. 163; [1970] 1 All E.R. 29, Ch D	14-074, 14-075, 14-076
Akerman, Re; sub nom. Akerman v Akerman [1891] 3 Ch. 212, Ch D	9-062
Alabama New Orleans Texas & Pacific Junction Railway Co, Re [1891] 1 Ch. 213, CA	15-041
Alipour v Ary; sub nom. Alipour v UOC Corp (No.1); UOC Corp (No.1), Re; Company (No.002180 of 1986), Re [1997] 1 W.L.R. 534; [1997] B.C.C. 377; [1997] 1 B.C.L.C. 557, CA (Civ Div)	20-019, 21-004, 21-055
Alivon v Furnival (1834) 1 C.M. & R. 277; 149 E.R. 1084	29-057
Allard Holdings Ltd, Re [2001] 1 B.C.L.C. 404; [2002] B.P.I.R. 1, Ch D	23-016
Allders Department Stores Ltd (In Administration), Re [2005] EWHC 172 (Ch); [2005] 2 All E.R. 122; [2005] B.C.C. 289; [2006] 2 B.C.L.C. 1; [2005] I.C.R. 867; (2005) 102(15) L.S.G. 34	16-124
Allen v Bonnett (1869-70) L.R. 5 Ch. App. 577, CA (Civ Div)	8-149
Alliance & Leicester BS v Edgestop Ltd (No.2) [1995] 2 B.C.L.C. 506, CA (Civ Div)	14-021
Alliance & Leicester BS v Ghahremani [1992] R.V.R. 198; (1992) 142 N.L.J. 313, Ch D	13-013
Allied Bank International v Banco Credito Agricola De Cartago 757 F.2d 516 (2nd Cir. 1985)	31-055
Allied Dunbar Assurance Plc v Fowle [1994] B.C.C. 422; [1994] 2 B.C.L.C. 197; [1994] 25 E.G. 149, QBD	25-019
Allobrogia Steamship Corp, Re [1978] 3 All E.R. 423; [1979] 1 Lloyd's Rep. 190, Ch D	30-012, 30-015, 30-028
Allo v Secretary of State for Trade and Industry; sub nom. Rodencroft Ltd, Re; WG Birch Developments Ltd, Re; HM Birch Ltd, Re [2004] EWHC 862 (Ch); [2004] 1 W.L.R. 1566; [2004] 3 All E.R. 56; [2004] B.C.C. 631	21-004
Alpha Club (UK) Ltd, Re; Marketing Services Worldwide (UK) Ltd, Re [2002] EWHC 884 (Ch); [2004] B.C.C. 754; [2002] 2 B.C.L.C. 612, Ch D	21-017
Al-Sabah v Grupo Torras SA [2005] UKPC 1; [2005] 2 A.C. 333; [2005] 2 W.L.R. 904; [2005] 1 All E.R. 871; [2005] B.P.I.R. 544; (2004-05) 7 I.T.E.L.R. 531; (2005) 102(9) L.S.G. 29; (2005) 149 S.J.L.B. 112	29-058
Aluminium Industrie Vaassen BV v Romalpa Aluminium [1976] 1 W.L.R. 676; [1976] 2 All E.R. 552; [1976] 1 Lloyd's Rep. 443; (1976) 120 S.J. 95, CA (Civ Div)	8-072, 26-024, 26-025, 26-026
Amalgamated Properties of Rhodesia Ltd, Re (1914) 30 T.L.R. 405	22-070
Amalgamated Properties of Rhodesia (1913) Ltd, Re [1917] 2 Ch. 115, CA	20-021, 21-010
American Express International Banking Corp v Hurley [1985] 3 All E.R. 564; (1986) 2 B.C.C. 98993; [1986] B.C.L.C. 52; [1985] F.L.R. 350; (1985) 135 N.L.J. 1034, QBD	14-085, 14-087, 14-100
Anantapadmanabhaswami v Official Receiver of Secunderabad [1933] A.C. 394, PC (Ind)	29-057
Anderson (A Bankrupt), Re [1911] 1 K.B. 896, KBD	8-048, 29-053
Andrabell, Re [1984] 3 All E.R. 407, Ch D	26-025
Andrew, Re (1881) 18 Ch.D. 464	4-026
Anglo Baltic and Mediterranean Bank v Barber & Co [1924] 2 K.B. 410, CA	26-004

Anglo-Moravian Hungarian Junction Railway Co Ex p. Watkin, Re (1875–76) L.R. 1 Ch. D. 130, CA	22–080
Antal International Ltd, Re [2003] EWHC 1339 (Ch); [2003] 2 B.C.L.C. 406; [2003] B.P.I.R. 1067	16–118
Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux (1890) L.R. 25 Q.B.D. 399, CA	29–005, 29–006, 29–065, 29–066, 29–067, 30–053, 30–061
Araya v Coghill 1921 S.C. 462; 1921 1 S.L.T. 321, IH (1 Div)	29–057, 29–060
Arbuthnot Leasing International Ltd v Havelet Leasing Ltd (No.2) [1990] B.C.C. 636, Ch D	8–118
Archer, Re (1904) 20 T.L.R. 390	6–084, 6–086
Arctic Engineering (No.2), Re; sub nom. Arctic Engineering Ltd, Re [1986] 1 W.L.R. 686; [1986] 2 All E.R. 346; (1985) 1 B.C.C. 99563; [1986] P.C.C. 1; (1986) 83 L.S.G. 1895; (1985) 130 S.J. 429, Ch D	19–025, 27–066
Arena Corp Ltd, Re. <i>See</i> Customs and Excise Commissioners v Arena Corp Ltd	
Argentum Reductions (UK) Ltd, Re [1975] 1 W.L.R. 186; [1975] 1 All E.R. 608; (1974) 119 S.J. 97, Ch D	26–016
Armani v Castrique (1844) 13 M. & W. 443; 153 E.R. 185	29–005, 29–037, 29–065
Armitage v Attorney General; sub nom. Gillig v Gillig [1906] P. 135, PDAD	29–005, 29–054, 29–062
Armour v Thyssen Edelstahlwerke AG [1991] 2 A.C. 339; [1990] 3 W.L.R. 810; [1990] 3 All E.R. 481; [1991] 1 Lloyd's Rep. 95; 1990 S.L.T. 891; [1990] B.C.C. 925; [1991] B.C.L.C. 28; (1990) 134 S.J. 1337, HL	26–026
Armstrong Ex p. Lindsay, Re [1892] 1 Q.B. 327, QBD	7–021
Armstrong Whitworth Securities Co Ltd, Re [1947] Ch. 673; [1947] 2 All E.R. 479; [1948] L.J.R. 172; (1947) 91 S.J. 544, Ch D	24–015
Army and Navy Hotel, Re (1886) L.R. 31 Ch. D. 644, Ch D	21–035
Arnold v Williams [2008] EWHC 218 (Ch); [2008] B.P.I.R. 247	9–086
Aro Co Ltd, Re [1980] Ch. 196; [1980] 2 W.L.R. 453; [1980] 1 All E.R. 1067; (1980) 124 S.J. 15, CA (Civ Div)	22–007
Arrows Ltd, Re [1992] B.C.C. 446; [1992] B.C.L.C. 1176; (1992) 136 S.J.L.B. 164, Ch D	22–032
Arrows Ltd, Re [1992] Ch. 545; [1992] 2 W.L.R. 923; [1992] B.C.C. 125; [1992] B.C.L.C. 126; (1992) 89(8) L.S.G. 27; [1991] N.P.C. 114, Ch D	22–037
Arrows Ltd, Re; sub nom. Hamilton v Naviede; Trachtenberg, Ex p.; Bishopsgate Investment Management Ltd, Re; Headington Investments Ltd, Re [1995] 2 A.C. 75; [1994] 3 W.L.R. 656; [1994] 3 All E.R. 814; [1994] B.C.C. 641; [1994] 2 B.C.L.C. 738; [1995] 1 Cr. App. R. 95; (1994) 144 N.L.J. 1203, HL	22–033, 22–035–22–039
Art Reproduction Co Ltd, Re [1952] Ch. 89; [1951] 2 All E.R. 984; [1951] 2 T.L.R. 979; (1951) 95 S.J. 745, Ch D	23–003
Arthur JS Hall & Co v Simons; sub nom. Harris v Scholfield Roberts & Hall; Barratt v Ansell (t/a Woolf Seddon); Barratt v Woolf Seddon; Cockbone v Atkinson Dacre & Slack; Harris v Scholfield Roberts & Hill [2002] 1 A.C. 615; [2000] 3 W.L.R. 543; [2000] 3 All E.R. 673; [2000] B.L.R. 407; [2000] E.C.C. 487; [2000] 2 F.L.R. 545; [2000] 2 F.C.R. 673; [2001] P.N.L.R. 6; [2000] Fam. Law 806; [2000] E.G. 99 (C.S.); (2000) 97(32) L.S.G. 38; (2000) 150 N.L.J. 1147; (2000) 144 S.J.L.B. 238; [2000] N.P.C. 87, HL	9–013, 9–014
Artistic Colour Printing Co, Re (1880) L.R. 14 Ch. D. 502, Ch D	19–013
Artman v Artman; sub nom. Bankrupt (No.622 of 1995), Re [1996] B.P.I.R. 511, Ch D	6–110
Ash & Newman v Creative Devices Research [1991] B.C.L.C. 403	14–076
Ashby Ex p. Wreford, Re [1892] 1 Q.B. 872, QBD	8–068
Ashurst v Pollard; sub nom. Pollard v Ashurst [2001] Ch. 595; [2001] 2 W.L.R. 722; [2001] 2 All E.R. 75; [2001] B.P.I.R. 131; (2001) 98(3) L.S.G. 42; (2000) 150 N.L.J. 1787, CA (Civ Div)	8–004
Ashwin, Re (1890) 25 Q.B.D. 271	7–014
Askew v Peter Dominic Ltd [1997] B.P.I.R. 163, CA (Civ Div)	11–036
Asset Visions Ltd, Re [2002] EWHC 756 (Ch); [2003] B.P.I.R. 305	14–028
Associated Dominions Assurance Society Pty Ltd, Re (1962) 109 C.L.R. 516	22–079
Associated Travel Leisure and Services Ltd (In Liquidation), Re [1978] 1 W.L.R. 547; [1978] 2 All E.R. 273; (1977) 121 S.J. 790, Ch D	22–082
Astor Chemical Ltd v Synthetic Technology Ltd [1990] B.C.C. 97; [1990] B.C.L.C. 1, Ch D	16–088

Atherton, Re [1912] 2 K.B. 251, KBD	7-030
Atlantic Computer Systems Plc, Re [1992] Ch. 505; [1992] 2 W.L.R. 367; [1992] 1 All E.R. 476; [1990] B.C.C. 859; [1991] B.C.L.C. 606, CA (Civ Div)	14-083, 14-084, 16-045, 16-046, 16-143, 16-145-16-147
Attorney General v Guardian Newspapers Ltd (No.2) [1990] 1 A.C. 109	1-046
Attorney General v Jackson; sub nom. Jackson v Attorney General; Cockell, Re [1932] A.C. 365, HL	9-063, 10-025, 12-007
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Attree Ex p. Ward, Re [1907] 2 K.B. 868, KBD	9-085
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Australian Mutual Provident Society v Gregory (1908) 5 C.L.R. 615	29-060
Autolook Pty Ltd, Re (1983) 8 A.C.L.R. 419	22-079
Avatar Communications Ltd, Re (1988) 4 B.C.C. 473, Ch D	22-044
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Aylwin's Trusts, Re (1873) L.R. 16 Eq. 585, Ct of Chancery	29-060
Ayres, Re; Ayres v Evans (1981) 51 F.L.R. 395; (1981) 56 F.L.R. 235; (1981) 39 A.L.R. 129	9-010, 29-031
Azoff Don Commercial Bank, Re [1954] Ch. 315; [1954] 2 W.L.R. 654; [1954] 1 All E.R. 947; (1954) 98 S.J. 252, Ch D	29-039, 30-007, 30-012, 30-015, 30-023, 30-042, 30-059, 30-064, 30-065
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Baby Moon (UK) Ltd, Re (1985) 1 B.C.C. 99298; [1985] P.C.C. 103, Ch D	21-028
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Bailey v Finch (1871-72) L.R. 7 Q.B. 34; (1871) 41 L.J. Q.B. 83, QB	23-020
Bailey v Thurston & Co Ltd [1903] 1 K.B. 137, CA	8-015
Bailey Hay & Co, Re [1971] 1 W.L.R. 1357; [1971] 3 All E.R. 693; (1971) 115 S.J. 639, Ch D	19-006
Baillie Ex p. Cooper, Re (1875) L.R. 20 Eq. 762; 44 L.J. Bkcy. 125; 32 L.T. 780, Ct of Chancery	6-013, 6-016, 6-017
Baker Ex p. Lupton, Re [1901] 2 K.B. 628, CA	8-131
Baker, Re (1887) 5 Mor. 5	6-036
Baker, Re (1890) 44 Ch. D. 262	12-004
Balfour's Settlement, Re; sub nom. Public Trustee v Official Receiver [1938] Ch. 928, Ch D	8-068

Ballast Plc (In Administration), Re [2004] EWHC 2356 (Ch); [2005] 1 W.L.R. 1928; [2005] 1 All E.R. 630; [2005] B.C.C. 96; [2005] 1 B.C.L.C. 446; (2004) 101(44) L.S.G. 33	16–133, 16–135
Bamford, Re [1910] 1 Ir. R. 390	21–025
Banco de Bilbao v Sancha; Banco de Bilbao v Rey [1938] 2 K.B. 176, CA	30–053, 30–054, 30–057
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Banco Nacional de Cuba v Cosmos Trading Corp [2000] B.C.C. 910; [2000] 1 B.C.L.C. 813, CA (Civ Div)	30–013, 30–017, 30–038, 32–044
Bangla Television Ltd (In Liquidation), Re. See Valentine v Bangla TV Ltd	
Bank of Credit and Commerce International SA, Re [1992] B.C.C. 83, Ch D	21–054
Bank of Credit and Commerce International SA (In Liquidation) (No.3), Re [1992] B.C.C. 715; [1993] B.C.L.C. 1490, CA (Civ Div)	22–053, 28–008, 31–011
Bank of Credit and Commerce International SA (In Liquidation) (No.7), Re [1994] 1 B.C.L.C. 455, Ch D	23–014
Bank of Credit and Commerce International SA (In Liquidation) (No.8), Re; sub nom. Morris v Rayners Enterprises Inc; Morris v Agrichemicals Ltd; Bank of Credit and Commerce International SA (No.3), Re [1998] A.C. 214; [1997] 3 W.L.R. 909; [1997] 4 All E.R. 568; [1998] Lloyd's Rep. Bank. 48; [1997] B.C.C. 965; [1998] 1 B.C.L.C. 68; [1998] B.P.I.R. 211; (1997) 94(44) L.S.G. 35; (1997) 147 N.L.J. 1653; (1997) 141 S.J.L.B. 229, HL	9–059
Bank of Credit and Commerce International SA (In Liquidation) (No.9), Re; sub nom. Morris v Mahfouz; Mahfouz v Morris; Bank of Credit and Commerce International SA (Overseas), Re [1994] 1 W.L.R. 708; [1994] 3 All E.R. 764; [1994] 2 B.C.L.C. 664; [1994] I.L.Pr. 300, CA (Civ Div)	31–011, 31–014
Bank of Credit and Commerce International SA (In Liquidation) (No.11), Re [1997] Ch. 213; [1997] 2 W.L.R. 172; [1996] 4 All E.R. 796; [1996] B.C.C. 980; [1997] 1 B.C.L.C. 80, Ch D	23–019, 24–051, 28–023, 30–067, 30–069, 31–032, 31–064
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Bank of Ireland v Hollicourt (Contracts) Ltd. See Hollicourt (Contracts) Ltd (In Liquidation) v Bank of Ireland	
Bank of South Australia (No.2), Re [1895] 1 Ch. 578; (1895) 2 Mans. 148	22–063
Bankrupt (No.622 of 1995), Re. See Artman v Artman	
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Banque des Marchands de Moscou (Koupetschesky) (No.3), Re [1954] 1 W.L.R. 1108; [1954] 2 All E.R. 746; (1954) 98 S.J. 557, Ch D	30–007, 30–053, 30–059, 30–062, 30–065
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Banque des Marchands de Moscou (Koupetschesky) v Kindersley [1951] Ch. 112; [1950] 2 All E.R. 549; (1950) 66 T.L.R. (Pt 2) 654, CA	30–007, 30–012, 30–028, 30–059
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Banque Industrielle de Moscou, Re [1952] Ch. 919; [1952] 2 All E.R. 532; [1952] 2 T.L.R. 406, Ch D	30–007, 30–023, 30–064

Banque Internationale de Commerce de Petrograd v Goukassow. <i>See</i> La Banque Internationale de Commerce de Petrograd v Goukassow	
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Barca v Mears [2004] EWHC 2170 (Ch); [2005] 2 F.L.R. 1; [2005] B.P.I.R. 15; [2005] Fam. Law 444; [2004] N.P.C. 141; [2005] 1 P. & C.R. DG7	8-027
Barclays Bank Plc v Eustice [1995] 1 W.L.R. 1238; [1995] 4 All E.R. 511; [1995] B.C.C. 978; [1995] 2 B.C.L.C. 630; (1995) 145 N.L.J. 1503; (1995) 70 P. & C.R. D29, CA (Civ Div)	8-119
Barclays Bank Plc v Homan; sub nom. Maxwell Communications Corp Plc (No.2), Re [1992] B.C.C. 757; [1993] B.C.L.C. 680, CA (Civ Div)	16-107, 28-008, 28-023, 29-023, 29-042, 30-047, 30-049, 30-050, 31-018
Barclays Bank Plc v Mogg [2003] EWHC 2645 (Ch); [2004] B.P.I.R. 259	6-058
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Barleycorn Enterprises Ltd, Re; sub nom. Mathias & Davies v Down (Liquidator of Barleycorn Enterprises Ltd) [1970] Ch. 465; [1970] 2 W.L.R. 898; [1970] 2 All E.R. 155; (1970) 114 S.J. 187, CA (Civ Div)	24-021
Barlow Clowes Gilt Managers Ltd, Re [1992] Ch. 208; [1992] 2 W.L.R. 36; [1991] 4 All E.R. 385; [1991] B.C.C. 608; [1991] B.C.L.C. 750; (1991) 141 N.L.J. 999; [1991] N.P.C. 73, Ch D	22-036
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Barn Crown Ltd, Re [1995] 1 W.L.R. 147; [1994] 4 All E.R. 42; [1994] B.C.C. 381; [1994] 2 B.C.L.C. 186, Ch D	26-012
Barne, Re (1886) 16 Q.B.D. 522	29-017
Barnett v King [1891] 1 Ch. 4, CA	9-032
Baroness Wenlock v River Dee Co (No.3) (1888) L.R. 38 Ch. D. 534, CA	30-007
Barr Ex p. Wolfe, Re [1896] 1 Q.B. 616, QBD	6-051
Barrett v Barrett [2008] EWHC 1061 (Ch); [2008] B.P.I.R. 817; [2008] 2 P. & C.R. 17; [2008] 31 E.G. 90; [2008] 21 E.G. 138 (C.S.); [2008] 2 P. & C.R. DG8	8-039
Bartley v Hodges (1861) 1 B. & S. 375; 121 E.R. 745	29-005, 29-065
Barton Manufacturing Co Ltd, Re [1998] B.C.C. 827; [1999] 1 B.C.L.C. 740, Ch D	26-043
Bastable Ex p. Trustee, Re [1901] 2 K.B. 518, CA	8-127
Batey Ex p. Emmanuel, Re (1881) L.R. 17 Ch. D. 35	7-060
Bath Glass Ltd, Re (1988) 4 B.C.C. 130; [1988] B.C.L.C. 329, Ch D	27-066
Baughan, Re. <i>See</i> Debtor Ex p. Official Receiver v United Auto & Finance Corp	
Baum Ex p. Baum, Re (1877-78) L.R. 7 Ch. D. 719, CA	4-057, 7-044
Bayoil SA, Re; sub nom. Seawind Tankers Corp v Bayoil SA [1999] 1 W.L.R. 147; [1999] 1 All E.R. 374; [1999] 1 Lloyd's Rep. 211; [1998] B.C.C. 988; [1999] 1 B.C.L.C. 62; (1998) 142 S.J.L.B. 251, CA (Civ Div)	6-073
Beacon Leisure Ltd, Re [1991] B.C.C. 213; [1992] B.C.L.C. 565, Ch D	26-049
Beale Ex p. Board of Trade, Re [1939] Ch. 761, Ch D	7-051
Beall Ex p. Beall, Re [1894] 2 Q.B. 135, CA	7-023
Beall Ex p. Official Receiver, Re [1899] 1 Q.B. 688, QBD	8-035
Beauchamp Ex p. Beauchamp, Re [1904] 1 K.B. 572, CA	6-117
Bebro, Re [1900] 2 Q.B. 316, CA	6-035
Beck Foods Ltd, Re. <i>See</i> Rees v Boston BC	
Beckham v Drake (1849) 2 H.L.C. 579; 9 E.R. 1213, HL	8-015

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- Belton, Re (1913) 108 L.T. 344 6-119
- Bendall v McWhirter [1952] 2 Q.B. 466; [1952] 1 All E.R. 1307; [1952] 1 T.L.R. 1332; (1952) 96 S.J. 344, CA 8-022
- Bennett Ex p. Official Receiver, Re [1907] 1 K.B. 149, KBD 8-034
- Benzon, Re; sub nom. Bower v Chetwynd [1914] 2 Ch. 68, CA 8-048, 9-007
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- Berkeley Securities (Property) Ltd, Re [1980] 1 W.L.R. 1589; [1980] 3 All E.R. 513; (1980) 124 S.J. 880, Ch D 1-026, 9-017, 23-001, 23-008
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- Bettle Ex p. (1895) 14 N.Z.L.R. 129 29-033, 29-060
- Betts Ex p. Official Receiver, Re [1901] 2 K.B. 39, KBD 6-083, 6-084, 6-086
- Betts (Receiving Order), Re; sub nom. Betts, Ex p. [1897] 1 Q.B. 50 6-119, 29-008
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- Bird v IRC Ex p. Debtor; sub nom. Bird Ex p. Debtor, Re; Debtor v IRC; Bird, Re [1962] 1 W.L.R. 686; [1962] 2 All E.R. 406; (1962) 41 A.T.C. 137; [1962] T.R. 173; (1962) 106 S.J. 507, CA 29-011
- Birkin, Re (1896) 3 Mans. 291 6-119
- Bishopgate Investment Management Ltd, Ex. p Trachtenberg; sub nom. Advisor (188) Ltd, Re [1993] B.C.C. 492, CA (Civ Div) 22-033
- Bishopgate Investment Management Ltd (No.2), Re [1994] B.C.C. 732, Ch D 22-040
- Bishopgate Investment Management Ltd (In Liquidation) v Homan [1995] Ch. 211; [1994] 3 W.L.R. 1270; [1995] 1 All E.R. 347; [1994] B.C.C. 868; (1994) 91(36) L.S.G. 37; (1994) 138 S.J.L.B. 176, CA (Civ Div) 8-059
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- Blackpool Motor Car Co Ltd, Re; sub nom. Hamilton Blackpool Motor Car Co Ltd [1901] 1 Ch. 77, Ch D 6-028
- Blackspur Group Plc, Re. *See* Secretary of State for Trade and Industry v Davies (No.1)
- Blain, Ex p.; sub nom. Sawers, Re (1879) L.R. 12 Ch. D. 522, CA 29-010, 29-054
- Blake, Re (1875) 10 Ch.App. 652 7-008

Blenheim Leisure (Restaurants) Ltd (No.1), Re [2000] B.C.C. 554; (1999) 96(33) L.S.G. 29; [1999] N.P.C. 105, CA (Civ Div)	25-019, 25-021
Blithman, Re (1866) L.R. 2 Eq. 23, Ct of Chancery	8-066, 29-053
Blount v Whitely (1898) 6 Mans. 48	7-005
Bloxwich Iron and Steel Co, Re [1894] W.N. 111	19-021
Boaler v Power [1910] 2 K.B. 229, CA	6-115
Board of Trade v Employers Liability Assurance Corp Ltd [1910] 2 K.B. 649, CA	7-065
Bolton, Re [1920] 2 I.R. 324	29-030
Bolton, Re; sub nom. Bolton Ex p. North British Artificial Silk Ltd, Re [1930] 2 Ch. 48, Ch D	9-020
Bonacina, Re; sub nom. Le Brasseur v Bonacina [1912] 2 Ch. 394, CA	11-017
Bond, Re (1888) L.R. 21 Q.B.D. 17	6-083, 6-084, 6-085, 29-008
Bond Worth Ltd, Re [1980] Ch. 228; [1979] 3 W.L.R. 629; [1979] 3 All E.R. 919; (1979) 123 S.J. 216, Ch D	8-073, 26-025
Bonus Breaks Ltd, Re [1991] B.C.C. 546, Ch D	17-014, 17-015, 27-046, 27-050
Borden (UK) Ltd v Scottish Timber Products Ltd [1981] Ch. 25; [1979] 3 W.L.R. 672; [1979] 3 All E.R. 961; [1980] 1 Lloyd's Rep. 160; (1979) 123 S.J. 688, CA (Civ Div)	8-073, 26-025
Borland's Trustee v Steel Bros & Co Ltd [1901] 1 Ch. 279, Ch D	8-070
Borneman v Wilson (1885) L.R. 28 Ch. D. 53, CA	7-060
Boston Timber Fabrications Ltd, Re (1984) 1 B.C.C. 99052; [1984] B.C.L.C. 328	21-045
Bottomley, Re (1893) 10 Morr. 262	4-058
Bottomley, Re (1915) 84 L.J.K.B. 1020	7-031
Bottomley v Bell (1915) 31 T.L.R. 591	8-015
Bourgogne, La. See Compagnie Générale Transatlantique v Thomas Law & Co	
Bourgogne, The. See Compagnie Générale Transatlantique v Thomas Law & Co	
Bournemouth & Boscombe Athletic Football Club Co Ltd, Re [1998] B.P.I.R. 183, Ch D	15-042
Bowes, Re (1889) W.N. 53	29-043
Bowes v Hope Life Assurance and Guarantee Co 11 E.R. 1383; (1865) 11 H.L. Cas. 389, HL	20-021, 21-011
Boxco, Re [1970] Ch. 442; [1970] 2 W.L.R. 959; [1970] 2 All E.R. 183; (1970) 114 S.J. 262, Ch D	25-022
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Boyden v Watson [2004] B.P.I.R. 1131, CC	8-045
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Bradley v Eagle Star Insurance Co Ltd [1989] A.C. 957; [1989] 2 W.L.R. 568; [1989] 1 All E.R. 961; [1989] 1 Lloyd's Rep. 465; [1989] B.C.L.C. 469; [1989] I.C.R. 301; [1989] Fin. L.R. 253; (1989) 86(17) L.S.G. 38; (1989) 86(3) L.S.G. 43; (1989) 139 N.L.J. 330; (1989) 133 S.J. 359, HL	25-016
Bradley-Hole (A Bankrupt), Re [1995] 1 W.L.R. 1097; [1995] 4 All E.R. 865; [1995] B.C.C. 418; [1995] 2 B.C.L.C. 163; [1995] 2 F.L.R. 838; [1996] 2 F.C.R. 259; [1995] Fam. Law 673, Ch D	4-032, 4-035
Bradley-Hole v Cusen [1953] 1 Q.B. 300	8-048, 9-058
Brampton Manor (Leisure) Ltd v McLean [2006] EWHC 2983 (Ch); [2007] B.C.C. 640	14-028
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