



OVERSEAS DECISIONS BULLETIN

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Decisions of the Supreme Court of the United Kingdom, the Supreme Court of Canada, the Supreme Court of the United States, the Constitutional Court of South Africa, the Supreme Court of New Zealand and the Hong Kong Court of Final Appeal. Admiralty, arbitration and constitutional decisions of the Court of Appeal of Singapore.

Aboriginal Law

Southwind v Canada

Supreme Court of Canada: [\[2021\] SCC 28](#)

Judgment delivered: 16 July 2021

Coram: Wagner CJ, Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

Catchwords:

Aboriginal law — Fiduciary duty — Reserve land — Remedy — Equitable compensation — Where part of First Nation's reserve land flooded to power hydroelectricity generation without consent of First Nation, without compensation and without lawful authorization — Where claim filed against Canada for breach of fiduciary duty and of obligations under *Indian Act* and applicable treaty — Where trial judge concluded that Canada breached fiduciary duty to First Nation and awarding equitable compensation for loss of flooded land — Whether trial judge erred in assessment of equitable compensation.

Held (8:1): Appeal allowed.

Administrative Law

R (BF (Eritrea)) v Secretary of State for the Home Department
Supreme Court of the United Kingdom: [\[2021\] UKSC 38](#)

Judgment delivered: 30 July 2021

Coram: Lord Reed, Lord Lloyd-Jones, Lord Briggs, Lord Sales and Lord Burnett

Catchwords:

Administrative law – Judicial review – Lawfulness of policy – Where Departmental policy *Enforcement Instructions and Guidance* s 55.9.3.1 provided for criteria for circumstances that asylum seeker would be treated as adult – Where Criterion C provided asylum seeker not be accepted as under 18 years old if physical appearance and demeanour strongly suggests significantly over 18 years and no other credible evidence exists – Where respondent national of Eritrea and asylum seeker claiming to be 16 years old – Where immigration officers considered his physical appearance suggested significantly over 18 years old and applied Criterion C – Where respondent applied for judicial review of Guidance on basis physical appearance and demeanour unreliable indicator of age – Where Upper Tribunal dismissed application and Court of Appeal allowed appeal – Whether Court of Appeal applied correct test of lawfulness of policy – Whether Guidance unlawful because directs officials to act contrary to legal obligations.

Held (5:0): Appeal allowed.

R (A) v Secretary of State for the Home Department
Supreme Court of the United Kingdom: [\[2021\] UKSC 37](#)

Judgment delivered: 30 July 2021

Coram: Lord Reed, Lord Lloyd-Jones, Lord Briggs, Lord Sales and Lord Burnett

Catchwords:

Administrative law – Judicial review – Lawfulness of policy – Human rights – Respect for private life – Where appellant convicted child sex offender – Where Child Sex Offender Disclosure Scheme set up to coordinate approach of police to responding to requests for information from members of public about child sex offenders – Where Secretary issued *Child Sex Offender Disclosure Scheme Guidance*, which includes paragraph reminding police to consider whether person about whom disclosure is made should be given opportunity to make representations – Where appellant applied for judicial review of Guidance – Where Administrative Court held Guidance lawful and Court of Appeal dismissed appeal – Whether Court of Appeal applied correct test of lawfulness of policy – Whether Guidance unlawful because directs officials to act contrary to legal obligations – Whether Guidance unlawful due to conflict

with art 8(2) (respect for private life) of *European Convention on Human Rights* – Whether Guidance unlawful due to inherent unfairness.

Held (5:0): Appeal dismissed.

Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd & Anor

Constitutional Court of South Africa: [\[2021\] ZACC 21](#)

Judgment delivered: 23 July 2021

Coram: Mogoeng CJ, Jafta, Madlanga JJ, Mathopo AJ, Mhlantla, Theron, Tshiqi JJ and Victor AJ

Catchwords:

Administrative law – Judicial review – Unlawfulness – Irrationality – Unfair discrimination – Where first respondent private company contracted to supply water and sanitation on behalf of Ilembe Municipality – Where second respondent sold water to first respondent – Where, until 2013, first respondent enjoyed annual tariff increases equivalent to those imposed on second respondent's other customers, who were municipalities that supplied water directly – Where, in 2014, second respondent decided to increase tariff significantly more for first respondent compared to other municipalities – Where second respondent applied to Minister to approve tariff increases and Minister approved – Where first respondent challenged decisions made by second respondent and Minister as unlawful, irrational and unfairly discriminatory – Where High Court held first respondent unfairly discriminated against as corporation despite providing Ilembe Municipality's constitutional and statutory obligations and therefore decisions irrational – Where Supreme Court of Appeal dismissed Minister and second respondent's appeal – Whether second respondent or Minister's decision invalid.

Held (7:1): Leave to appeal granted, Minister's appeal dismissed, second respondent's cross-appeal allowed.

Public Protector & Ors v President of the Republic of South Africa & Ors

Constitutional Court of South Africa: [\[2021\] ZACC 19](#)

Judgment delivered: 1 July 2021

Coram: Mogoeng CJ, Jafta, Madlanga JJ, Mathopo AJ, Mhlantla, Theron, Tshiqi JJ and Victor AJ

Catchwords:

Administrative law – Judicial review – Unlawfulness – Irrationality – Procedural fairness – Where first appellant decided to investigate and

report on CR17 campaign for African National Congress leadership – Where certain payments made to first respondent's son were subject to complaints regarding breach of *Members' Ethics Act* and *Executive Ethics Code* – Where first appellant conducted investigation and concluded first defendant "wilfully" misled Parliament and breached Ethics Act and Code – Where first respondent applied to review and set aside first appellant's decision to investigate and report on basis first appellant made error of law – Where High Court set aside decision and findings of first appellant – Whether first appellant erred in interpreting "wilfully" to mean "deliberately or inadvertently" – Whether first appellant's findings irrational – Whether first appellant's investigation breached procedural fairness.

Held (7:1): Appeal dismissed.

Constitutional Law

Qwelane v South African Human Rights Commission & Anor
Constitutional Court of South Africa: [\[2021\] ZACC 22](#)

Judgment delivered: 20 July 2021

Coram: Khampepe, Madlanga, Majiedt JJ, Mathopo AJ, Mhlantla, Theron, Tshiqi JJ and Victor AJ

Catchwords:

Constitutional law – Right to free expression – Vagueness – Where applicant published article expressing offensive views about LGBT people – Where South African Human Rights Commission received complaints of hate speech in relation to article and referred complaints to Equality Court – Where, in response, applicant instituted constitutional challenge to s 10(1) of *Equality Act* on basis unjustifiably limits right to free expression or impermissibly vague – Where High Court dismissed applicant's challenge and found applicant engaged in hate speech – Where Supreme Court of Appeal substantially allowed appeal – Whether s 10(1) unjustifiably limits right to free expression – Whether s 10(1) impermissibly vague – Whether applicant engaged in hate speech.

Held (8:0): Declaration of constitutional invalidity confirmed in part; leave to appeal granted, appeal allowed.

Brnovich & Ors v Democratic National Committee & Ors; Arizona Republican Part & Ors v Democratic National Committee & Ors
Supreme Court of the United States: [Docket No. 19-1257; 19-1258](#)

Judgment delivered: 1 July 2021

Coram: Roberts CJ, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh and Barrett JJ

Catchwords:

Constitutional law – Fifteenth Amendment – Voting Rights – Racial discrimination – Where Arizona law provided ballot cast in precinct by person registered in different precinct not counted – Where Arizona law provided crime for any person other than postal worker, election official, or voter’s caregiver, family or household member to collect mail ballot – Where respondents allege both restrictions have discriminatory effects on Indian, Hispanic and African-American citizens in violation of §2 of *Voting Rights Act of 1965* and Fifteenth Amendment right to vote not denied by race – Where District Court rejected claims and Ninth Circuit reversed – Whether voting restrictions racially discriminatory and violate *Voting Rights Act* or Fifteenth Amendment.

Held (6:3): Reversed and remanded.

Americans for Prosperity Foundation v Bonta; Thomas More Law Center v Bonta

Supreme Court of the United States: [Docket No. 19-251; 19-255](#)

Judgment delivered: 1 July 2021

Coram: Roberts CJ, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh and Barrett JJ

Catchwords:

Constitutional law – First Amendment – Freedom of association – Where petitioners charitable organisations registered in California – Where condition of registration must disclose identities of major donors – Where petitioners refused to disclose and respondent threatened suspension of registration and fines for non-compliance – Where petitioners challenged constitutionality of disclosure requirement on basis violated First Amendment freedom of association – Where District Court held disclosure burdened freedom of information and Ninth Circuit allowed appeal by respondent – Whether disclosure requirement breaches freedom of association in First Amendment.

Held (6:3): Reversed and remanded.

Contracts

Pakistan International Airline Corporation v Times Travel (UK) Ltd

Supreme Court of the United Kingdom: [\[2021\] UKSC 40](#)

Judgment delivered: 18 August 2021

Coram: Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Kitchin and Lord Burrows

Catchwords:

Contracts – Rescission – Lawful act economic duress – Where appellant travel agent business consisted almost exclusively of selling plane tickets operated by respondent – Where dispute arose when certain travel agents, including appellant, alleged respondent withheld commission payments – Where travel agents brought claim to recover commission, but appellant did not join due to pressure from respondent – Where respondent lawfully gave notice of termination of agency contract with appellant and offered new contract, which included waiver by appellant of claims of unpaid commission – Where appellant agreed but subsequently brought claim for unpaid commission, arguing recession based on lawful act economic duress – Where High Court allowed claim but found respondent genuinely believed commission not due – Where Court of Appeal allowed respondent’s appeal as respondent not acted in bad faith – Whether party can rescind contract on basis of lawful act economic duress – Whether respondent’s acts constituted lawful act economic duress.

Held (5:0): Appeal dismissed.

X v Kuoni Travel Ltd

Supreme Court of the United Kingdom: [\[2021\] UKSC 34](#)

Judgment delivered: 30 July 2021

Coram: Lord Hodge, Lord Lloyd-Jones, Lady Arden and Lord Kitchin

Catchwords:

Contracts – Breach of contract – Package holiday contracts – Where appellant contracted with respondent for package holiday, including accommodation at hotel – Where contract governed by *EU Directive 90/314/EEC on package travel, package holidays and package tours* – Where, during holiday, appellant sexually assaulted by hotel employee – Where appellant sued respondent for breach of contract and for breach of obligations under Directive – Where High Court dismissed claim on basis art 5(2) of Directive provides defence to claim if sexual assault events which, even with all due care, respondent could not have foreseen or forestalled – Where Court of Appeal dismissed appeal – Where, on appeal, Supreme Court referred question to EU Court of Justice – Where Court of Justice in *X v Kuoni Travel Ltd (Case C-578/19)* decided art 5(2) does not apply where act result of employees of suppliers of services – Whether respondent liable to appellant for breach of contract and breach of Directive.

Held (4:0): Appeal allowed.

Corner Brook (City) v Bailey

Supreme Court of Canada: [\[2021\] SCC 29](#)

Judgment delivered: 23 July 2021

Coram: Wagner CJ, Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

Catchwords:

Contracts — Interpretation — Releases — Scope of release — Where city employee struck by car — Where driver sued city — Where driver and city entered into release agreement to settle action — Where driver subsequently brought third party claim against city in separate action by employee against her — Where city applied for summary trial on basis that third party claim barred by release agreement — Where application judge stayed claim — Where Court of Appeal reinstated claim — Whether special interpretive rule applies to releases — Whether application judge made reviewable error in interpretation of release.

Held (9:0): Appeal allowed.

Triple Point Technology, Inc v PTT Public Company Ltd

Supreme Court of the United Kingdom: [\[2021\] UKSC 29](#)

Judgment delivered: 16 July 2021

Coram: Lord Hodge, Lady Arden, Lord Sales, Lord Leggatt, Lord Burrows

Catchwords:

Contracts – Breach of contract – Termination – Liquidated damages – Where appellant contracted with respondent to build software, payable in 9 instalments by reference to milestones – Where contract provided for liquidated damages for delay, cap on damages recoverable and exception to cap for negligence – Where respondent completed first two milestones late and appellant terminated contract – Where respondent claimed against appellant to recover outstanding invoices and appellant counter-claimed for damages for breach and liquidated damages for delay – Where primary judge dismissed respondent claim and allowed appellant’s claim – Where Court of Appeal set aside primary judge’s award of liquidated damages, held all damages subject to cap and held exception for negligence did not apply to breach of contractual obligation to exercise care – Whether liquidated damages payable under contract in respect of work not completed before contract termination – Whether contractual cap on damages applied to liquidated damages – Whether exception to cap for negligence means only tort or includes breach of contractual duty.

Held (3:2): Appeal allowed in part.

Bathurst Resources Ltd & Anor v L & M Coal Holdings Ltd
Supreme Court of New Zealand: [\[2021\] NZSC 85](#)

Judgment delivered: 14 July 2021

Coram: Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ

Catchwords:

Contracts – Interpretation – Implication of terms – Admissibility of extrinsic evidence – Evidence of pre-contractual negotiations – Where first appellant agreed to purchase coal exploration rights and mining applications from respondent, structured as purchase of all shares in second appellant – Where purchase price included two performance payments payable when certain milestones achieved relating to amount of coal “shipped” from permit area – Where parties also executed deed obliging first appellant to pay royalties to respondent – Where, in 2012, parties executed deed varying purchase agreement, such that first appellant entitled to delay performance payments when due if royalty payments continued to be made under royalty deed – Where, due to economic developments, first appellant suspended mining operations and stopped paying royalties because no longer extracting coal – Where respondent claimed first performance payment – Where High Court allowed claim and Court of Appeal dismissed appeal – Whether “shipped” in contract means literally “carriage by ship” or generic meaning “transported” – Whether, in light of deferral clause, performance payment triggered when no royalties are paid at all, or merely when royalties are not paid when royalty deed required them.

Held (3:2): Appeal allowed.

Corporations

Canada v Canada North Group Inc
Supreme Court of Canada: [\[2021\] SCC 30](#)

Judgment delivered: 28 July 2021

Coram: Wagner CJ, Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

Catchwords:

Corporations – bankruptcy and insolvency — Priority — Source deductions — Priming charges — Where employee source deductions not remitted to

Crown by companies in receivership — Where judge supervising restructuring proceedings under *Companies' Creditors Arrangement Act* ordered priming charges over debtor companies' assets in favour of interim lender, monitor and directors — Where order gave priority to priming charges over claims of secured creditors and providing that they are not to be limited or impaired in any way by provisions of any federal or provincial statute — Where property of debtor companies subject to deemed trust in favour of Crown for unremitted source deductions under *Income Tax Act* — Whether court has authority to rank priming charges ahead of Crown's deemed trust for unremitted source deductions — *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 227(4.1) — *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, ss 11, 11.2, 11.51, 11.52.

Held (5:4): Appeal dismissed.

Courts

FMV v TZB

Supreme Court of New Zealand: [\[2021\] NZSC 102v](#)

Judgment delivered: 20 August 2021

Coram: Winkelmann CJ, William Young, Glazebrook, O'Regan and Williams JJ

Catchwords:

Courts – Jurisdiction – High Court of New Zealand – Employment Relations Authority – Where s 161(1) of *Employment Relations Act 2000* provided Employment Relations Authority has exclusive jurisdiction over “employment relationship problems” – Where s 161(1)(r) provided Authority has exclusive jurisdiction over “any other action arising from or related to employment relationship other than action founded on tort” – Where appellant filed proceedings against respondent in High Court on basis of tort for breach of duty to create safe work environment – Where appellant also filed proceedings in Authority for unjust dismissal and disadvantage – Where Authority stayed unjust dismissal proceedings because appellant could not demonstrate capacity to prosecute claim – Where respondent applied to strike-out High Court tort proceedings on basis Authority had exclusive jurisdiction – Where High Court granted strike-out and Court of Appeal upheld decision – Whether High Court has jurisdiction to determine tort claims arising from employment relationship.

Held (4:1): Appeal dismissed.

In the matter of T (a child)

Supreme Court of the United Kingdom: [\[2021\] UKSC 35](#)

Judgment delivered: 23 July 2021

Coram: Lady Black, Lord Lloyd-Jones, Lady Arden, Lord Hamblen, Lord Stephens

Catchwords:

Courts – Inherent jurisdiction – Deprivation of child’s liberty – Where borough council has duty to provide child in care with secure accommodation but insufficient places in registered children’s homes – Where borough council applied for orders under High Court’s inherent jurisdiction to authorise placement of child in alternative secure accommodation involving her being deprived of liberty – Where child submitted she consented to restrictions and therefore orders unnecessary – Where High Court did not consider consent valid and made orders sought – Where Court of Appeals dismissed appeal – Whether exercise of inherent jurisdiction to authorise child’s placement in unregistered secure accommodation permissible – If so, whether child’s consent relevant to determination.

Held (5:0): Appeal dismissed.

Criminal Law

HKSAR v Liang Yaoqiang

Hong Kong Court of Final Appeal: [\[2021\] HKCFA 26](#)

Judgment delivered: 21 July 2021

Coram: Cheung CJ, Ribeiro, Fok PJJ, Tang and French NPJJ

Catchwords:

Criminal law – Retrial – Court of Appeal discretion – Where appellant admitted killing cohabitee – Where, for the same event, appellant tried for murder and convicted three times, due to Court of Appeal quashing conviction and ordering re-trial twice – Where appellant appealed latest conviction and Court of Appeal quashed conviction and ordered third re-trial on basis trial judge did not direct jury as to availability of defence provocation that would reduce conviction to manslaughter – Where appellant already remanded in custody equivalent to sentence of 27 years, beyond upper limit of usual sentence for manslaughter – Whether Court of Appeal’s discretion in ordering third re-trial miscarried.

Held (5:0): Appeal dismissed.

HKSAR v Leung Chung Hang Sixtus

Hong Kong Court of Final Appeal: [\[2021\] HKCFA 24](#)

Judgment delivered: 16 July 2021

Coram: Cheung CJ, Ribeiro, Fok PJJ, Stock and French NPJJ

Catchwords:

Criminal law – Mental element – Presumption of mental element – Unlawful assembly – Where appellant charged with unlawful assembly under s 18(1) of *Public Order Ordinance* (Cap. 245) – Where s 18(1) provided unlawful if three or more people either “intend” to cause any person to reasonably fear they will commit breach of peace, or “likely” to cause any person to reasonably fear they will commit breach of peace – Where Court of First Instance held not necessary to establish any mental element in respect of “likely” limb – Whether presumption of mental element arises where statutory offence silent – Whether “likely” limb of unlawful assembly offence requires proof of mental element.

Held (5:0): Appeal dismissed.

Human Rights

Royal Mail Group Ltd v Efobi

Supreme Court of the United Kingdom: [\[2021\] UKSC 33](#)

Judgment delivered: 23 July 2021

Coram: Lord Hodge, Lord Briggs, Lady Arden, Lord Hamblen, Lord Leggatt

Catchwords:

Human rights – Discrimination – Racial discrimination – Burden of proof – Where appellant born in Nigeria and identifies as black – Where appellant worked as postman for respondent and unapplied unsuccessfully for thirty managerial or technical roles with respondent over four years – Where appellant claimed rejection of applications result of racial discrimination pursuant to *Race Relations Act 1976* – Where respondent did not call as witnesses individuals who actually decided to reject appellant’s job applications, instead calling witnesses who were familiar with respondent’s recruitment process generally – Where Employment Tribunal dismissed claims and appeal to Employment Appeal Tribunal succeeded on basis Employment Tribunal made error of law – Where Court of Appeal allowed respondent’s appeal – Whether Employment Tribunal applied correct test on which party bears burden of proving discrimination has or has not occurred – Whether Employment Tribunal entitled to draw adverse inference based on respondent not calling witnesses who actually dealt with appellant.

Held (5:0): Appeal dismissed.

Sanambar v Secretary of State for the Home Department
Supreme Court of the United Kingdom: [\[2021\] UKSC 30](#)

Judgment delivered: 16 July 2021

Coram: Lord Reed, Lord Hodge, Lord Sales, Lord Stephens and Sir Declan Morgan

Catchwords:

Human rights – Respect for private and family life – Immigration – Deportation – Where appellant national of Iran arrived in UK in 2005 age 10 years – Where, between 2009 to 2013, appellant convicted of various violent crimes – Where respondent decided appellant’s deportation conducive to public good and made deportation order – Where appellant appealed and Upper Tribunal dismissed appeal – Where Upper Tribunal held appellant had not established “very significant obstacles” to integration in Iran if deported, as required by s 117C(4) of *Immigration and Asylum Act 2002* – Where Court of Appeal dismissed appeal – Whether Upper Tribunal correctly approached balancing exercise required by art 8 (respect for private and family life) of *European Convention on Human Rights* in interpretation and application of s 117C(4).

Held (5:0): Appeal dismissed.

R (AB) v Secretary of State for Justice
Supreme Court of the United Kingdom: [\[2021\] UKSC 28](#)

Judgment delivered: 9 July 2021

Coram: Lord Reed, Lord Lloyd-Jones, Lord Sales, Lord Hamblen and Lord Stephens

Catchwords:

Human rights – Inhuman and degrading treatment – Where, aged 15, appellant pleaded guilty to indecent exposure and sexual assault and sentenced to custody – Where appellant held in solitary confinement for safety of prison officers and own safety – Where appellant claimed solitary confinement violates art 3 (freedom from inhuman and degrading treatment) of *European Convention on Human Rights* – Where High Court dismissed application and Court of Appeal dismissed appeal – Whether solitary confinement of minors automatically violates art 3 – Alternatively, whether solitary confinement justified only in exceptional circumstances.

Held (5:0): Appeal dismissed.

A and B v Criminal Injuries Compensation Authority & Anor
Supreme Court of the United Kingdom: [\[2021\] UKSC 27](#)

Judgment delivered: 9 July 2021

Coram: Lord Lloyd-Jones, Lady Arden, Lord Hamblen, Lord Burrows and Lord Stephens

Catchwords:

Human rights – Criminal injuries compensation – Freedom from slavery – Non-discrimination – Where Criminal Injuries Compensation Scheme provides compensation may be awarded to person if injured as direct victim of violent crime – Where Scheme rules exclude compensation if applicant has unspent conviction resulting in custodial sentence – Where appellants each convicted of crime in Lithuania and sentenced to custodial sentence – Where appellants trafficked from Lithuania to UK and subjected to labour exploitation – Where appellants applied for compensation under Scheme after traffickers convicted – Where applications refused because of exclusionary rule – Where appellants allege exclusionary rule violates art 14 (non-discrimination) of *European Convention on Human Rights* in conjunction with art 4 (freedom from slavery) – Where High Court dismissed claim and Court of Appeal dismissed appeal – Whether exclusionary rule breaches art 14 and 4 – If so, whether breach proportionate and justified.

Held (5:0): Appeal dismissed.

R (SC, CB and 8 Children) v Secretary of State for Work and Pensions & Ors

Supreme Court of the United Kingdom: [\[2021\] UKSC 26](#)

Judgment delivered: 9 July 2021

Coram: Lord Reed, Lord Hodge, Lady Black, Lord Lloyd-Jones, Lord Kitchin, Lord Sales and Lord Stephens

Catchwords:

Human rights – Respect for private and family life – Non-discrimination – Where ss 9(3A) and 9(3B) of *Tax Credits Act 2002* provides for tax credits intended to support families with children but limits amount payable to two children unless exception applies – Where appellants allege two child limit violates art 8 (respect for private and family life) and art 14 (non-discrimination) of *European Convention on Human Rights* – Where High Court dismissed claim and Court of Appeals dismissed appeal – Whether two child limit breaches art 8 or 14 – If so, whether breach proportionate and justified.

Held (7:0): Appeal dismissed.

Industrial Law

Maroveke v Talane NO & Ors

Constitutional Court of South Africa: [\[2021\] ZACC 20](#)

Judgment delivered: 6 July 2021

Coram: Mogoeng CJ, Jafta, Khampepe, Madlanga, Majiedt, Mhlantla JJ, Pillay AJ, Theron and Tshiqi JJ

Catchwords:

Industrial law – Unfair dismissal – Quantification of back pay – Where applicant employee involved in accident while driving vehicle in mine – Where third respondent dismissed applicant on ground of misconduct – Where applicant found alternative employment at lesser pay two months after dismissal – Where applicant lodged unfair dismissal claim to Commission for Conciliation, Mediation and Arbitration – Where Commissioner determined applicant acted reasonably and dismissal unfair and awarded 12 months back pay – Where third respondent appealed to Labour Court on basis award gave applicant windfall – Where Labour Court allowed appeal and substituted award of 2 months back pay – Where Labour Appeal Court dismissed appeal – Where, on appeal to Constitutional Court, discovered discrepancy whereby Labour Court mistakenly recorded applicant’s salary lower than actual salary – Whether Commissioner applied correct test in quantification of back pay – Whether Labour Court misdirected itself by relying on incorrect facts.

Held (9:0): Leave to appeal granted; appeal allowed in part.

Intellectual Property

York University v Canadian Copyright Licensing Agency

Supreme Court of Canada: [\[2021\] SCC 32](#)

Judgment delivered: 30 July 2021

Coram: Wagner CJ, Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

Catchwords:

Intellectual property — Copyright — Tariffs — Enforcement — Fair dealing — Declaratory relief — Where collective society obtained certification of interim tariff for post-secondary educational institutions — Where university refused to pay royalties under interim tariff for its copying

activities — Where collective society brought enforcement action — Where university brought counterclaim seeking declaration that copying conducted within its fair dealing guidelines protected by fair dealing rights — Whether collective society can enforce royalty payments set out in tariff against user who chooses not to be bound by licence on the approved terms — Whether declaratory relief sought by university should be granted — *Copyright Act*, RSC 1985, c C-42, ss. 29, 68.2(1).

Held (9:0): Appeals dismissed.

Legal Profession

Harcus Sinclair LLP & Anor v Your Lawyers Ltd
Supreme Court of the United Kingdom: [\[2021\] UKSC 32](#)

Judgment delivered: 23 July 2021

Coram: Lord Lloyd-Jones, Lord Briggs, Lady Arden, Lord Hamblen and Lord Burrows

Catchwords:

Legal profession – Inherent supervisory jurisdiction – Solicitor’s undertakings – Where appellant intended to collaborate with respondent in respect of potential group litigation order in certain litigation – Where respondent signed non-disclosure agreement, including non-compete clause where respondent agreed not to accept instructions or act on behalf of any other group of claimants in relation to same litigation – Where respondent recruited claimants for own group action and agreed to collaborate with separate law firm – Where appellants sought injunction based on non-compete clause – Where High Court granted injunction and Court of Appeal allowed respondent’s appeal – Whether non-complete clause solicitor’s undertaking – If so, whether High Court has inherent supervisory jurisdiction – If so, whether undertaking unenforceable due to public policy under doctrine of restraint of trade.

Contracts – Unenforceability – Restraint of trade – Whether non-compete clause unenforceable due to restraint of trade.

Held (5:0): Appeal allowed.

Practice and Procedure

CPRE Kent v Secretary of State for Communities and Local Government
Supreme Court of the United Kingdom: [\[2021\] UKSC 36](#)

Judgment delivered: 30 July 2021

Coram: Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Leggatt, Lord Burrows

Catchwords:

Practice and procedure – Costs – Statutory review – Where appellants filed claim for statutory review challenging adoption of policy allowing development at particular site – Where appellant served claim to Secretary as first defendant, local council as second defendant and developer as interested party – Where judge refused permission for appellant’s claim – Where judge made costs order in favour of each defendant and interested party – Where Court of Appeal dismissed appeal on costs – Whether claimant in statutory review unsuccessful at permission stage liable for costs of multiple parties, including interest parties.

Held (5:0): Appeal dismissed.

Grant Thornton LLP v New Brunswick

Supreme Court of Canada: [\[2021\] SCC 31](#)

Judgment delivered: 29 July 2021

Coram: Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

Catchwords:

Practice and procedure – Limitation of actions — Discoverability — Requisite degree of knowledge to discover claim — Negligence — Where province delivered loan guarantees to company based on auditor’s report — Where company ran out of working capital months after receiving loan from bank — Where province paid out guarantees — Where province commenced negligence claim against auditor — Where auditor sought summary judgment on basis that claim commenced after two-year statutory limitation period — Whether correct standard applied in determining whether plaintiff has requisite degree of knowledge to discover claim — Whether province discovered negligence claim against auditor — Whether claim statute-barred — *Limitation of Actions Act*, SNB 2009, c L-8.5, s 5(1)(a), (2).

Held (7:0): Appeal allowed.

Taxation

Tinkler v Commissioners for Her Majesty’s Revenue and Customs

Supreme Court of the United Kingdom: [\[2021\] UKSC 39](#)

Judgment delivered: 23 July 2021

Coram: Lord Hodge, Lord Briggs, Lady Arden, Lord Burrows and Lady Rose

Catchwords:

Taxation – Estoppel by convention – Where, on 1 July 2005, appellant sent notice of enquiry to wrong address – Where appellant also sent copy of notice to respondent’s tax accountants – Where tax accountants responded to notice and confirmed valid tax enquiry opened – Where, on 30 August 2012, appellants issued closure notice purporting to amend tax return and disallow certain losses claimed – Whether respondent argued closure notice invalid because initial notice of enquiry sent to wrong address – Where appellants argued respondent estopped from denying validity on basis of wrong address – Where Court of Appeal found for respondent – Whether respondent estopped from denying validity of enquiry on basis of wrong address by doctrine of estoppel by convention.

Held (5:0): Appeal allowed.

Test Claimants in the Franked Investment Income Group Litigation & Ors v Commissioners for Her Majesty’s Revenue and Customs
Supreme Court of the United Kingdom: [\[2021\] UKSC 31](#)

Judgment delivered: 23 July 2021

Coram: Lord Reed, Lord Hodge, Lord Briggs, Lord Sales and Lord Hamblen

Catchwords:

Taxation – Franked investment income – Differential tax treatment – European Union law – Where matter arose in context of long-running proceedings – Where original claim provisions of *Income and Corporation Taxes Act 1988* relating to taxation of franked foreign investment income breached European Union treaty provisions – Where current matter determination of seven disparate issues – Whether (1) Commissioners barred from contesting award of compound interest for tax paid prematurely – Whether (2) claimants entitled to recover compound interest for tax paid prematurely – Whether (3) remedy for breach of EU law appropriate in respect of set off – Whether (4) Commissioners enriched by unlawful levying of taxes – Whether (5) relevant that claimants had non-UK residential parent receiving double taxation credits – Whether (6) impugned provisions permitted by art 64(1) of *Treaty on the Functioning of the European Union* – Whether (7) unlawful tax paid considered surrendered.

Held (5:0): Commissioners’ appeal allowed on issues 1 and 2, and appeal dismissed on issue 4. Claimants’ appeal allowed on issues 3, 5 and 6, and appeal dismissed on issue 7.

R (Haworth) v Commissioners for Her Majesty's Revenue and Customs
Supreme Court of the United Kingdom: [\[2021\] UKSC 25](#)

Judgment delivered: 2 July 2021

Coram: Lord Briggs, Lady Arden, Lord Leggatt, Lord Stephens and Lady Rose

Catchwords:

Taxation – Tax advantage – Follower notice regime – Where respondent entered into tax arrangements to minimise tax – Where appellant issued follower notice, pursuant to Part 4 of *Finance Act 2014*, which applies when tax advantage claimed by taxpayer depends on interpretation of relevant statute and court has already decided interpretation is incorrect – Where s 205(3)(b) of *Finance Act* provides that notice can only be issued if appellant satisfied principles in earlier judgment “would” if applied to respondent’s arrangements deny asserted advantage – Where appellant considered decision in *Smallwood v Revenue and Customs Commissioners* [2010] EWCA Civ 778 likely to apply to respondent’s arrangements – Where appellant applied for judicial review of notice and High Court dismissed application – Where Court of Appeal allowed appeal – Whether “would” in s 205(3)(b) means principles in earlier decision *will* deny advantage, or merely *more likely than not* to deny advantage.

Held (5:0): Appeal dismissed.

Torts

BE on behalf of JE v Member of the Executive Council for Social Development, Western Cape

Constitutional Court of South Africa: [\[2021\] ZACC 23](#)

Judgment delivered: 27 August 2021

Coram: Mogoeng CJ, Jafta, Khampepe, Madlanga, Majiedt, Mhlantla JJ, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Catchwords:

Torts – Delicts – Negligence – Duty of care – Where applicant suffered injury at school when top beam of swing collapsed on top of her – Where applicant sued respondent Minister for damages arising from incident – Where High Court upheld claim against Minister and Supreme Court of Appeal allowed Minister’s appeal – Whether Minister owed duty to take reasonable steps to ensure safety of equipment at schools.

Held (10:0): Leave to appeal granted’ appeal dismissed.

Secretary of State for Health & Anor v Servier Laboratories Ltd & Ors
Supreme Court of the United Kingdom: [\[2021\] UKSC 24](#)

Judgment delivered: 2 July 2021

Coram: Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Briggs, Lord Kitchin, Lord Sales and Lord Hamblen

Catchwords:

Torts – Causing loss by unlawful means – Dealing requirement – Where respondent granted patent by European Patent Office (EPO) – Where challenge to patent upheld in UK Court of Appeal and EPO Technical Board of Appeal revoked patent – Where appellants alleged respondent practised deceit on EPO and courts (third parties) with intention of profiting at expense of appellants by obtaining and defending patent while knowing or reckless as to novelty of patent subject – Where High Court struck out claim on basis unlawful means tort requires impugned act affected third party's freedom to deal with appellant – Where Court of Appeal dismissed appellant's appeal – Whether necessary element of unlawful means tort is unlawful means affect third party's freedom to deal with claimant.

Held (7:0): Appeal dismissed.