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**THE LAW OF EVIDENCE**

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### **PUBLISHERS' NOTE**

In order to keep the seventeenth edition of this work up to date and thus make it of greater value to readers, we will issue cumulative supplements as necessitated by changes and development in the law. Prices will be fixed at the time of publication.

## FOREWORD

Publication of the new 17th Edition of *Phipson* is an occasion for welcome and congratulation. There are few topics in the law of so wide a reach, of such importance, and yet so demanding of illumination. *Phipson* is equal to its task. Its breadth is breathtaking. Where else can one find teaching of such quality in relation to the criminal law, the law relating to opinion evidence and to experts and the evidential role and use of statistics?

In particular, this new edition properly acknowledges the impact on the process of criminal trials of the reforms introduced by the Criminal Justice Act 2003. Perhaps Lord Walker of Gestingthorpe, in his foreword to the previous edition, was prescient in his hint that *Phipson* underestimated the impact of the changes relating to the admission of evidence of misconduct, other than evidence to do with the allegations, misleadingly described by s.98 of the 2003 Act as “bad character” evidence. Those changes are, as the authorities to which *Phipson* refers demonstrate, of far wider scope than the title to that Chapter suggests. The rules against hearsay seek to introduce a measure of good sense into the arcane and ridiculous.

No criminal practitioner can afford, now, to leave *Phipson* behind for his civil colleagues. The rules of evidence have, perhaps, always had a greater impact on the outcome of a criminal trial than those of relevance only in the civil jurisdiction; they affect liberty. *Phipson*, in its fresh references to the Human Rights Act 1998 recognises the role of evidence in the preservation of rights enshrined in the Convention.

Helpful, clear, accurate and comprehensive, what more could be demanded of a textbook? All these qualities are fulfilled by Hodge Malek Q.C. and his co-editors.

Alan Moses  
Lord Justice of Appeal  
November 13, 2009

## PREFACE

In October 2009 came into effect the 50th set of amendments to the Civil Procedure Rules introduced in 1999. This included some amendments to the expert evidence provisions in CPR Pt 35, none of great importance, but illustrative of the fact that even 10 years on the rules continue to develop. However, it is fair to say that the Civil Procedure Rules have more or less bedded down.

The Criminal Procedure Rules introduced in 2005 have also been updated and have plenty of scope for development. They reflect that in the criminal sphere the courts are expected to exercise effective case management. This is not an easy task given the large workload criminal judges are expected to deal with. The burden on counsel has also increased as they are expected to settle notices and counter-notices as with hearsay and bad character evidence.

It is in the field of hearsay and bad character evidence that there has been the most significant developments since the 16th edition in 2005. The bad character provisions in the Criminal Justice Act 2003 have generated a plethora of case law. The Court of Appeal regularly hears appeals where bad character evidence and its treatment in the trial court is the main focus on appeal. In a jury system where a verdict is reached with no reasons given, the focus on the appeal tends to be on the admissibility of evidence and the content of the directions given to the jury by the judge in summing up. As reflected in Peter Mirfield's chapters whilst the legislative intent behind the Criminal Justice Act 2003 may have been to expand the situations in which bad character evidence may be given, the courts have shied away from permitting bad character evidence from being admitted as a matter of routine. As any experienced practitioner knows, the admission of previous convictions can have a highly prejudicial effect.

In this edition the opportunity has been taken to reduce the treatment of some subjects which only rarely come up in practice, but to expand or add those areas which are important. Courts not infrequently have to grapple with statistical evidence. It is all too easy to be blinded by figures and draw unsafe conclusions as a result as shown by the shaken syndrome cases, now regarded as miscarriages of justice. Chapter 34 contributed by Déirdre Dwyer provides a useful survey of this field (if not mine-field).

With a work so established as *Phipson* those who edit it can only be regarded as temporary custodians. Since the 16th edition some of the contributors have changed. Daniel Hochberg, who has significantly contributed to the book over many years, has stepped down, and Déirdre Dwyer and Saima Hanif have been added as contributors. Acting as a contributor can be a burdensome commitment, particularly in areas where there has been a large amount of legislative change and new case law, as with bad character and expert evidence. The treatment of Human Rights in Chapter 1 has been expanded as the impact of the Human Rights Act 1998 and the incorporation of the ECHR has at the very least added an additional element into arguments as to the admissibility of evidence. Tony Oakley has developed extensively Chapter 5 on estoppels, as has Rosemary Pattenden with her various chapters. On the other hand in some areas there has

## PREFACE

been little change in recent years, such as with judicial notice. This book like the law of evidence itself, is like a tree which has branches which grow and develop as well as having those which need heavy pruning to ensure that it continues to reflect modern practice. Looking back on the last few editions it is interesting to note how much has in fact changed and in which areas.

*Phipson* continues to be regularly used in court as reflected in its frequent citation in judgments all over common law jurisdictions. The current work is up to date until August 2009, although a few additional cases since then have been squeezed in at the proofs stage. Supplements will be issued on an annual basis. As with the last edition, every chapter has been checked by one contributor in addition to the person allocated to that chapter. In addition I have reviewed all the chapters.

It is my pleasure to thank those at Sweet and Maxwell for their help in producing this edition in particular Kacey Mann and Greg Smith. The patience of Greg Smith who has been responsible for overseeing this edition has no doubt been tested and his efforts in enticing us all in producing the manuscript on time were ultimately successful. I am also very grateful to Ann Kavanagh and Kathy Stewart for the great amount of time spent on typing and amending the various drafts of chapters.

**HODGE M. MALEK Q.C.**  
**Gray's Inn**  
**November 16, 2009**

# TABLE OF CASES

|                                                                                                                                                                                                                                                                                                                          |                           |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------|
| 56 Denton Road, Twickenham, Re; sub nom. War Damage Act 1943, Re [1953] Ch. 51; [1952] 2 All E.R. 799; [1952] 2 T.L.R. 676; [1952] W.N. 472 Ch D .....                                                                                                                                                                   | 5-05                      |
| A&J Inglis v John Buttery & Co (1877-78) L.R. 3 App. Cas. 552; (1878) 5 R. (H.L.) 87 HL .....                                                                                                                                                                                                                            | 42-15                     |
| A v A (1988) 18 Fam. Law 57 .....                                                                                                                                                                                                                                                                                        | 13-12                     |
| A v A (Ancillary Relief); B v B (Ancillary Relief) [2000] 1 F.L.R. 701; [2000] 1 F.C.R. 577; [2000] Fam. Law 470 Fam Div .....                                                                                                                                                                                           | 27-03                     |
| A v Secretary of State for the Home Department; D v Secretary of State for the Home Department; C v Secretary of State for the Home Department [2005] UKHL 71; [2006] 2 A.C. 221; [2005] 3 W.L.R. 1249; [2006] 1 All E.R. 575; [2006] H.R.L.R. 6; [2006] U.K.H.R.R. 225; 19 B.H.R.C. 441; (2005) 155 N.L.J. 1924 .....   | 1-54, 36-06, 36-31, 39-21 |
| 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 A.C. 68; [2005] 2 W.L.R. 87; [2005] 3 All E.R. 169; [2005] H.R.L.R. 1; [2005] U.K.H.R.R. 175; 17 B.H.R.C. 496; [2005] Imm. A.R. 103; (2005) 155 N.L.J. 23; (2005) 149 S.J.L.B. 28 ..... | 36-31                     |
| A Company, Re, November 1, 2005 .....                                                                                                                                                                                                                                                                                    | 24-20, 24-38              |
| A Debtor (No.517 of 1991), Re, <i>The Times</i> , November 25, 1991 Ch D .....                                                                                                                                                                                                                                           | 42-25                     |
| A Debtor, Re; sub nom. Wilton & Co v Osborn [1903] 1 K.B. 705 CA .....                                                                                                                                                                                                                                                   | 43-84                     |
| A Roberts & Co Ltd v Leicestershire CC [1961] Ch. 555; [1961] 2 W.L.R. 1000; [1961] 2 ALL E.R. 545; 59 L.G.R. 349; 105 S.J. 425 Ch D .....                                                                                                                                                                               | 42-46                     |
| A, Re. <i>See</i> R. (on the application of A) v Crown Court at the Central Criminal Court                                                                                                                                                                                                                               |                           |
| A/S Rendal v Arcos [1937] 3 All E.R. 577 .....                                                                                                                                                                                                                                                                           | 3-10, 3-21                |
| ABB Asea Brown Boveri Ltd v Hiscox Dedicated Corporate Member Ltd; ABB Asea Brown Boveri Ltd v Jardine Lloyd Thompson Ltd (formerly JLT Risk Solutions Ltd) [2007] EWHC 1150 (Comm) .....                                                                                                                                | 2-06, 2-07                |
| ACT Construction Co Ltd v Customs and Excise Commissioners [1981] 1 W.L.R. 1542; [1982] 1 All E.R. 84; [1982] S.T.C. 25; (1981) 125 S.J. 864 HL .....                                                                                                                                                                    | 1-40                      |
| ADC v Chief Constable of Greater Manchester Unreported March 15, 1983 .....                                                                                                                                                                                                                                              | 36-18                     |
| AF Noonan (Architectural Practice) Ltd v Bournemouth & Boscombe Athletic Football Club Ltd; sub nom. Bournemouth & Boscombe Athletic Football Club Ltd, Re [2007] EWCA Civ 848; [2007] 1 W.L.R. 2614; [2007] C.P. Rep. 44; (2007) 151 S.J.L.B. 923 ...                                                                   | 11-10                     |
| AG Securities v Vaughan; Antoniadis v Villiers [1990] 1 A.C. 417; [1988] 3 W.L.R. 1205; [1988] 3 All E.R. 1058; (1989) 21 H.L.R. 79; (1989) 57 P. & C.R. 17; [1988] 47 E.G. 193; [1988] E.G. 153 (C.S.); (1989) 86(1) L.S.G. 39; (1988) 138 N.L.J. Rep. 325; (1988) 132 S.J. 1638 HL .....                               | 42-31                     |
| AH Allen & Co Ltd v Whiteman (1920) 89 L.J. Ch. 534 .....                                                                                                                                                                                                                                                                | 42-19                     |
| AK v Western Australia [2008] H.C.A. 8; (2008) 232 C.L.R. 438 HC (Aus) .....                                                                                                                                                                                                                                             | 15-39                     |
| AL v Finland Application (23220/04) January 27, 2009 .....                                                                                                                                                                                                                                                               | 30-77                     |
| ANZ Banking Group Ltd v Australian Glass & Mirrors Pty Ltd (1991) 4 A.C.S.R. 14 SC (Vic) .....                                                                                                                                                                                                                           | 40-23                     |
| APA Excelsior v Premiere Technologies Inc [2002] EWHC 2205 QBD .....                                                                                                                                                                                                                                                     | 8-44                      |
| ASIC v Rich [2003] N.S.W.S.C. 257 .....                                                                                                                                                                                                                                                                                  | 8-13                      |
| 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 .....                                                                                                                                                                              | 24-61, 24-92              |
| Abbey v Lill (1829) 5 Bing. 299 .....                                                                                                                                                                                                                                                                                    | 33-71                     |
| Abbey National Building Society v Clive Travers [1999] 1 Lloyd's Rep. P.N. 753 .....                                                                                                                                                                                                                                     | 26-72                     |
| Abbey National Mortgages Plc v Key Surveyors Nationwide Ltd [1996] 1 W.L.R. 1534; [1996] 3 All E.R. 184; 80 B.L.R. 52; 53 Con. L.R. 93; [1996] P.N.L.R. 120; [1996] 2 E.G.L.R. 99; [1996] 33 E.G. 88; [1996] E.G. 23 (C.S.); [1996] N.P.C. 14; (1996) 72 P. & C.R. D1 CA (Civ Div) .....                                 | 33-28                     |
| Abbey National Plc v Clive Travers & Co [1999] Lloyd's Rep. P.N. 753; [1999] P.N.L.R. 819 CA (Civ Div) .....                                                                                                                                                                                                             | 23-33                     |
| Abbott v Abbott (1860) 29 L.J.P. & M. 57 .....                                                                                                                                                                                                                                                                           | 32-68, 33-76, 41-61       |
| Abinger v Ashton (1874) L.R. 17 Eq. 358 Ct of Chancery .....                                                                                                                                                                                                                                                             | 33-67                     |
| Ablitt v Mills & Reeve <i>The Times</i> , October 25, 1995 Ch D .....                                                                                                                                                                                                                                                    | 26-62, 26-66              |
| Abouloff v Oppenheimer & Co (1882-83) L.R. 10 Q.B.D. 295 CA .....                                                                                                                                                                                                                                                        | 43-08                     |

# TABLE OF CASES

|                                                                                                                                                                                                                                                                                                                                                   |                                          |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|
| Abrath v North Eastern Railway Co (1886) L.R. 11 App. Cas. 247 HL .....                                                                                                                                                                                                                                                                           | 1-42, 6-06, 6-08                         |
| Abrey v Crux (1869-70) L.R. 5 C.P. 37 CCP .....                                                                                                                                                                                                                                                                                                   | 42-37                                    |
| Accident Insurance Mutual Holdings Ltd v McFadden [1993] 31 N.S.W.L.R. 412 .....                                                                                                                                                                                                                                                                  | 24-60                                    |
| Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GLEN SpA<br>[2003] UKHL 17; [2003] 2 A.C. 541; [2003] 2 W.L.R. 1060; [2003] 2 All E.R. 615;<br>[2003] 2 All E.R. (Comm) 331; [2005] 1 B.C.L.C. 606; [2003] 1 C.L.C. 1003; [2003]<br>B.L.R. 207; 88 Con. L.R. 208; (2003) 153 N.L.J. 563; (2003) 147 S.J.L.B. 418 .. | 5-03, 5-30                               |
| Adam v Kerr (1798) 1 B. & P. 360 .....                                                                                                                                                                                                                                                                                                            | 40-26                                    |
| Adami v R. (1959) 108 C.L.R. 605 .....                                                                                                                                                                                                                                                                                                            | 1-22                                     |
| Adams (Deceased), Re [1990] Ch. 601; [1990] 2 W.L.R. 924; [1990] 2 All E.R. 97; [1990]<br>2 F.L.R. 519; (1990) 134 S.J. 518 Ch D .....                                                                                                                                                                                                            | 40-48                                    |
| Adams (Michael) v Queen, The [2002] UKPC 14 .....                                                                                                                                                                                                                                                                                                 | 36-15                                    |
| Adamthwaite v Synge (1816) 1 Stark. 183 .....                                                                                                                                                                                                                                                                                                     | 41-36                                    |
| Adel Muhammed El Dabbah v Attorney General of Palestine [1944] A.C. 156 PC (Pal) .....                                                                                                                                                                                                                                                            | 11-57,<br>11-58                          |
| Adelaide Chemical & Fertiliser Co Ltd v Carlyle (1940) 64 C.L.R. 514 .....                                                                                                                                                                                                                                                                        | 31-14                                    |
| Adelson v Associated Newspapers Ltd [2007] EWCA Civ 701; [2008] 1 W.L.R. 585; [2007]<br>4 All E.R. 330; [2007] C.P. Rep. 40; [2008] E.M.L.R. 9 .....                                                                                                                                                                                              | 2-06, 2-07                               |
| Admiral Management Services Ltd v Para Protect Europe Ltd [2002] EWHC 233 (Ch);<br>[2002] 1 W.L.R. 2722; [2003] 2 All E.R. 1017; [2002] C.P. Rep. 37; [2003] 1 Costs L.R.<br>1; [2002] F.S.R. 59; (2002) 99(16) L.S.G. 37; (2002) 152 N.L.J. 518; (2002) 146<br>S.J.L.B. 93 Ch D .....                                                            | 24-24, 33-29                             |
| Aegis Blaze, The [1986] 1 Lloyd's Rep. 203; (1986) 130 S.J. 15 CA (Civ Div) .....                                                                                                                                                                                                                                                                 | 23-20, 23-29,<br>23-38                   |
| Agassiz v London Tram Co (1873) 21 W.R. 199 .....                                                                                                                                                                                                                                                                                                 | 31-24                                    |
| Agip (Africa) Ltd v Jackson [1991] Ch. 547; [1991] 3 W.L.R. 116; [1992] 4 All E.R. 451;<br>(1991) 135 S.J. 117 CA (Civ Div) .....                                                                                                                                                                                                                 | 16-05                                    |
| Agricultural Cattle Insurance Company v Sir John Foster Fitzgerald, Knight, 117 E.R. 944;<br>(1851) 16 Q.B. 432 KB .....                                                                                                                                                                                                                          | 40-45, 42-08                             |
| Agricultural Industries, Re [1952] 1 All E.R. 1188; [1952] W.N. 209 CA .....                                                                                                                                                                                                                                                                      | 11-23                                    |
| Agrimex Ltd v Tradigrain SA [2003] EWHC 1656 (Comm); [2003] 2 Lloyd's Rep. 537;<br>(2003) 153 N.L.J. 1121 .....                                                                                                                                                                                                                                   | 33-50                                    |
| Ahern v R. (1988) 165 C.L.R. 87; 80 A.L.R. 161 H Ct (Aus) .....                                                                                                                                                                                                                                                                                   | 31-45, 31-47, 31-50, 38-12               |
| Ahmed v Brumfitt (1967) 112 S.J. 32 CA (Civ Div) .....                                                                                                                                                                                                                                                                                            | 12-08                                    |
| Ahmed v University of Oxford; sub nom. Ahmed v Governing Body of the University of<br>Oxford [2002] EWCA Civ 1907; [2003] 1 W.L.R. 995; [2003] 1 All E.R. 915; [2003]<br>I.C.R. 733; (2003) 100(10) L.S.G. 27 .....                                                                                                                               | 33-17                                    |
| Aid, The; Aid, The (1881) L.R. 6 P.D. 84 PDAD .....                                                                                                                                                                                                                                                                                               | 33-17                                    |
| Ainsworth v Hanrahan [1991] 25 N.S.W.L.R. 155 .....                                                                                                                                                                                                                                                                                               | 27-13                                    |
| Ainsworth v Wilding (No.2) [1900] 2 Ch. 315 Ch D .....                                                                                                                                                                                                                                                                                            | 23-50, 23-52                             |
| Air Canada v Secretary of State for Trade (No.2) [1983] 2 A.C. 394; [1983] 2 W.L.R. 494;<br>[1983] 1 All E.R. 910 HL .....                                                                                                                                                                                                                        | 25-05, 25-16, 25-24, 25-30, 25-32, 27-19 |
| Aird v Prime Meridian Ltd [2006] EWCA Civ 1866; [2007] C.P. Rep. 18; [2007] B.L.R.<br>105; 111 Con. L.R. 209; (2007) 104(2) L.S.G. 31; (2007) 151 S.J.L.B. 60 .....                                                                                                                                                                               | 24-53, 33-46                             |
| Airey, Re; sub nom. Airey v Stapleton [1897] 1 Ch. 164 Ch D .....                                                                                                                                                                                                                                                                                 | 40-38                                    |
| Airey v Ireland (A/32) (1979-80) 2 E.H.R.R. 305 ECtHR .....                                                                                                                                                                                                                                                                                       | 1-80                                     |
| Aitchison v Lohre; Brandt v Lohre; sub nom. Lohre v Aitchison (1878-79) L.R. 4 App. Cas.<br>755 HL .....                                                                                                                                                                                                                                          | 3-09                                     |
| Aitken v Batchelor (1893) 68 L.T. 530 .....                                                                                                                                                                                                                                                                                                       | 4-25                                     |
| Aitken v McMeckan [1895] A.C. 310 PC (Aus) .....                                                                                                                                                                                                                                                                                                  | 33-67                                    |
| Ajami v Comptroller of Customs [1954] 1 W.L.R. 1405; (1954) 98 S.J. 803 PC (West<br>Africa) .....                                                                                                                                                                                                                                                 | 33-75                                    |
| Ajayi (t/a Colony Carrier Co) v RT Briscoe (Nigeria) Ltd [1964] 1 W.L.R. 1326; [1964] 3<br>All E.R. 556; (1964) 108 S.J. 857 PC (Nig) .....                                                                                                                                                                                                       | 5-45                                     |
| Ajodha v Trinidad and Tobago; Chandree v Trinidad and Tobago; Fletcher v Trinidad and<br>Tobago; Noreiga v Trinidad and Tobago [1982] A.C. 204; [1981] 3 W.L.R. 1; [1981] 2<br>All E.R. 193; (1981) 73 Cr. App. R. 129; [1981] Crim. L.R. 555; (1981) 125 S.J. 305<br>PC (Trinidad and Tobago) .....                                              | 36-11, 36-15, 36-16                      |
| Ajum Goolam Hossen & Co v Union Marine Insurance Co Ltd; Hajee Cassim Joosub v<br>Ajum Goolam Hossen & Co [1901] A.C. 362 PC (Mau) .....                                                                                                                                                                                                          | 7-22                                     |

# TABLE OF CASES

|                                                                                                                                                                                                                                                                 |                                                   |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|
| Akai Holdings Ltd v Ernst & Young, Final Appeal No.28 of 2008 (Civil) .....                                                                                                                                                                                     | 23-83, 23-108                                     |
| Akhtar v Muhammad [2002] EWHC 673 (Ch) .....                                                                                                                                                                                                                    | 10-10, 11-06, 29-14                               |
| Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA (The Torenia);<br>Torenia, The [1983] 2 Lloyd's Rep. 210 QBD (Comm Ct) .....                                                                                                             | 33-10                                             |
| Akzo Nobel v Commission (T-125/03 and T-253/03) September 17, 2007 .....                                                                                                                                                                                        | 23-26                                             |
| Al Rawi v Secret Service [2009] EWHC 2959 (QB); <i>The Times</i> , November 24, 2009 .....                                                                                                                                                                      | 1-82, 11-10,<br>25-27                             |
| Albrighton v Royal Prince Alfred Hospital [1980] 2 N.S.W.L.R. 542 .....                                                                                                                                                                                         | 28-48                                             |
| Alcock v The Corporation of the Royal Exchange Assurance, 116 E.R. 1275; (1848) 13 Q.B.<br>292 QB .....                                                                                                                                                         | 33-63                                             |
| Alcoota v CLC [2001] N.T.S.C. 30 Sup Ct (NT) .....                                                                                                                                                                                                              | 23-52, 25-28, 25-32                               |
| Alderman v Alderman and Dunn [1958] 1 W.L.R. 177; [1958] 1 All E.R. 391; (1958) 102<br>S.J. 126 PDAD .....                                                                                                                                                      | 4-02                                              |
| Aldersey, Re; sub nom. Gibson v Hall [1905] 2 Ch. 181 Ch D .....                                                                                                                                                                                                | 6-26                                              |
| Alderson v Clay (1816) 1 Stark. 405 .....                                                                                                                                                                                                                       | 37-12, 41-02, 42-10                               |
| Aldi Stores Ltd v WSP Group Plc [2007] EWCA Civ 1260; [2008] 1 W.L.R. 748; [2008]<br>C.P. Rep. 10; [2008] B.L.R. 1; 115 Con. L.R. 49; [2008] P.N.L.R. 14; (2008) 24 Const.<br>L.J. 334; [2008] C.I.L.L. 2549; (2007) 104(48) L.S.G. 24; [2007] N.P.C. 128 ..... | 43-46                                             |
| Aldous v Cornwell (1867-68) L.R. 3 Q.B. 573 QB .....                                                                                                                                                                                                            | 40-45                                             |
| Alexander v Burgoine [1940] W.N. 9 .....                                                                                                                                                                                                                        | 11-20                                             |
| Alexander v Midland Bank Plc; Lancaster v Midland Bank Plc; Mulholland v Midland Bank<br>Plc; Osler v Midland Bank Plc; Rolfe v Midland Bank Plc [2000] I.C.R. 464; [1999]<br>I.R.L.R. 723 CA (Civ Div) .....                                                   | 6-07                                              |
| Alexander v R. (1981) 145 C.L.R. 39 HCA .....                                                                                                                                                                                                                   | 28-39                                             |
| Alexander v Rayson [1936] 1 K.B. 169; 114 A.L.R. 357 CA .....                                                                                                                                                                                                   | 11-20                                             |
| Alexander v Vanderzee (1871-72) L.R. 7 C.P. 530 Ex Chamber .....                                                                                                                                                                                                | 1-42                                              |
| Al-Fayed v Al-Tajir [1988] Q.B. 712; [1987] 3 W.L.R. 102; [1987] 2 All E.R. 396; [1987]<br>1 F.T.L.R. 441; (1987) 84 L.S.G. 1055; (1987) 131 S.J. 744 CA (Civ Div) .....                                                                                        | 25-31                                             |
| Al-Fayed v Commissioner of Police of the Metropolis (No.1) [2002] EWCA Civ 780; (2002)<br>99(30) L.S.G. 39; (2002) 146 S.J.L.B. 153 .....                                                                                                                       | 26-36, 26-53, 26-64, 26-67, 26-68, 26-69          |
| Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No.1)<br>[1971] 2 All E.R. 843; (1971) 115 S.J. 307 QBD .....                                                                                                                        | 23-64                                             |
| Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No.2)<br>[1974] A.C. 405; [1972] 1 W.L.R. 833; [1973] 3 W.L.R. 268; [1973] 2 All E.R. 1169;<br>(1973) 117 S.J. 602 HL .....                                                          | 6-04, 25-33, 23-26, 23-90, 23-91, 23-93, 25-36    |
| Algar v Middlesex CC [1945] 2 All E.R. 243 KBD .....                                                                                                                                                                                                            | 5-18                                              |
| Al-Hawaz v The Thomas Cook Group Ltd, New Law Online Case 2001019305, October 27,<br>2000, .....                                                                                                                                                                | 43-79, 43-85                                      |
| Ali v Revenue and Customs Prosecutions Office; sub nom. R. v Ali (Liaquat) [2008] EWCA<br>Crim 1466; (2008) 172 J.P. 516; [2008] Lloyd's Rep. F.C. 516; [2009] Crim. L.R. 106;<br>(2008) 172 J.P.N. 723 .....                                                   | 30-71                                             |
| Ali Shipping Corp v Shipyard Trogir [1999] 1 W.L.R. 314; [1998] 2 All E.R. 136; [1998]<br>1 Lloyd's Rep. 643; [1998] C.L.C. 566 CA (Civ Div) .....                                                                                                              | 27-20                                             |
| Al-Khawaja v United Kingdom (26766/05); Tahery v United Kingdom (22228/06) (2009) 49<br>E.H.R.R. 1; 26 B.H.R.C. 249; [2009] Crim. L.R. 352 ECtHR .....                                                                                                          | 1-76, 12-24, 30-76, 30-78,<br>30-79, 30-81, 30-82 |
| Allan v Sundius (1862) 1 H. & C. 123 .....                                                                                                                                                                                                                      | 7-24                                              |
| Allan v United Kingdom (48539/99) (2003) 36 E.H.R.R. 12; 13 B.H.R.C. 652 ECtHR .....                                                                                                                                                                            | 24-79,<br>30-76, 36-13, 39-17                     |
| Allen v Dundas (1789) 3 T.R. 125 .....                                                                                                                                                                                                                          | 43-14                                             |
| Allen v Flood; sub nom. Flood v Jackson [1898] A.C. 1 HL .....                                                                                                                                                                                                  | 16-11                                             |
| Allen v Maddock (1858) 11 Moo.P.C. 427 .....                                                                                                                                                                                                                    | 40-42                                             |
| Allen v Pink (1838) 4 M. & W. 140 .....                                                                                                                                                                                                                         | 42-22                                             |
| Alliance Syndicate v McIvor (1891) 7 T.L.R. 599 .....                                                                                                                                                                                                           | 4-25                                              |
| Allie v Katah [1963] 1 W.L.R. 202; (1963) 107 S.J. 110 PC (Sierra Leone) .....                                                                                                                                                                                  | 41-58                                             |
| Allied Pastoral Holdings v Federal Commissioner of Taxation (1983) 44 A.L.R. 607 .....                                                                                                                                                                          | 12-12                                             |
| Allsop & Joy's Contract, Re (1889) 61 L.T. 213 .....                                                                                                                                                                                                            | 43-31                                             |
| Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd Unreported May<br>26, 1995 .....                                                                                                                                                         | 27-07                                             |

# TABLE OF CASES

|                                                                                                                                                                                                                                                     |                                                         |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------|
| Allstate Life Assurance Co v Australia and New Zealand Banking Group Ltd (No.6) (1996) 137 A.L.R. 138 .....                                                                                                                                         | 1-42, 33-12                                             |
| Alpina Zurich Insurance Co v Bain Clarkson. <i>See</i> Bayerische Ruckversicherung AG v Clarkson Puckle Overseas Ltd                                                                                                                                |                                                         |
| Alterskye v Scott [1948] 1 All E.R. 469; (1948) 92 S.J. 220 Ch D .....                                                                                                                                                                              | 27-02, 27-06, 27-07, 27-18, 27-19                       |
| Alwina, The (1916) 32 T.L.R. 494 .....                                                                                                                                                                                                              | 3-10                                                    |
| Amado-Taylor [2001] EWCA Crim 1898 .....                                                                                                                                                                                                            | 18-23, 18-24                                            |
| Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd [1982] Q.B. 84; [1981] 3 W.L.R. 565; [1981] 3 All E.R. 577; [1982] 1 Lloyd's Rep. 27; [1981] Com. L.R. 236; (1981) 125 S.J. 623 CA (Civ Div) .... | 5-06, 5-26, 5-34, 5-40, 5-45, 5-47                      |
| Amand v Home Secretary [1943] A.C. 147 HL .....                                                                                                                                                                                                     | 41-50                                                   |
| Amand v Secretary of State for the Home Department; sub nom. R. v Secretary of State for Home Affairs Ex p. Amand                                                                                                                                   |                                                         |
| Ambiorex Ltd v Minister for Environment (No.1) [1992] 1 I.R. 277 .....                                                                                                                                                                              | 27-03                                                   |
| Amery v Long (1808) 9 East 472 .....                                                                                                                                                                                                                | 8-09                                                    |
| Amherst v James Walker Goldsmith & Silversmith Ltd [1983] Ch. 305; [1983] 3 W.L.R. 334; [1983] 2 All E.R. 1067; (1984) 47 P. & C.R. 85; (1982) 267 E.G. 163; (1983) 127 S.J. 391 CA (Civ Div) .....                                                 | 5-06                                                    |
| Amin Rasheed Shipping Corp v Kuwait Insurance Co (The Al Wahab) [1984] A.C. 50; [1983] 3 W.L.R. 241; [1983] 2 All E.R. 884; [1983] 2 Lloyd's Rep. 365; (1983) 127 S.J. 492 HL .....                                                                 | 3-18                                                    |
| Amore v Queen, The [1994] 1 W.L.R. 547; (1994) 99 Cr. App. R. 279; (1994) 138 S.J.L.B. 78 PC (Jam) .....                                                                                                                                            | 15-23                                                   |
| Amys v Barton [1912] 1 K.B. 40 CA .....                                                                                                                                                                                                             | 16-03, 31-29                                            |
| Ancienne Maison Marcel Bauche SA v Woodhouse Drake and Carey (Sugar) Ltd; Ancienne Maison Marcel Bauche SA v EF Hutton & Co (London) Ltd [1982] 2 Lloyd's Rep. 516; [1983] E.C.C. 405 QBD (Comm) .....                                              | 29-15                                                   |
| Ancon v CWS, 172 L.T. 248 .....                                                                                                                                                                                                                     | 33-17                                                   |
| Anderson, Ex p. <i>See</i> Tollemache Ex p. Anderson, Re                                                                                                                                                                                            |                                                         |
| Anderson, Re, 39 L.J.P. 55 .....                                                                                                                                                                                                                    | 42-50                                                   |
| Anderson, Re; sub nom. Pegler v Gillatt [1905] 2 Ch. 70 Ch D .....                                                                                                                                                                                  | 5-14                                                    |
| Anderson v Bank of British Columbia (1875-76) L.R. 2 Ch. D. 644 CA ....                                                                                                                                                                             | 23-03, 23-40, 23-62, 23-77, 23-78, 23-81, 23-89, 23-105 |
| Anderson v Collinson [1901] 2 K.B. 107 KBD .....                                                                                                                                                                                                    | 43-14                                                   |
| Anderson (Rupert) v Queen, The [1972] A.C. 100; [1971] 3 W.L.R. 718; [1971] 3 All E.R. 768; (1971) 115 S.J. 791 PC (Jamaica) .....                                                                                                                  | 33-12, 33-66                                            |
| Andreae v Selfridge & Co Ltd [1938] Ch. 1 CA .....                                                                                                                                                                                                  | 3-17                                                    |
| Andrews v Andrews [1924] P. 255 PDAD .....                                                                                                                                                                                                          | 6-22                                                    |
| Andrews v Ulthwaite (1886) 2 T.L.R. 895 .....                                                                                                                                                                                                       | 33-07                                                   |
| Andrews v Wirral Rural DC [1916] 1 K.B. 863 CA .....                                                                                                                                                                                                | 41-22, 41-24, 41-40, 41-66                              |
| Angell v Duke (1874-75) L.R. 10 Q.B. 174 QBD .....                                                                                                                                                                                                  | 42-26                                                   |
| Anglo Group Plc v Winther Browne & Co Ltd; sub nom. Winther Brown & Co Ltd v Anglo Group Plc, 72 Con. L.R. 118; [1999-2000] Info. T.L.R. 61; [2000] I.T.C.L.R. 559; [2000] Masons C.L.R. 13; (2000) 144 S.J.L.B. 197 QBD .....                      | 33-33                                                   |
| Anglo Overseas Transport Ltd v Titan Industrial Corp Ltd [1959] 2 Lloyd's Rep. 152 QBD (Comm Ct) .....                                                                                                                                              | 40-11                                                   |
| Anne Casement v John Williamson Fulton and Wife, 13 E.R. 439; (1845) 5 Moo. P.C. 130 PC .....                                                                                                                                                       | 40-08                                                   |
| Annesley v Anglesea (1743) 17 How. St. Tr. 1348 .....                                                                                                                                                                                               | 12-53, 23-84, 32-10                                     |
| Annette, The [1919] P. 105 PDAD .....                                                                                                                                                                                                               | 3-22                                                    |
| Anon. (1701) 12 Mod. Rep. 560 .....                                                                                                                                                                                                                 | 38-08                                                   |
| Anon. (1741) 2 Atk. 61 .....                                                                                                                                                                                                                        | 7-45                                                    |
| Anonima Petroli Italiana SpA and Neste Oy v Marlucidez Armadora SA (The Filiatra Legacy) [1991] 2 Lloyd's Rep. 337 CA (Civ Div) .....                                                                                                               | 12-01, 12-64, 29-05                                     |
| Anstee v Nelms (1856) 1 H. & M. 225 .....                                                                                                                                                                                                           | 32-46, 33-08                                            |
| Antares II and Victory, The; Victory, The [1996] 2 Lloyd's Rep. 482 QBD .....                                                                                                                                                                       | 33-17                                                   |
| Apple Corps Ltd v Apple Computer Inc (Use of Documents in EC Commission Proceedings) [1992] 1 C.M.L.R. 969; [1992] F.S.R. 389 Ch D .....                                                                                                            | 26-64, 27-23, 27-27                                     |

# TABLE OF CASES

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                          |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|
| Application by Bayer AG, Re [1999] I.L.Pr. 786, (3rd Cir.) CA (US) .....                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 8-38                                     |
| Application of Forsyth; Cordova v Philips Roxane Laboratories Inc, Re [1984] 2 N.S.W.L.R. 327 .....                                                                                                                                                                                                                                                                                                                                                                                                                            | 8-46                                     |
| Application of Technostrogexport, Re, 853 F. Supp. 695 (S.D.N.Y., 1994) .....                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 8-38                                     |
| Aquarius Financial Enterprises Inc v Lloyd's Underwriters (The Delphine) [2001] 2 Lloyd's Rep. 542; (2001) 151 N.L.J. 694 QBD (Comm) .....                                                                                                                                                                                                                                                                                                                                                                                     | 10-10                                    |
| Arab Monetary Fund v Hashim (No.2) [1990] 1 All E.R. 673 Ch D .....                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 24-67, 39-34                             |
| Arab Monetary Fund v Hashim (No.3) (1994) 6 Admin. L.R. 348 CA (Civ Div) .....                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 24-67                                    |
| Arantzazu Mendi, The. <i>See</i> Spain v Owners of the Arantzazu Mendi                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                          |
| Arbon v Fussell (1862) 3 F. & F. 152 .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 33-74, 40-35, 40-53                      |
| Arbuthnot v Fagan, Independent, July 11, 1994, CA .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 25-33                                    |
| Ardennes, The. <i>See</i> Owners of Cargo Lately Laden on Board the Ardennes v Owners of the Ardennes (The Ardennes)                                                                                                                                                                                                                                                                                                                                                                                                           |                                          |
| Argo Hellas, The. Richard Adler (t/a Argo Rederei) v Sutos (Hellas) Maritime Corp (The Argo Hellas)                                                                                                                                                                                                                                                                                                                                                                                                                            |                                          |
| Arhill Pty Ltd v General Terminal Company Pty Ltd (1991) 23 N.S.W.L.R. 545 .....                                                                                                                                                                                                                                                                                                                                                                                                                                               | 8-10, 8-13, 8-22, 8-33                   |
| Ariadne Steamship Co v James McKelvie & Co. <i>See</i> Universal Steam Navigation Co Ltd v James McKelvie & Co                                                                                                                                                                                                                                                                                                                                                                                                                 |                                          |
| Arkwright's Settlement, Re; sub nom. Phoenix Assurance Co Ltd v Arkwright [1945] Ch. 195                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                          |
| Armagas Ltd v Mundogas SA (The Ocean Frost) [1986] A.C. 717; [1986] 2 W.L.R. 1063; [1986] 2 All E.R. 385; [1986] 2 Lloyd's Rep. 109; (1986) 2 B.C.C. 99197; (1986) 83 L.S.G. 2002; (1986) 130 S.J. 430 HL .....                                                                                                                                                                                                                                                                                                                | 5-32, 16-26                              |
| Armchair Passenger Transport Ltd v Helical Bar Plc [2003] EWHC 367 (QB) .....                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 33-30                                    |
| Armour v Walker (1884) L.R. 25 Ch. D. 673 CA .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 8-37                                     |
| Armstrong v First York Ltd [2005] EWCA Civ 277; [2005] 1 W.L.R. 2751; [2005] C.P. Rep. 25; [2005] R.T.R. 19 .....                                                                                                                                                                                                                                                                                                                                                                                                              | 33-51                                    |
| Armstrong v Hewitt (1817) 4 Price 216 .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 40-41                                    |
| Armstrong v Newcastle upon Tyne NHS Hospital Trust [2005] EWCA Civ 1608; [2006] I.R.L.R. 124 .....                                                                                                                                                                                                                                                                                                                                                                                                                             | 34-29                                    |
| Arnarsson v Iceland (44671/98). <i>See</i> Sigurthor Arnarsson v Iceland                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                          |
| Arnold v Bath and Wells (Bishop) (1829) 5 Bing. 316 .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 32-78                                    |
| Arnold v Cheque Bank; Arnold v City Bank (1875-76) L.R. 1 C.P.D. 578 CPD .....                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 5-18                                     |
| Arnold v National Westminster Bank Plc (No.1) [1991] 2 A.C. 93; [1991] 2 W.L.R. 1177; [1991] 3 All E.R. 41; (1991) 62 P. & C.R. 490; [1991] 2 E.G.L.R. 109; [1991] 30 E.G. 57; [1991] E.G. 49 (C.S.); (1991) 135 S.J. 574 HL .. 43-15, 43-24, 43-31, 43-32, 43-43, 43-44                                                                                                                                                                                                                                                       |                                          |
| Arnott v Hayes (1887) L.R. 36 Ch. D. 731 CA .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 32-108, 32-114                           |
| Arrows Ltd, Re; Bishopsgate Investment Management Ltd, Re; Headington Investments Ltd, Re sub nom. Hamilton v Naviede; Trachtenberg, Ex p. [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 .....                                                                                                                                                                                                                    | 24-90, 25-33                             |
| Arthur JS Hall & Co v Simons; Barratt v Woolf Seddon; Cockbone v Atkinson Dacre & Slack; Harris v Scholfield Roberts & Hill; sub nom. Harris v Scholfield Roberts & Hall Barratt v Ansell (t/a Woolf Seddon) [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 ..... | 43-58, 43-59, 43-60, 43-61, 43-62, 43-79 |
| Article X, Re, 45 T.L.R. 57 .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 43-12                                    |
| Arton (No.2), Re [1896] 1 Q.B. 509 QBD .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 33-76                                    |
| Asbestos Insurance Coverage Cases, Re. <i>See</i> Sedgwick Group Plc v Johns-Manville Fibreboard Corp                                                                                                                                                                                                                                                                                                                                                                                                                          |                                          |
| Asch v Austria (A/203A) (1993) 15 E.H.R.R. 597 ECtHR .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 1-47, 1-77                               |
| Ascot Commodities NV v Northern Pacific Shipping (The Irini A) (No.2); Irini A, The (No.2) [1999] 1 Lloyd's Rep. 189 QBD (Comm Ct) .....                                                                                                                                                                                                                                                                                                                                                                                       | 43-05                                    |
| Ashford v Price (1823) 3 Stark. 185 .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 4-23                                     |
| Ashforth v Redford (1873-74) L.R. 9 C.P. 20 CCP .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 1-42                                     |
| Ashley v Harrison, 170 E.R. 276; (1793) 1 Esp. 48 Assizes .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 7-42                                     |
| Ashling v Boon [1891] 1 Ch. 568 Ch D .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 40-53                                    |

# TABLE OF CASES

|                                                                                                                                                                                                                                                                                                                                                          |                             |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|
| Ashmore v British Coal Corp [1990] 2 Q.B. 338; [1990] 2 W.L.R. 1437; [1990] 2 All E.R. 981; [1990] I.C.R. 485; [1990] I.R.L.R. 283 .....                                                                                                                                                                                                                 | 43–47, 43–60                |
| Ashmore v Corp of Lloyd's [1992] 1 W.L.R. 446; [1992] 2 All E.R. 486; [1992] 2 Lloyd's Rep. 1; (1992) 136 S.J.L.B. 113 HL .....                                                                                                                                                                                                                          | 4–15                        |
| Ashtiani v Kashi [1987] Q.B. 888; [1986] 3 W.L.R. 647; [1986] 2 All E.R. 970; (1986) 83 L.S.G. 3248; (1986) 136 N.L.J. 753; (1985) 130 S.J. 730 CA (Civ Div) .....                                                                                                                                                                                       | 27–05                       |
| Ashton, Re (1891) 64 L.T. 28 .....                                                                                                                                                                                                                                                                                                                       | 38–02                       |
| Ashwell Ex p. Salaman, Re [1912] 1 K.B. 390 KBD .....                                                                                                                                                                                                                                                                                                    | 5–04                        |
| Ashworth Hospital Authority v MGN Ltd; sub nom. Ashworth Security Hospital v MGN Ltd [2002] UKHL 29; [2002] 1 W.L.R. 2033; [2002] 4 All E.R. 193; [2002] C.P.L.R. 712; [2002] E.M.L.R. 36; [2002] H.R.L.R. 41; [2002] U.K.H.R.R. 1263; 12 B.H.R.C. 443; [2003] F.S.R. 17; (2002) 67 B.M.L.R. 175; (2002) 99(30) L.S.G. 37; (2002) 146 S.J.L.B. 168 ..... | 25–40                       |
| Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd [1916] 1 K.B. 822 CA .....                                                                                                                                                                                                                                                                           | 25–31                       |
| Askew v Woodhead, 21 W.R. 573 .....                                                                                                                                                                                                                                                                                                                      | 43–26                       |
| Aslam v Single (1986) 16 Fam. Law 362 CA .....                                                                                                                                                                                                                                                                                                           | 13–15                       |
| Assheton-Smith v Owen (1906) 75 L.J. Ch. 181 .....                                                                                                                                                                                                                                                                                                       | 32–29, 32–40                |
| Assimina Maritime Ltd v Pakistan National Shipping Corp (The Tasman Spirit) [2004] EWHC 3005 (Comm); [2005] 1 All E.R. (Comm) 460; [2005] 1 Lloyd's Rep. 525; [2005] 2 C.L.C. 448 .....                                                                                                                                                                  | 8–20                        |
| Assistant Deputy Coroner for Inner West London v Channel 4 Television Corp [2007] EWHC 2513 (QB); [2008] 1 W.L.R. 945; (2008) 100 B.M.L.R. 44; [2007] Inquest L.R. 239 .....                                                                                                                                                                             | 8–10, 8–14, 8–20            |
| Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich [2003] UKPC 11; [2003] 1 W.L.R. 1041; [2003] 1 All E.R. (Comm) 253; [2003] 2 C.L.C. 340; (2003) 100(11) L.S.G. 31; (2003) 147 S.J.L.B. 148 .....                                                                                                                    | 27–20                       |
| Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 K.B. 223; [1947] 2 All E.R. 680; (1947) 63 T.L.R. 623; (1948) 112 J.P. 55; 45 L.G.R. 635; [1948] L.J.R. 190; (1947) 177 L.T. 641; (1948) 92 S.J. 26 CA .....                                                                                                                         | 19–02                       |
| Assyrian, The (1890) 63 L.T. 91 .....                                                                                                                                                                                                                                                                                                                    | 33–17                       |
| Astro Exito Navegacion SA v Southland Enterprise Co (The Messiniaki Tolmi) (No.2); Messiniaki Tolmi, The (No.2) [1983] 2 A.C. 787; [1983] 3 W.L.R. 130; [1983] 2 All E.R. 725; [1983] Com. L.R. 217; (1983) 80 L.S.G. 3083; (1983) 127 S.J. 461 HL ....                                                                                                  | 40–23                       |
| Astrovlanis Compania Naviera SA v Linard (The Gold Sky) [1972] 2 Lloyd's Rep. 187 QBD (Comm) .....                                                                                                                                                                                                                                                       | 8–24                        |
| Asylum for Idiots v Handysides (1906) 22 T.L.R. 573 .....                                                                                                                                                                                                                                                                                                | 32–108                      |
| Atherfold v Beard (1788) 2 T.R. 610 .....                                                                                                                                                                                                                                                                                                                | 41–20                       |
| Athill, Re; sub nom. Athill v Athill (1880–81) L.R. 16 Ch. D. 211 CA .....                                                                                                                                                                                                                                                                               | 32–52                       |
| Atkinson VT&P Fabrications [2001] T.A.S.S.C. 38 Sup Ct (Tas) .....                                                                                                                                                                                                                                                                                       | 26–16                       |
| Atkinson, In the Goods of (1883) L.R. 8 P.D. 165 PDAD .....                                                                                                                                                                                                                                                                                              | 40–11                       |
| Atlan v United Kingdom (36533/97) (2002) 34 E.H.R.R. 33; [2001] Crim. L.R. 819 ECtHR ...                                                                                                                                                                                                                                                                 | 25–17, 25–18                |
| Atlanta Gas Light Co v Aetna Casualty & Surety Unreported February 7, 1993 .....                                                                                                                                                                                                                                                                         | 8–44, 8–45                  |
| Atos Consulting Ltd v Avis Plc [2007] EWHC 323 (TCC); [2008] Bus. L.R. D20 .....                                                                                                                                                                                                                                                                         | 23–73                       |
| Attlay, Re, 67 L.T. 502 .....                                                                                                                                                                                                                                                                                                                            | 41–40                       |
| Attorney General v Antrobus [1905] 2 Ch. 188 Ch D .....                                                                                                                                                                                                                                                                                                  | 32–93                       |
| Attorney General v Barker, 83 L.T. 245 .....                                                                                                                                                                                                                                                                                                             | 41–65                       |
| Attorney General v Birmingham Tame and Rea Drainage Board (1881) L.R. 17 Ch. D. 685 CA .....                                                                                                                                                                                                                                                             | 43–27                       |
| Attorney General v Bowman (1791) 1 Bos. & P. 532n .....                                                                                                                                                                                                                                                                                                  | 18–25                       |
| Attorney General v Bradlaugh (1885) 1 C. & E. 467; (1884–85) L.R. 14 Q.B.D. 667 CA .....                                                                                                                                                                                                                                                                 | 7–20, 32–57                 |
| Attorney General v Briant; sub nom. Attorney General v Bryant, 153 E.R. 808; (1846) 15 M. & W. 169 Ex Ct .....                                                                                                                                                                                                                                           | 25–06                       |
| Attorney General v Clough [1963] 1 Q.B. 773; [1963] 2 W.L.R. 343; [1963] 1 All E.R. 420; (1963) 107 S.J. 96 QBD .....                                                                                                                                                                                                                                    | 8–14, 23–25                 |
| Attorney General v Emerson (1882–83) L.R. 10 Q.B.D. 191 CA .....                                                                                                                                                                                                                                                                                         | 23–69                       |
| Attorney General v Emerson (John) [1891] A.C. 649 HL .....                                                                                                                                                                                                                                                                                               | 32–26, 32–43, 32–78, 32–119 |
| Attorney General v Good (1825) M'Cle and Yo 286 .....                                                                                                                                                                                                                                                                                                    | 28–22                       |

# TABLE OF CASES

|                                                                                                                                                                                                                                                                                                           |                                   |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------|
| Attorney General v Guardian Newspapers Ltd (No.2). <i>See</i> Attorney General v Observer Ltd                                                                                                                                                                                                             |                                   |
| Attorney General v Hitchcock, 154 E.R. 38; (1847) 1 Ex. 91 Ex Ct .....                                                                                                                                                                                                                                    | 12-46, 12-48, 22-01               |
| Attorney General v Horner (No.2) [1913] 2 Ch. 140 CA .....                                                                                                                                                                                                                                                | 32-28, 32-29, 32-40, 40-41, 41-43 |
| Attorney General v Kohler, 11 E.R. 885; (1861) 9 H.L. Cas. 654 HL .....                                                                                                                                                                                                                                   | 32-14                             |
| Attorney General v Leveller Magazine Ltd; Attorney General v National Union of Journalists; Attorney General v Peace News Ltd [1979] A.C. 440; [1979] 2 W.L.R. 247; [1979] 1 All E.R. 745; (1979) 68 Cr. App. R. 342; [1979] Crim. L.R. 247; (1979) 123 S.J. 129 HL .....                                 | 11-09, 11-10, 11-24               |
| Attorney General v Maurice [1986] 161 C.L.R. 475 .....                                                                                                                                                                                                                                                    | 26-12                             |
| Attorney General v Mayor of Bournemouth [1902] 2 Ch. 714 CA .....                                                                                                                                                                                                                                         | 42-08                             |
| Attorney General v Meyrick (1915) 79 J.P. 515 .....                                                                                                                                                                                                                                                       | 32-93                             |
| Attorney General v Mulholland; Attorney General v Foster [1963] 2 Q.B. 477; [1963] 2 W.L.R. 658; [1963] 1 All E.R. 767; (1963) 107 S.J. 154 CA .....                                                                                                                                                      | 8-14, 25-39                       |
| Attorney General v Nottingham Corp [1904] 1 Ch. 673 Ch D .....                                                                                                                                                                                                                                            | 22-06                             |
| Attorney General v Observer Ltd; Attorney General v Guardian Newspapers Ltd (No.2); Attorney General v Times Newspapers Ltd (No.2) [1990] 1 A.C. 109; [1988] 3 W.L.R. 776; [1988] 3 All E.R. 545; [1989] 2 F.S.R. 181; (1988) 85(42) L.S.G. 45; (1988) 138 N.L.J. Rep. 296; (1988) 132 S.J. 1496 HL ..... | 25-26                             |
| Attorney General v Oldham, cited Burn on Parish Registers, p.209 .....                                                                                                                                                                                                                                    | 32-80                             |
| Attorney General v Punch Ltd; sub nom. Steen v Attorney General [2002] UKHL 50; [2003] 1 A.C. 1046; [2003] 2 W.L.R. 49; [2003] 1 All E.R. 289; [2003] E.M.L.R. 7; [2003] H.R.L.R. 14 .....                                                                                                                | 27-19                             |
| Attorney General v Radloff (1854) 10 Exch. 84 .....                                                                                                                                                                                                                                                       | 18-25                             |
| Attorney General v Scotcher [2005] UKHL 36; [2005] 1 W.L.R. 1867; [2005] 3 All E.R. 1; [2005] 2 Cr. App. R. 35; [2005] U.K.H.R.R. 637; [2005] Crim. L.R. 791; (2005) 155 N.L.J. 828 .....                                                                                                                 | 25-46                             |
| Attorney General v Theakstone (1820) 8 Price 89 .....                                                                                                                                                                                                                                                     | 3-12, 32-60                       |
| Attorney General v Tse Chu-Fai (1998) 153 A.L.R. 128 .....                                                                                                                                                                                                                                                | 3-10                              |
| Attorney General v Warwick, 4 Russ. 222 .....                                                                                                                                                                                                                                                             | 32-101, 32-103                    |
| Attorney General v Wilson (1829) 9 Sim. 526 .....                                                                                                                                                                                                                                                         | 8-09, 8-10                        |
| Attorney General for Gibraltar v Leoni, Crim.App. No.4 of 1998, March 19, 1999 .....                                                                                                                                                                                                                      | 43-69                             |
| Attorney General for the Northern Territory of Australia v Kearney [1985] 158 C.L.R. 500 .....                                                                                                                                                                                                            | 23-14, 26-72                      |
| Attorney General for Trinidad and Tobago v Eriché [1893] A.C. 518 PC (Trinidad and Tobago) .....                                                                                                                                                                                                          | 43-24                             |
| Attorney General of Gibraltar v May [1999] 1 W.L.R. 998 CA (Civ Div) .....                                                                                                                                                                                                                                | 27-23                             |
| Attorney General of Hong Kong v Yip Kai-foon [1988] A.C. 642; [1988] 2 W.L.R. 326; [1988] 1 All E.R. 153; (1988) 86 Cr. App. R. 368; (1988) 85(3) L.S.G. 33; (1988) 132 S.J. 264 PC (HK) .....                                                                                                            | 6-50                              |
| Attorney General of Ontario v Holly Big Canoe [2002] Ont CA Lexis 543 .....                                                                                                                                                                                                                               | 23-29                             |
| Attorney General of the Cayman Islands v Roberts [2002] UKPC 18; [2002] 1 W.L.R. 1842; [2002] 2 Cr. App. R. 28; [2002] Crim. L.R. 968; (2002) 146 S.J.L.B. 93 .....                                                                                                                                       | 3-17, 32-98                       |
| Attorney General of Zambia v Meer Care & Desai (A Firm) [2008] EWCA Civ 1007; [2008] Lloyd's Rep. F.C. 587 .....                                                                                                                                                                                          | 16-14, 16-26                      |
| Attorney General to the Prince of Wales v Collom [1916] 2 K.B. 193 KBD .....                                                                                                                                                                                                                              | 5-09                              |
| Attorney General's Reference (No.3 of 1977), Re [1978] 1 W.L.R. 1123; [1978] 3 All E.R. 1166; (1978) 67 Cr. App. R. 393; (1978) 122 S.J. 641 CA (Crim Div) .....                                                                                                                                          | 33-70                             |
| Attorney General's Reference (No.3 of 1979), Re (1979) 69 Cr. App. R. 411; [1979] Crim. L.R. 786; (1979) 123 S.J. 70 CA (Crim Div) .....                                                                                                                                                                  | 28-40                             |
| Attorney General's Reference (No.2 of 1995) (Unduly Lenient Sentence), Re; sub nom. R. v S (David William) [1996] 1 Cr. App. R. (S.) 274; [1995] Crim. L.R. 835 CA (Crim Div) .....                                                                                                                       | 11-86                             |
| Attorney General's Reference (No.2 of 1999), Re [2000] Q.B. 796; [2000] 3 W.L.R. 195; [2000] 3 All E.R. 182; [2001] B.C.C. 210; [2000] 2 B.C.L.C. 257; [2000] 2 Cr. App. R. 207; [2000] I.R.L.R. 417; [2000] Crim. L.R. 475; (2000) 97(9) L.S.G. 39 CA (Crim Div). .....                                  | 16-07, 38-10                      |

# TABLE OF CASES

|                                                                                                                                                                                                                                                                                                                                                                                                   |                                                       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------|
| Attorney General's Reference (No.3 of 1999), Re; sub nom. R. v B [2001] 2 A.C. 91; [2001] 2 W.L.R. 56; [2001] 1 All E.R. 577; [2001] 1 Cr. App. R. 34; [2001] H.R.L.R. 16; [2000] Po. L.R. 386; [2001] Crim. L.R. 394; (2001) 98(7) L.S.G. 39; (2000) 150 N.L.J. 1889; (2001) 145 S.J.L.B. 8 HL                                                                                                   | 11–30, 39–21                                          |
| Attorney General's Reference (No.2 of 2000) [2002] 1 Cr. App. R. 503                                                                                                                                                                                                                                                                                                                              | 11–74                                                 |
| Attorney General's Reference (No.3 of 2000), Re; R. v Looseley (Grant Spencer) (No.2); sub nom. R. v Loosely (Grant Spencer); R. v G (Entrapment); R. v Loosley (Grant Spencer) (No.2) [2001] UKHL 53; [2001] 1 W.L.R. 2060; [2001] 4 All E.R. 897; [2002] 1 Cr. App. R. 29; [2002] H.R.L.R. 8; [2002] U.K.H.R.R. 333; [2002] Crim. L.R. 301; (2001) 98(45) L.S.G. 25; (2001) 145 S.J.L.B. 245 .. | 1–88, 15–07, 25–38, 36–13, 39–13, 39–17, 39–18, 39–32 |
| Attorney General's Reference (No.7 of 2000), Re; sub nom. R. v P [2001] EWCA Crim 888; [2001] 1 W.L.R. 1879; [2001] 2 Cr. App. R. 19; [2001] H.R.L.R. 41; [2001] B.P.I.R. 953; [2001] Crim. L.R. 736; (2001) 98(22) L.S.G. 35; (2001) 145 S.J.L.B. 109 ....                                                                                                                                       | 24–80, 36–42, 36–43                                   |
| Attorney General's Reference (No.44 of 2000), Re; sub nom. R. v Peverett (Robin) [2001] 1 Cr. App. R. 27; [2001] 1 Cr. App. R. (S.) 132; (2001) 165 J.P. 93; [2001] Crim. L.R. 60 CA (Crim Div)                                                                                                                                                                                                   | 11–23                                                 |
| Attorney General's Reference (No.4 of 2002), Re. <i>See</i> <i>Sheldrake v DPP</i>                                                                                                                                                                                                                                                                                                                |                                                       |
| Attorney General's Reference (No.2 of 2001), Re; sub nom. R. v J (Unreasonable Delay) [2003] UKHL 68; [2004] 2 A.C. 72; [2004] 2 W.L.R. 1; [2004] 1 All E.R. 1049; [2004] 1 Cr. App. R. 25; [2004] H.R.L.R. 16; [2004] U.K.H.R.R. 193; 15 B.H.R.C. 472; [2004] Crim. L.R. 574; (2004) 101(4) L.S.G. 30; (2004) 148 S.J.L.B. 25 HL                                                                 | 1–49                                                  |
| Attorney General's Reference (No.2 of 2002), Re [2002] EWCA Crim 2373; [2003] 1 Cr. App. R. 21; [2003] Crim. L.R. 192                                                                                                                                                                                                                                                                             | 15–05, 33–62, 33–80, 39–27                            |
| Attorney General's Reference (No.5 of 2002), Re; sub nom. Attorney General's Reference (No.5 of 2003), Re; R. v W [2004] UKHL 40; [2005] 1 A.C. 167; [2004] 3 W.L.R. 957; [2004] 4 All E.R. 901; [2005] 1 Cr. App. R. 20; [2004] H.R.L.R. 37; [2005] Crim. L.R. 220; (2004) 101(42) L.S.G. 29; (2004) 148 S.J.L.B. 1215                                                                           | 1–89, 25–52, 39–30                                    |
| Attorney General's Reference (No.1 of 2003) [2003] 2 Cr. App. R. 453                                                                                                                                                                                                                                                                                                                              | 30–08, 31–20, 31–29                                   |
| Attorney General's Reference (No.1 of 2003), Re; sub nom. R. v W [2003] EWCA Crim 1286; [2003] 2 Cr. App. R. 29                                                                                                                                                                                                                                                                                   | 16–25                                                 |
| Attorney General's Reference (No.1 of 2004), Re R. v Edwards (Caroline Patricia); R. v Denton (Errol); R. v Jackson (Ruth); R. v Hendley (Ian); R. v Crowley (Helen) [2004] EWCA Crim 1025; [2004] 1 W.L.R. 2111; [2005] 4 All E.R. 457 (Note); [2004] 2 Cr. App. R. 27; [2004] H.R.L.R. 23; [2004] U.K.H.R.R. 608; [2004] B.P.I.R. 1073; (2004) 101(20) L.S.G. 34; (2004) 148 S.J.L.B. 568 ...   | 1–69, 1–70, 6–33, 6–34, 6–35, 6–36, 6–40, 6–43, 6–44  |
| Attwood v R. (1960) 102 C.L.R. 353 HC (Aus)                                                                                                                                                                                                                                                                                                                                                       | 18–01, 18–04, 28–25                                   |
| Attwood v Small (1838) 6 C. & F. 295                                                                                                                                                                                                                                                                                                                                                              | 9–04                                                  |
| August Leonhardt, The, <i>See</i> <i>K Lokumal &amp; Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The August Leonhardt)</i>                                                                                                                                                                                                                                                                     |                                                       |
| Augustin v Challis (1847) 1 Ex 279                                                                                                                                                                                                                                                                                                                                                                | 41–03, 42–06, 42–10, 42–23                            |
| Augustus Newton and Wife v Sir Cornwallis Ricketts, Bart, 11 E.R. 731; (1861) 9 H.L. Cas. 262 HL                                                                                                                                                                                                                                                                                                  | 33–67                                                 |
| Australia v Verwayen (1990) 95 A.L.R. 321                                                                                                                                                                                                                                                                                                                                                         | 5–06, 5–33, 5–45                                      |
| Australia Environment Protection Authority v Caltex Refining Co Pty Ltd [1993] 178 C.L.R. 477                                                                                                                                                                                                                                                                                                     | 24–74                                                 |
| Australia Farrow Mortgage Services Pty Ltd v Webb [1996] 132 F.L.R. 466                                                                                                                                                                                                                                                                                                                           | 24–04                                                 |
| Australia Welfare v Birton Sands Pty Ltd [1997] 1178 FCA                                                                                                                                                                                                                                                                                                                                          | 27–13                                                 |
| Australia, The v The Nautilus. <i>See</i> Owners of the Australia v Owners of Cargo of the Nautilus                                                                                                                                                                                                                                                                                               |                                                       |
| Australian Communist Party v Commonwealth (1951) 83 C.L.R. 1                                                                                                                                                                                                                                                                                                                                      | 3–21, 3–22                                            |
| Australian Competition and Consumer Commission v Shell Co of Australia Ltd (1999) 161 A.L.R. 686 Fed Ct (Aus)                                                                                                                                                                                                                                                                                     | 8–06, 8–10, 8–12, 8–13                                |
| Australian Competition and Consumer Protection Commission v Cadbury Schweppes Pty Ltd [2009] FCAFC 32                                                                                                                                                                                                                                                                                             | 23–89                                                 |
| Australian Consolidated Press Ltd v Uren (Thomas) [1969] 1 A.C. 590; [1967] 3 W.L.R. 1338; [1967] 3 All E.R. 523; (1967) 111 S.J. 741 PC (Aus)                                                                                                                                                                                                                                                    | 43–32                                                 |

# TABLE OF CASES

|                                                                                                                                                                                                                                                                                                                              |                                                                                           |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------|
| Australian Mining & Smelting Europe Ltd v Commission of the European Communities (155/79); sub nom. AM&S Europe Ltd v Commission of the European Communities (155/79) 1983] Q.B. 878; [1983] 3 W.L.R. 17; [1983] 1 All E.R. 705; [1982] E.C.R. 1575; [1982] 2 C.M.L.R. 264; [1982] F.S.R. 474; (1983) 127 S.J. 410 ECJ ..... | 23-08, 23-26                                                                              |
| Australian Rugby Union Ltd v Hospitality Group Pty Ltd (2000) 173 A.L.J.R. 702 .....                                                                                                                                                                                                                                         | 8-13, 8-14                                                                                |
| Australian Widows Fund Life Assurance Society Ltd v National Mutual Life Association of Australasia Ltd [1914] A.C. 634 PC (Aus) .....                                                                                                                                                                                       | 40-43                                                                                     |
| Auten v Rayner (No.2); Auten v Baker Todman & Co [1960] 1 Q.B. 669; [1960] 2 W.L.R. 562; [1960] 1 All E.R. 692; (1960) 104 S.J. 252 QBD .....                                                                                                                                                                                | 8-22                                                                                      |
| Auty v National Coal Board [1985] 1 W.L.R. 784; [1985] 1 All E.R. 930; (1985) 82 L.S.G. 1782; (1985) 129 S.J. 249 CA (Civ Div) .....                                                                                                                                                                                         | 34-32                                                                                     |
| Averill v United Kingdom (36408/97) (2001) 31 E.H.R.R. 36; 8 B.H.R.C. 430; [2000] Po. L.R. 198; [2000] Crim. L.R. 682 ECtHR .....                                                                                                                                                                                            | 35-11, 36-12                                                                              |
| Aveson v Lord Kinnaird (1805) 6 East 188; 102 E.R. 1258 .....                                                                                                                                                                                                                                                                | 31-29                                                                                     |
| Avon CC v Howlett [1983] 1 W.L.R. 605; [1983] 1 All E.R. 1073; [1983] I.R.L.R. 171; 81 L.G.R. 555; (1983) 133 N.L.J. 377; (1983) 127 S.J. 173 CA (Civ Div) .....                                                                                                                                                             | 5-02, 5-06, 5-30                                                                          |
| Axen v Germany (A/72) (1984) 6 E.H.R.R. 195 ECtHR .....                                                                                                                                                                                                                                                                      | 1-73, 1-74                                                                                |
| Ayers v Hanson (1912) 56 S.J. 735 .....                                                                                                                                                                                                                                                                                      | 3-21                                                                                      |
| Aylesford Peerage, Re (1886) L.R. 11 App. Cas. 1 HL .....                                                                                                                                                                                                                                                                    | 32-21                                                                                     |
| Ayscough v Sheed Thomson & Co (1924) 131 L.T. 610 HL .....                                                                                                                                                                                                                                                                   | 43-06                                                                                     |
| Azzi v Volvo [2006] N.S.W.S.C. 283 .....                                                                                                                                                                                                                                                                                     | 8-06, 8-13                                                                                |
| B (A Child) (Parentage: Knowledge of Proceedings), Re; sub nom. B (A Child) (Adoption Proceedings: Joinder of Presumed Father), Re; AB (Care Proceedings: Service on Husband Ignorant of Child's Existence), Re [2003] EWCA Civ 1842; [2004] 1 F.L.R. 527; [2004] 1 F.C.R. 473; [2004] Fam. Law 178 .....                    | 6-23                                                                                      |
| B (A Child) (Split Hearings: Jurisdiction), Re [2000] 1 W.L.R. 790; [2000] 1 F.L.R. 334; [2000] 1 F.C.R. 297; [2000] Fam. Law 320; (2000) 164 J.P.N. 441; (1999) 96(48) L.S.G. 39; (2000) 144 S.J.L.B. 23 CA (Civ Div) .....                                                                                                 | 33-51                                                                                     |
| B (A Minor) (Contempt of Court: Affidavit Evidence), Re [1996] 1 W.L.R. 627; [1996] 1 F.L.R. 239; [1996] 1 F.C.R. 158; [1996] Fam. Law 147; (1995) 92(44) L.S.G. 30; (1996) 140 S.J.L.B. 12 Fam Div .....                                                                                                                    | 35-18                                                                                     |
| B (Children) (Care Proceedings: Standard of Proof), Re; sub nom. Local Authority X v B [2008] UKHL 35; [2009] 1 A.C. 11; [2008] 3 W.L.R. 1; [2008] 4 All E.R. 1; [2008] 2 F.L.R. 141; [2008] 2 F.C.R. 339; [2008] Fam. Law 619; [2008] Fam. Law 837 HL ...                                                                   | 6-24, 6-55, 6-56                                                                          |
| B&S Displays v Inland Revenue Commissioners; sub nom. B&S Displays v Special Commissioners of Income Tax [1978] S.T.C. 331; [1978] T.R. 61 Ch D .....                                                                                                                                                                        | 38-15                                                                                     |
| B v Attorney General (NEB intervening) (No.1) [1965] P. 278; [1965] 2 W.L.R. 871; [1965] 1 All E.R. 62; (1964) 108 S.J. 941 PDAD .....                                                                                                                                                                                       | 32-14                                                                                     |
| B v Auckland District Law Society; sub nom. Russell McVeagh McKenzie Bartleet & Co v Auckland District Law Society [2003] UKPC 38; [2003] 2 A.C. 736; [2003] 3 W.L.R. 859; [2004] 4 All E.R. 269; (2003) 100(26) L.S.G. 38; (2003) 147 S.J.L.B. 627 ...                                                                      | 23-01, 23-14, 23-20, 23-21, 23-22, 23-29, 23-34, 23-35, 23-99, 26-01, 26-07, 26-24, 26-25 |
| B v Chief Constable of Avon and Somerset [2001] 1 W.L.R. 340; [2001] 1 All E.R. 562; [2000] Po. L.R. 98 DC .....                                                                                                                                                                                                             | 6-56                                                                                      |
| B v Dentists Disciplinary Tribunal [1994] 1 N.Z.L.R. 95 .....                                                                                                                                                                                                                                                                | 8-37                                                                                      |
| B v DPP. See R. (on the application of B) v DPP                                                                                                                                                                                                                                                                              |                                                                                           |
| B v United Kingdom (1984) 38 D.R. 213 .....                                                                                                                                                                                                                                                                                  | 23-07                                                                                     |
| BCCI SA, Re Unreported December 6, 1999 .....                                                                                                                                                                                                                                                                                | 24-67                                                                                     |
| BNP Paribas v Deloitte & Touche LLP [2003] EWHC 2874 (Comm); [2004] 1 Lloyd's Rep. 233; [2004] 1 C.L.C. 530; [2004] B.L.R. 90; (2003) 153 N.L.J. 184 .....                                                                                                                                                                   | 8-20                                                                                      |
| BNP Paribas v Mezzotero [2004] I.R.L.R. 508; (2004) 148 S.J.L.B. 666 EAT .....                                                                                                                                                                                                                                               | 24-45                                                                                     |
| BOC Ltd v Instrument Technology Ltd; sub nom. BOC Ltd v Barlow; Barlow v BOC Ltd [2001] EWCA Civ 854; [2002] Q.B. 537; [2001] 3 W.L.R. 1687 .....                                                                                                                                                                            | 8-52, 39-21                                                                               |
| BP Plc v AON Ltd (No.1) [2005] EWHC 2554 (Comm); [2006] 1 Lloyd's Rep. 549 .....                                                                                                                                                                                                                                             | 2-06                                                                                      |
| BR v Germany Unreported October 23, 1997 .....                                                                                                                                                                                                                                                                               | 23-08                                                                                     |
| BSF Consulting Engineers Ltd v MacDonald Crosbie [2008] All E.R. (D) 171 (Apr) ...                                                                                                                                                                                                                                           | 40-42, 42-05                                                                              |
| Babanaft International Co SA v Bassatne (No.2) Unreported May 23, 1989, CA .....                                                                                                                                                                                                                                             | 8-12                                                                                      |
| Backhouse v Jones (1839) 6 Bing. N.C. 65 .....                                                                                                                                                                                                                                                                               | 7-36                                                                                      |