



OVERSEAS DECISIONS BULLETIN

Produced by the Legal Research Officer,
High Court of Australia Library

Volume 16 Number 2 (1 March – 30 April 2019)

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.

Civil Procedure

Steenkamp & Ors v Edcon Limited

Constitutional Court of South Africa: [\[2019\] ZACC 17](#)

Judgment delivered: 30 April 2019

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe and Mhlantla JJ, Petse AJ and Theron J

Catchwords:

Civil procedure – Extension of time – Where respondent retrenched approximately 3000 employees for operational requirements – Where employees approached Labour Court relying on cause of action grounded in common law seeking order that dismissals invalid – Where Constitutional Court overturned basis for common law cause of action – Where employees brought application in terms of s 189A(13) of *Labour Relations Act* challenging procedural fairness of dismissals and seeking compensation for unfair dismissal – Where application was brought out of time – Whether condonation should be granted because employees' reliance on common law cause of action had been reasonable and competent at time or refused in light of lengthy delay and urgent and expeditious nature of s 189A applications and its remedies – Whether compensation remedy under s 189A(3)(d) is self-standing remedy – Whether overturned legal strategy alone sufficient to show good cause for granting condonation.

Held (10:0): Appeal dismissed; no order as to costs.

Lamps Plus Inc v Varela

United States Supreme Court: [Docket 17-988](#)

Judgment delivered: 24 April 2019

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

Catchwords:

Civil procedure – Arbitration – Class arbitration – Where hacker tricked employee of petitioner employer into disclosing tax information of about 1,300 company employees – Where fraudulent federal income tax return filed in name of respondent Frank Varela, an employee – Where Varela filed putative class action against employer on behalf of employees whose information had been compromised – Where employer sought to compel arbitration by relying on arbitration agreement in Varela’s employment contract on an individual rather than a classwide basis and to dismiss suit – Whether ambiguous agreement can provide necessary contractual basis for concluding that parties agreed to submit to class arbitration under *Federal Arbitration Act*.

Held (5:4): Reversed and remanded.

Spilhaus Property Holdings (Pty) Limited & Ors v MTN & Anor

Constitutional Court of South Africa: [\[2019\] ZACC 16](#)

Judgment delivered: 24 April 2019

Coram: Cameron, Froneman and Jafta JJ, Ledwaba AJ, Madlanga and Mhlantla JJ, Nicholls AJ and Theron J

Catchwords:

Civil procedure – Standing – Body corporate – Where second respondent (“Alphen”) sectional title unit owner of property divided into precincts – Where Alphen entered into lease agreement with Vodacom (Pty) Limited and MTN to install 2G network antenna on rooftop – Where subsequently consent of trustees of residential precinct was sought and obtained for upgrade of network to 3G – Where new cell phone mast was installed on rooftop – Where MTN improved base station equipment without authorisation of City of Cape Town – Where City noticed illegal structure and called upon Alphen to apply for approval or face prosecution – Where residential precinct trustees withdrew consent to upgrade – Where applicants are individual owners of units in residential precinct seeking to have MTN ordered to remove new cell phone mast – Where MTN challenged standing of applicants contending only body corporate has

requisite standing to institute proceedings in relation to common property in terms of s 41 of *Sectional Titles Act* – Whether object of s 41 is to determine legal standing of individual owners – Whether applicants’ standing flows from fact that conduct complained of prohibited in their interests.

Held (8:0): Appeal upheld.

Mark Robert Sandman v Colin Charles McKay, Roger David Cann and David John Clark (as partners of Wilson McKay)

New Zealand Supreme Court: [\[2019\] NZSC 41](#)

Judgment delivered: 16 April 2019

Coram: Elias CJ, Glazebrook, O’Regan, Ellen France and Arnold JJ

Catchwords:

Civil procedure – Summary judgment – Will – Where in 2010 Mrs Sandman executed a will and then died in 2013 – Where appellant left apartment he occupied but residual estate divided between him and others – Where under earlier will executed in 2005 residual estate would have gone to appellant if his sister predeceased mother (as she did) – Where appellant alleged mother lacked testamentary capacity when she executed 2010 will and that respondent solicitors dishonestly assisted daughter and another – Where respondents applied to strike out claim against firm and for summary judgment – Where Court of Appeal granted respondents’ application – Whether arguable that solicitors would be obliged to follow instructions of client to draft a will and have it executed even if doubts as to testamentary capacity – Whether appellant could succeed at trial in proving that firm either knew that mother lacked testamentary capacity or was wilfully blind – Whether respondents would have strong case for strike-out.

Held (4:1): Appeal dismissed; costs of \$25,000 plus usual disbursements awarded to respondents.

JW v Canada (Attorney General)

Supreme Court of Canada: [\[2019\] SCC 20](#)

Judgment delivered: 12 April 2019

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

Catchwords:

Civil procedure – Class proceedings – Settlement – Administration and implementation – Where settlement agreement resolving class actions brought by former Aboriginal students for harms suffered at residential

schools — Where agreement providing procedure for settling individual claims through adjudicative process — Whether courts can intervene in relation to adjudication decisions where internal review mechanisms exhausted — Appropriate scope of judicial recourse.

Held (5:2): Appeal allowed; reconsideration adjudicator's compensation award reinstated.

TELUS Communications Inc v Wellman
Supreme Court of Canada: [\[2019\] SCC 19](#)

Judgment delivered: 4 April 2019

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

Catchwords:

Civil procedure — Stay — Class actions — Consumer and non-consumer claims — Arbitration clause — Where customer filing class action for damages alleging cell phone service provider engaged in deceptive practices — Where class consisting of both consumers and non-consumers — Where cell phone service provider's standard terms and conditions containing mandatory arbitration clause — Where arbitration clause invalidated by provincial consumer protection legislation with respect to claims by consumers — Where cell phone service provider relying on arbitration clause to seek stay of proceedings with respect to non-consumers' claims — Whether provincial statute governing arbitration grants court discretion to refuse to stay non-consumers' claims — *Arbitration Act 1991*, SO 1991, c 17, s 7 — *Consumer Protection Act 2002*, SO 2002, c 30, Sch A.

Held (5:4): Appeal allowed; claims of business customers stayed.

Takhar v Gracefield Developments Limited & Ors
United Kingdom Supreme Court: [\[2019\] UKSC 13](#)

Judgment delivered: 20 March 2019

Coram: Lords Kerr, Sumption, Hodge, Lloyd-Jones, Briggs, Lady Arden and Lord Kitchin

Catchwords:

Civil procedure – Application to set aside judgment allegedly obtained by fraud – Where in November 2005 it was agreed that legal title to appellant's properties would be transferred to newly formed company (first respondent) – Where appellant issued proceedings claiming properties transferred as result of undue influence or unconscionable

conduct – Where evidence at trial included scanned copy of written profit share agreement apparently signed by appellant but she was unable to say how her signature came to appear on document – Where appellant’s claim was rejected in absence of an explanation – Where following trial appellant engaged handwriting expert who stated conclusively that signature on agreement transposed from earlier document – Where appellant sought to have judgment and order set aside on ground it had been obtained by fraud – Whether person seeking to set aside an earlier judgment on basis of fraud must demonstrate evidence of fraud could not have been obtained with reasonable diligence in advance of earlier trial.

Held (7:0): Appeal allowed.

In the matter of an application by Hugh Jordan for Judicial Review (Northern Ireland)

United Kingdom Supreme Court: [\[2019\] UKSC 9](#)

Judgment delivered: 6 March 2019

Coram: Lady Hale, Lords Reed, Carnwath, Lloyd-Jones and Lady Arden

Catchwords:

Civil procedure – Stay – Where Pearse Jordan was killed by member of Royal Ulster Constabulary in 1992 – Where in 1994 his father Hugh Jordan made successful application to European Court of Human Rights complaining that failure to carry out prompt and effective investigation into son’s death was violation of art 2 of *European Convention on Human Rights* – Where first inquest commenced on 4 January 1995 but was adjourned shortly afterwards – Where fresh inquest commenced on 24 September 2012 and a verdict was delivered but subsequently quashed upon judicial review proceedings – Where Hugh Jordan brought proceedings for judicial review seeking declarations that Police Service of Northern Ireland (“PSNI”) and Coroner had violated his art 2 rights by delaying commencement of inquest and damages under section 8 of *Human Rights Act 1998* in respect of delay – Where PSNI appealed and Hugh Jordan cross-appealed against dismissal of his claim against Coroner – Where Court of Appeal ordered on 22 September 2015 that proceedings be stayed until after further inquest completed – Where Hugh Jordan appealed against stay – Whether stay was imposed without any evident consideration of its proportionality.

Held (5:0): Appeal allowed.

Constitutional Law

R v Mills

Supreme Court of Canada: [\[2019\] SCC 22](#)

Judgment delivered: 18 April 2019

Coram: Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Brown and Martin JJ

Catchwords:

Constitutional law — Charter of Rights — Search and seizure — Child luring — Police sting operation — Interception with consent — Where accused charged with child luring after communicating online with police officer posing as 14-year-old girl — Where police using screen capture software to create record of online communications — Whether investigative technique amounted to search or seizure of accused's online communications — Whether police intercepted private communication without prior judicial authorization — *Canadian Charter of Rights and Freedoms*, s 8 — *Criminal Code*, RSC 1985, c C-46, s 184.2.

Held (7:0): Appeal dismissed.

Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited
Constitutional Court of South Africa: [\[2019\] ZACC 15](#)

Judgment delivered: 16 April 2019

Coram: Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe and Mhlantla JJ, Petse AJ and Theron J

Catchwords:

Constitutional law – Legality review – Unreasonable delay – Constitution, s 172 – Where Asla tendered for appointment as implementing agent for housing project to address housing needs of Duncan Village – Where Municipality accepted Asla's tender and concluded agreement – Where subsequently parties concluded further agreement for engineering services and construction of housing top structures within Reeston – Where Asla commenced work under Reeston agreement but dispute arose and Municipality failed to pay Asla for its work – Where Asla instituted provisional sentence proceedings against Municipality – Where Municipality brought counter-application seeking to review and set aside its decision relating to Reeston agreement on basis that there ought to have been separate tender and procurement process – Whether conduct of Municipality including delay in launching review proceedings was unreasonable – Whether Reeston agreement unlawful – Whether Reeston agreement should be set aside.

Held (6:3): Appeal upheld; declaration that Reeston agreement invalid.

Wong Souk Yee v Attorney-General
Court of Appeal of Singapore: [\[2019\] SGCA 25](#)

Judgment delivered: 10 April 2019

Coram: Sundaresh Menon CJ, Andrew Phang Boon Leong, Judith Prakash, Tay Yong Kwang and Steven Chong JJA

Catchwords:

Constitutional law – Elections – Where appellant member of Singapore Democratic Party who contested a constituency with other members of that party in September 2015 election – Where team comprising members of People’s Action Party (“PAP”) won that constituency – Where member of PAP resigned seat but no by-election called – Whether arts 39A(2) and/or 49(1) of Constitution imposes duty to call by-election to fill casual vacancies of elected Members in a Group Representation Constituency (“GRC”) that might arise from time to time – Whether by reason of voters’ implied right to representation in Parliament appellant entitled to order for by-election to be called – Whether “seat of a Member” in art 49(1) refers only to seat of Member of Single Member Constituency and does not apply to seat in a GRC – Whether by-election would have to be called if all Members representing a GRC were to vacate their seats.

Held (8:1): Appeal dismissed; no order as to costs.

Speaker of the National Assembly & Anor v Land Access Movement of South Africa & Ors

Constitutional Court of South Africa: [\[2019\] ZACC 10](#)

Judgment delivered: 19 March 2019

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe and Mhlantla JJ, Petse AJ, Theron J

Catchwords:

Constitutional law – Where *Land Access Movement of South Africa v Chairperson, National Council of Provinces (“LAMOSA 1”)* involved challenge to constitutionality of now repealed *Restitution of Land Rights Amendment Act* (“repealed Amendment Act”) on basis that Parliament failed to facilitate public participation in promulgation of repealed Amendment Act – Where Constitutional Court declared repealed Amendment Act invalid – Where Constitutional Court afforded Parliament opportunity to enact new Amendment Act within 24 months and if not ordered that Chief Land Claims Commissioner must (and certain others may) apply within two months after 24 months elapsed for appropriate order on processing of land claims lodged between 1 July 2014 and 28 July 2016 (“interdicted claims”) – Where Parliament failed to enact new Amendment Act within 24-month period and applied for extension of

interdict against processing of interdicted claims until 29 March 2019 – Whether interdicting processing of interdicted claims operated as suspension of declaration of invalidity – Whether factors and considerations relevant to extensions of suspension of declaration of invalidity apply.

Held (10:0): Application for extension dismissed; counter-application by first to sixth respondents partly upheld subject to Parliament legislating otherwise; applicants jointly and severally ordered to pay costs of first to sixth respondents.

R v Morrison

Supreme Court of Canada: [\[2019\] SCC 15](#)

Judgment delivered: 15 March 2019

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

Catchwords:

Constitutional law — Charter of Rights — Presumption of innocence — Right to liberty — Fundamental justice — Child luring — Police sting operation — Presumption of belief regarding age — Where accused charged with child luring after communicating online with police officer posing as 14-year-old girl — Where accused contesting constitutionality of *Criminal Code* provision establishing presumption that if person with whom he was communicating was represented to him as being underage, he believed representation absent evidence to contrary — Where accused contesting constitutionality of provision barring him from raising as defence that he believed person with whom he was communicating was of legal age unless he took reasonable steps to ascertain person's age — Whether reasonable steps requirement deprives accused of liberty in violation of principles of fundamental justice — Whether presumption infringes accused's right to be presumed innocent and, if so, whether infringement justified — *Canadian Charter of Rights and Freedoms*, ss 1, 7, 11(d) — *Criminal Code*, RSC 1985, c C-46, s 172.1.

Held (8:1): Appeal and cross-appeal allowed in part; s 172.1(3) of the *Criminal Code* declared to be of no force or effect; conviction set aside; new trial ordered.

Consumer Law

Lorenzo v SEC

United States Supreme Court: [Docket 17-1077](#)

Judgment delivered: 27 March 2019

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

Catchwords:

Consumer law – Dissemination – False and misleading statements – Where petitioner while director of investment banking at registered brokerage firm sent two e-mails to prospective investors – Where content of e-mails supplied by another and described potential investment in company with “confirmed assets” of \$10m – Where petitioner knew company recently disclosed total assets worth less than \$400,000 – Where Securities and Exchange Commission found petitioner violated r 10b-5, §10(b) of *Exchange Act* and §17(a)(1) of *Securities Act* by sending false and misleading statements to investors with intent to defraud – Whether dissemination of false or misleading statements with intent to defraud can fall within scope of rr 10b-5(a) and (c) as well as relevant statutory provisions if disseminator did not “make” statements and consequently falls outside r 10b-5(b).

Held (6:2): Affirmed.

Criminal Law

Secretary for Justice v Cheng Ka Yee & Ors
Hong Kong Court of Final Appeal: [\[2019\] HKCFA 9](#)

Judgment delivered: 4 April 2019

Coram: Ma CJ, Ribeiro, Fok and Cheung PJJ, and French NPJ

Catchwords:

Criminal law – Accessing computer for dishonest gain - *Crimes Ordinance* (Cap 200), s 161(1)(c) – Where limited places for admission to certain primary school and children applying for admission interviewed – Where primary school teachers and friend used phones and a computer to transmit to third parties questions to be used in competitive admission interviews – Where charged with offence of obtaining access to a computer with a view to dishonest gain for oneself or another under s 161(1)(c) of *Crimes Ordinance* (Cap 200) – Whether s 161(1)(c) offence covers use by a person of their own computer not involving access to another’s computer with requisite intent.

Held (5:0): Appeal dismissed.

Bucklew v Precythe
United States Supreme Court: [Docket 17-8151](#)

Judgment delivered: 1 April 2019

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

Catchwords:

Criminal law – Execution – Eighth Amendment – Where petitioner convicted of murder and sentenced to death – Where State of Missouri plans to execute by lethal injection using pentobarbital – Where petitioner presented as-applied Eighth Amendment challenge to State’s lethal injection protocol alleging it would cause severe pain because of particular medical condition – Where petitioner identified nitrogen hypoxia as alternative but District Court found proposal did not constitute feasible and readily implementable alternative and granted State’s motion for summary judgment – Whether *Baze* and *Glossip* govern all Eighth Amendment challenges facial or as-applied alleging that a method of execution inflicts unconstitutionally cruel pain – Whether petitioner failed to satisfy *Baze-Glossip* test.

Held (5:4): Affirmed.

R v Myers

Supreme Court of Canada: [\[2019\] SCC 18](#)

Judgment delivered: 28 March 2019

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

Catchwords:

Criminal law — Interim release — Detention review — Where accused denied interim release pending trial after being arrested and charged with several firearm offences — Where detention status confirmed by judge conducting review under s 525 of *Criminal Code* — Whether proper approach taken to detention review hearing under s 525 — *Criminal Code*, RSC 1985, c C-46, s 525.

Held (9:0): Appeal allowed.

Defamation

Craig v Williams

New Zealand Supreme Court: [\[2019\] NZSC 38](#)

Judgment delivered: 11 April 2019

Coram: Elias CJ, William Young, Glazebrook, Ellen France and Arnold JJ

Catchwords:

Defamation – Misdirection – Qualified privilege – Loss of privilege – Use of privilege for improper purposes – *Defamation Act 1992*, s 19 – Where in June 2015 Williams accused Craig former leader of Conservative Party of sexually harassing former press secretary – Where in response Craig made public remarks and produced a leaflet distributed to 1.6m households accusing Williams of lying and of engaging in “dirty politics” – Where Williams sued Craig for defamation – Where jury rejected qualified privilege defence under *Defamation Act 1992* found Craig liable for defamation and \$1.27m in damages – Where trial judge set aside jury’s verdict on basis damages excessive and ordered a retrial – Where judge also accepted that jury had been misdirected – Whether jury was misdirected – Whether miscarriage of justice warranting an order for a new trial on liability and damages.

Held (3:2): Appeal allowed; cross-appeal dismissed; order for general retrial on liability and damages.

Stocker v Stocker

United Kingdom Supreme Court: [\[2019\] UKSC 17](#)

Judgment delivered: 3 April 2019

Coram: Lords Reed, Kerr, Lady Black, Lords Briggs and Kitchin

Catchwords:

Defamation – Libel – Meaning of words – Defendant posted on Facebook that plaintiff (former husband) “tried to strangle” her – Whether meaning of words was that he had tried to kill her – Where defendant raised defence of justification claiming that words would be understood to mean plaintiff grasped her by neck and inhibited her breathing so as to put her in fear of being killed – Whether judge at first instance erred in law by using dictionary definitions as starting point of analysis of meaning and in subsequently failing properly to take into account context of Facebook post.

Held (5:0): Appeal allowed.

Insolvency Law

Commissioners for Her Majesty’s Revenue and Customs v Joint Administrators of Lehman Brothers International (Europe) (In Administration)

United Kingdom Supreme Court: [\[2019\] UKSC 12](#)

Judgment delivered: 13 March 2019

Coram: Lords Reed, Carnwath, Hodge, Lady Black and Lord Briggs

Catchwords:

Insolvency – Administration – Distribution of assets – Entitlement to interest on debts after commencement of administration – Whether statutory interest “yearly interest” requiring administrator to deduct income tax – Where Lehman Brothers International (Europe) (“LBIE”) went into administration on 15 September 2008 – Where administration generated surplus in region of £7 billion and estimated that about £5 billion payable as statutory interest – Where all unsecured creditors repaid principal sums owed in full – Whether interest payable under r 14.23(7) of *Insolvency Rules 2016* “yearly interest” within meaning of s 874 of *Income Tax Act 2007* – Whether income tax must be deducted before payment of statutory interest to creditors.

Held (5:0): Appeal dismissed.

Intellectual Property

Actavis Group PTC EHF & Ors v ICOS Corporation & Anor

United Kingdom Supreme Court: [\[2019\] UKSC 15](#)

Judgment delivered: 27 March 2019

Coram: Lady Hale, Lords Kerr, Sumption, Hodge and Briggs

Catchwords:

Intellectual property – Patents – Obviousness – *Patents Act 1977*, s 3 – Dosage patent – Where patent EP(UK) 1,173,181 (“181 patent”) owned by ICOS and exclusively licensed to Eli Lilly (collectively “Lilly”) – Where 181 patent relates to use of drug named tadalafil in dosage form for treatment of erectile dysfunction (“ED”) – Where tadalafil is competitor to sildenafil sold under brand name VIAGRA – Where *Patents Act 1977* mandates court to assess whether invention obvious by having regard to state of art at priority date of invention – Where Lilly asserts essence of invention is discovery that tadalafil effective in treating ED at low dose and with minimal side effects – Where proceedings raised to revoke 181 patent – Whether and how obviousness test applies to 181 patent – Whether Court of Appeal was entitled to reverse judgment of judge at first instance on that question in circumstances of case.

Held (5:0): Appeal dismissed.

Rimini Street Inc v Oracle USA Inc
United States Supreme Court: [Docket 17-1625](#)

Judgment delivered: 4 March 2019

Coram: Kavanaugh J delivered opinion for a unanimous Court

Catchwords:

Intellectual property – Copyright – Infringement – Costs – Where jury awarded Oracle damages after finding Rimini Street infringed various Oracle copyrights – Where after judgment District Court also awarded Oracle fees and costs including \$12.8m for litigation expenses such as expert witnesses, e-discovery and jury consulting – Where Ninth Circuit affirmed \$12.8m award and acknowledged it covered expenses not included within six categories of costs that general federal statute authorising district courts to award costs 28 USC §§1821 and 1920 provides may be awarded against a losing party – Where court nonetheless held that award was appropriate because *Copyright Act* gives federal district courts discretion to award “full costs” to a party in copyright litigation, 17 USC §505 – Whether term “full costs” in §505 of *Copyright Act* means costs specified in general costs statute codified at §§1821 and 1920.

Held: Reversed in part and remanded.

Fourth Estate Public Benefit Corp v Wall-Street.com
United States Supreme Court: [Docket 17-571](#)

Judgment delivered: 4 March 2019

Coram: Ginsburg J delivered opinion for a unanimous Court

Catchwords:

Intellectual property – Copyright – Where petitioner licensed works to respondent – Where petitioner sued respondent and its owner for copyright infringement of news articles that respondent failed to remove from its website after cancelling parties’ license agreement – Where petitioner had filed applications to register articles with Copyright Office but Register of Copyrights had not acted on applications – Where 17 USC §411(a) states “no civil action for infringement of the copyright in any United States work shall be instituted until ... registration of the copyright claim has been made in accordance with this title” – Where District Court dismissed complaint holding that “registration ... has [not] been made” under §411(a) until Copyright Office registers a copyright – Whether registration occurs and copyright claimant may commence infringement suit when Copyright Office registers copyright – Whether upon registration copyright owner can recover for infringement occurring before registration.

Held: Affirmed.

Migration Law

Comilang, Milagros Tecson & Anor v Director of Immigration; Luis, Desiree Rante & Ors v Director of Immigration

Hong Kong Court of Final Appeal: [\[2019\] HKCFA 10](#)

Judgment delivered: 4 April 2019

Coram: Ma CJ, Ribeiro, Fok and Stock PJJ, and French NPJ

Catchwords:

Migration law – Where appeals brought by two families against refusal by Director of Immigration (“Director”) to grant first appellants extensions of permission to remain in Hong Kong – Where first appellants mothers of other appellants who are minors – Where minors permanent residents or have resident status – Where mothers seek extensions of permission to remain in Hong Kong to take care of child appellants – Where appellants sought judicial reviews against Director’s refusal arguing he wrongly failed to take into account and give effect to rights under Basic Law (“BL”), *International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Rights*, *Convention on the Rights of the Child* and best interests of child principle at common law – Where Court of Appeal held immigration reservation under s 11 of *Hong Kong Bill of Rights Ordinance* (Cap 383) (“Reservation”) asserted rights not engaged – Whether in deciding mothers’ applications Director obliged to take into account families’ enjoyment of any applicable fundamental rights while living in Hong Kong – Whether Reservation exempts immigration authorities from having to take into account any rights protected under BL of a child member of family.

Held (5:0): Appeals dismissed.

Robinson (formerly JR (Jamaica)) v Secretary of State for the Home Department

United Kingdom Supreme Court: [\[2019\] UKSC 11](#)

Judgment delivered: 13 March 2019

Coram: Lady Hale, Lord Wilson, Lady Black, Lord Lloyd-Jones, Lady Arden

Catchwords:

Migration law – Deportation – Human rights claim – Renewed claims – Whether respondent’s rejection of further representations subject to

statutory right of appeal – Where appellant a Jamaican national who arrived in United Kingdom on 9 October 1998 aged seven – Where appellant has several criminal convictions including two robberies triggering deportation proceedings – Where deportation order issued – Where appellant appealed to First-tier Tribunal (“FTT”) but appeal dismissed – Where appellant’s previous solicitors made further submissions to Secretary of State focusing that partner pregnant – Where Secretary concluded deportation not breach art 8 of *European Convention on Human Rights* refused to revoke deportation order and decided submissions did not amount to fresh human rights claim under para 353, Immigration Rules – Where after birth of son appellant made further submissions to Secretary – Where Secretary again concluded deportation not breach art 8 and further submissions not fresh claim – Where appellant appealed decision but FTT declined jurisdiction – Whether further submissions that rely on human rights grounds have to be accepted by Secretary of State as fresh claim in accordance with para 353 where human rights claim already refused and no pending appeal – Whether “human rights claim” in s 82 of *Nationality, Immigration and Asylum Act 2002* as amended means an original human rights claim or a fresh human rights claim within para 353.

Held (5:0): Appeal dismissed.

KV (Sri Lanka) v Secretary of State for the Home Department

United Kingdom Supreme Court: [\[2019\] UKSC 10](#)

Judgment delivered: 6 March 2019

Coram: Lady Hale, Lord Wilson, Lady Black, Lords Briggs and Kitchin

Catchwords:

Migration law – Asylum – Expert evidence – Allegations of torture – Where medical expert gave evidence scars consistent with torture – Where KV national of Sri Lanka of Tamil ethnicity – Where KV alleges torture by government forces – Where KV has scars on back and right arm – Where Home Secretary took position that scars self-inflicted by proxy (“SIBP”) – Role of medical expert in contributing to evidence regarding torture.

Held (5:0): Appeal allowed; KV’s appeal against refusal of asylum remitted to Upper Tribunal for fresh determination.

Private International Law

Vedanta Resources PLC & Anor v Lungowe & Ors

United Kingdom Supreme Court: [\[2019\] UKSC 20](#)

Judgment delivered: 10 April 2019

Coram: Lady Hale, Lords Wilson, Hodge, Lady Black and Lord Briggs

Catchwords:

Private international law – Forum non conveniens – Claimants’ claims against defendants domiciled in United Kingdom and Zambia – Where court has jurisdiction over United Kingdom defendant under European Union Regulation – Whether abuse of EU law to rely on art 4 of Regulation (EU) 1215/2012 for jurisdiction over parent company as anchor defendant to make Zambian company a “necessary or proper party” – Whether respondents’ pleaded case and supporting evidence disclose no real triable issue against parent company – Whether England is proper place in which to bring claims – Whether real risk that respondents would not obtain access to substantial justice in Zambian jurisdiction even if Zambia would otherwise be proper place.

Held (5:0): Appeal dismissed.

Social Security

Biestek v Berryhill

United States Supreme Court: [Docket 17-1184](#)

Judgment delivered: 1 April 2019

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

Catchwords:

Social security – Expert testimony – Whether vocational expert’s opinion constitutes “substantial evidence” for purpose of 42 USC §405(g) – Where petitioner applied for social security disability benefits claiming he could no longer work due to physical and mental disabilities – Where Social Security Administration assigned Administrative Law Judge (“ALJ”) to conduct hearing to determine whether petitioner could successfully transition to less physically demanding work – Where vocational expert testified regarding types of jobs petitioner could still perform and number of such jobs existing in national economy – Where on cross-examination petitioner’s attorney requested expert’s labor market surveys on which relied but expert declined – Where ALJ denied petitioner benefits basing conclusion on expert’s testimony about number of jobs available to petitioner – Whether vocational expert’s refusal to provide private market-survey data upon request categorically precludes testimony from counting as “substantial evidence”.

Held (6:3): Affirmed.

Statutory Interpretation

Road Traffic Management Corporation v Waymark (Pty) Limited
Constitutional Court of South Africa: [\[2019\] ZACC 12](#)

Judgment delivered: 2 April 2019

Coram: Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe and Mhlantla JJ, Petse AJ and Theron J

Catchwords:

Statutory interpretation – Contract – Where parties entered into agreement whereby Waymark undertook to develop and install an Enterprise Resource Planning System for RTMC – Where agreement set delivery milestones beyond financial year in which tender process launched – Where Minister of Finance did not approve agreement and no approval sought – Where dispute about payment after partially performed contractual obligations – Where Waymark purported to terminate agreement and commenced action for damages flowing from RTMC’s alleged repudiation – Where RTMC counter-claimed that not bound by agreement because of two provisions in *Public Finance Management Act* – Whether Act required Minister to approve agreement.

Held (9:0): Appeal dismissed.

Sturgeon v Frost
United States Supreme Court: [Docket 17-949](#)

Judgment delivered: 26 March 2019

Coram: Kagan J delivered opinion for a unanimous Court; Sotomayor J concurring (Ginsburg J joined)

Catchwords:

Statutory interpretation – Where *Alaska National Interest Lands Conservation Act* (“ANILCA”) set aside 104m acres of federally owned land in Alaska for preservation purposes – Where petitioner travelled for decades by hovercraft up a stretch of Nation River within boundaries of conservation system unit in Alaska – Where on one trip Park rangers informed petitioner that National Park Service’s regulations under *Service’s Organic Act* prohibit operating a hovercraft on navigable waters – Where petitioner sought injunction allowing him to resume using his hovercraft on his accustomed route – Whether Nation River public land for purposes of ANILCA – Whether non-public lands within Alaska’s national parks exempt from Park Service’s ordinary regulatory authority – Whether

navigable waters within Alaska's national parks exempt from Park Service's normal regulatory authority.

Held: Reversed and remanded.

Republic of Sudan v Harrison

United States Supreme Court: [Docket 16-1094](#)

Judgment delivered: 26 March 2019

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

Catchwords:

Statutory interpretation – Foreign immunity – Exception – Subject matter jurisdiction – Personal jurisdiction – Service – Where respondents sued Republic of Sudan under *Foreign Sovereign Immunities Act of 1976* ("FSIA") alleging it provided material support to al Qaeda for bombing of USS *Cole* – Where court clerk at respondents' request addressed service packet to Sudan's Minister of Foreign Affairs at Sudanese Embassy in United States and later certified that signed receipt returned – Where Sudan failed to appear in litigation and District Court entered default judgment – Where Sudan challenged orders arguing judgment invalid for lack of personal jurisdiction because §1608(a)(3) required service packet to be sent to its foreign minister at principal office in Sudan – Whether §1608(a)(3) requires a mailing to be sent directly to foreign minister's office in foreign state.

Held (8:1): Reversed and remanded.

Obduskey v McCarthy & Holthus LLP

United States Supreme Court: [Docket 17-1307](#)

Judgment delivered: 20 March 2019

Coram: Breyer J delivered opinion for a unanimous Court; Sotomayor J concurring

Catchwords:

Statutory interpretation – *Fair Debt Collection Practices Act* ("FDCPA") – Whether a business engaged in no more than nonjudicial foreclosure proceedings a "debt collector" under FDCPA, except for limited purpose of §1692f(6) – Where respondent law firm hired to carry out nonjudicial foreclosure on Colorado home owned by petitioner - Where respondent sent correspondence related to foreclosure and petitioner responded with letter invoking FDCPA provision, 15 USC §1692g(b) which provides that if consumer disputes amount of debt a "debt collector" must "cease

collection” until it “obtains verification of the debt” and mails a copy to debtor – Where petitioner sued alleging respondent failed to comply with FDCPA’s verification procedure.

Held: Affirmed.

Nielsen v Preap

United States Supreme Court: [Docket 16-1363](#)

Judgment delivered: 19 March 2019

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

Catchwords:

Statutory interpretation – Where respondents comprised two classes of aliens detained under §1226(c)(2) of federal immigration law, 8 USC – Where respondents allege that because they were not immediately detained by immigration officials after release from criminal custody they are not aliens “described in paragraph (1)” even though all fall into at least one of four categories covered by §§1226(c)(1)(A)–(D) – Where respondents argue they are entitled to bond hearings to determine if they should be released pending decision on their status – Where District Courts ruled for respondents and Ninth Circuit affirmed – Whether Ninth Circuit’s interpretation of §1226(c) is contrary to plain text and structure of statute – Whether §§1252(b)(9), 1226(e), and 1252(f)(1) limit judicial review – Whether District Courts had Article III jurisdiction to certify classes.

Held (5: 4): Reversed and remanded.

Taxation

R (on the application of Derry) v Commissioners for Her Majesty’s Revenue and Customs

United Kingdom Supreme Court: [\[2019\] UKSC 19](#)

Judgment delivered: 20 March 2019

Coram: Lords Reed, Carnwath, Ladies Black, Arden and Lord Kitchin

Catchwords:

Taxation – Income tax – Assessment – Self-assessment – Deduction for capital loss on shares – Whether taxpayer entitled to claim share loss relief in tax review for year prior to sale – Where Derry bought 500,000 shares at a cost of £500,000 in company in tax year 2009/10 and sold

them for £85,500 in tax year 2010/11 realising loss of £414,500 – Where in his tax return for 2009/10 Derry claimed share loss relief for that amount against his income for that year under s 132 of *Income Taxes Act 2007* – Where Her Majesty’s Revenue and Customs (“HMRC”) identified claim as case of possible tax avoidance – Where HMRC opened enquiry into claim for share loss relief under Sch 1A of *Taxes Management Act 1970* on basis that claim made “outside of a return” – Where HMRC opened enquiry into subsequent return under s 9A of *Taxes Management Act 1970* – Where HMRC subsequently issued a demand for £95,546.36 with interest – Where Derry began judicial review proceedings relating to demand – Whether loss relief correctly deducted from net income for 2009/10.

Held (5: 0): Appeal dismissed.

SAE Education Ltd v Commissioners for Her Majesty’s Revenue and Customs

United Kingdom Supreme Court: [\[2019\] UKSC 14](#)

Judgment delivered: 20 March 2019

Coram: Lords Reed, Sumption, Briggs, Lady Arden and Lord Kitchin

Catchwords:

Taxation – Value added tax (“VAT”) – Exemptions – Education – Where supplies of education to students in United Kingdom exempt from VAT if made by college of university within meaning of Note 1(b) to Item 1, Group 6 of *Value Added Tax Act 1994* (“VAT Act”) – Where appellant contends its supplies of education to students in United Kingdom exempt from VAT because college of Middlesex University – Where appellant appealed against assessments raised by Commissioners for Her Majesty’s Revenue and Customs and appeal allowed by First-tier Tribunal – Where Upper Tribunal allowed appeal and Court of Appeal dismissed appeal – Whether Court of Appeal adopted correct approach in determining whether appellant college of Middlesex University for purposes of VAT Act – Whether appellant such a college.

Held (5:0): Appeal allowed.

Washington State Department of Licensing v Cougar Den Inc

United States Supreme Court: [Docket 16-1498](#)

Judgment delivered: 19 March 2019

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

Catchwords:

Taxation – Where State of Washington taxes “motor vehicle fuel importer[s]” who bring large quantities of fuel into State by “ground transportation” – Where respondent wholesale fuel importer owned by member of Yakama Nation imports fuel from Oregon over Washington’s public highways to Yakama Reservation to sell to Yakama-owned retail gas stations located within reservation – Where in 2013 Washington State Department of Licensing assessed respondent \$3.6m in taxes, penalties, and licensing fees – Where respondent appealed arguing Washington tax pre-empted by an 1855 treaty between United States and Yakama Nation that reserves Yakamas’ “right, in common with citizens of the United States, to travel upon all public highways” 12 Stat 953 – Whether 1855 treaty pre-empts State of Washington’s fuel tax as applied to respondent’s importation of fuel by public highway – Whether 1855 treaty guarantees tribal members right to move their goods (including fuel) to and from market freely.

Held (5:4): Affirmed.

BNSF Railway Co v Loos

United States Supreme Court: [Docket 17-1042](#)

Judgment delivered: 4 March 2019

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

Catchwords:

Taxation – Compensation – Whether lost wages constitutes compensation taxable under *Railroad Retirement Tax Act* (“RRTA”) – Where respondent sued petitioner under *Federal Employers’ Liability Act* (“FELA”) for injuries received while working at its railyard – Where jury awarded respondent \$126,212.78, ascribing \$30,000 to wages lost during time he was unable to work – Where petitioner asserted lost wages constituted “compensation” taxable under RRTA and asked to withhold \$3,765 of \$30,000 to cover respondent’s share of RRTA taxes – Whether railroad’s payment to employee for working time lost due to an on-the-job injury taxable “compensation” under RRTA.

Held (7:2): Reversed and remanded.

Tort Law

Thacker v TVA

United States Supreme Court: [Docket 17-1201](#)

Judgment delivered: 29 April 2019

Coram: Kagan J delivered opinion for a unanimous Court

Catchwords:

Tort law – Government immunity – Discretionary functions – Where Tennessee Valley Authority (“TVA”) Government-owned corporation that provides electric power – Where Congress waived immunity from tort suits involving agencies across Government in *Federal Tort Claims Act* (“FTCA”) but carved out an exception for claims based on a federal employee’s performance of a “discretionary function” (28 USC §2680(a)) – Where “[a]ny claim arising from the activities of the [TVA]” specifically excluded from FTCA’s provisions (§2680(l)) – Where TVA employees were raising downed power line partially submerged in Tennessee River when petitioner drove his boat into area at high speed – Where petitioner’s boat collided with power line – Where petitioner sued for negligence – Where TVA moved to dismiss on basis of sovereign immunity – Whether waiver of immunity in TVA’s sue-and-be-sued clause subject to discretionary function exception of kind contained in FTCA – Whether to determine if TVA has immunity court must first decide if conduct governmental or commercial – Whether implied limitation on clause bars suit if prohibiting it “is necessary to avoid grave interference” with performance of governmental function.

Held: Reversed and remanded.

R&S Pilling t/a Phoenix Engineering v UK Insurance Ltd

United Kingdom Supreme Court: [\[2019\] UKSC 16](#)

Judgment delivered: 27 March 2019

Coram: Lady Hale, Lords Wilson, Hodge, Lady Arden and Lord Kitchin

Catchwords:

Tort law – Insurance – Third party insurance – Compulsory insurance in respect of use of vehicle on road or other public place – Where motorist accidentally set fire to his car while repairing it at premises of employer – Where fire caused £2m of damage – Whether policy limited to use on roads or other public places – Whether repair on car amounts to “use”.

Held (5:0): Appeal allowed.

Air & Liquid Systems Corp v DeVries

United States Supreme Court: [Docket 17-1104](#)

Judgment delivered: 19 March 2019

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

Catchwords:

Tort law – Maritime tort – Duty of care – Duty to warn – Where manufactures produced equipment that required asbestos insulation or asbestos parts to function as intended for three Navy ships – Where manufacturers delivered much equipment to Navy without asbestos and Navy later added asbestos – Where two Navy veterans exposed to asbestos on ships and developed cancer – Where veterans and wives sued manufacturers alleging asbestos exposure caused cancer and contending that manufacturers negligent in failing to warn about dangers of asbestos in integrated products – Where petitioners raised “bare-metal defense” argued they should not be liable for harms caused by later-added third-party parts – Whether in maritime tort context a product manufacturer has a duty to warn when its product requires incorporation of a part manufacturer knows or has reason to know that integrated product likely to be dangerous for intended uses and manufacturer has no reason to believe that product’s users will realise that danger.

Held (6:3): Affirmed.
