



OVERSEAS DECISIONS BULLETIN

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

Volume 14 Number 2 (1 March 2017 – 30 April 2017)

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.

Arbitration

Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd
Court of Appeal of Singapore: [\[2017\] SGCA 32](#)

Judgment delivered: 26 April 2017

Coram: Sundaresh Menon CJ, Judith Prakash and Steven Chong JJA

Catchwords:

Arbitration – *International Arbitration Act* (2002 Rev Ed) s 6 – Stay of proceedings – Where contract gave respondent right to elect to arbitrate dispute arising in connection with contract – Where respondent commenced suit against appellant – Where appellant sought to have suit stayed pursuant to s 6 – Whether contractual clause constituted valid arbitration agreement – If so, whether dispute not within scope of arbitration agreement because respondent elected to litigate.

Held (3:0): Appeal dismissed.

IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation
United Kingdom Supreme Court: [\[2017\] UKSC 16](#)

Judgment delivered: 1 March 2017

Coram: Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge, Lord Toulson

Catchwords:

Arbitration – Enforcement – Where respondent obtained award in Nigeria in 2004 – Where appellant applied for award to be set aside or enforcement adjourned under *Arbitration Act 1996* (UK) s 103 – Where award still subject to outstanding challenges in Nigeria – Where respondent renewed application for enforcement in 2012 – Where Court of Appeal ordered any further adjournment of enforcement be conditional on appellant providing further USD \$100m security – Whether appellant should have to put up further security in enforcement proceedings.

Held (5:0): Appeal allowed.

Bankruptcy

Czyzewski et al v Jevic Holding Corp et al

Supreme Court of the United States: [Docket No 15-649](#)

Judgment delivered: 22 March 2017

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

Catchwords:

Bankruptcy – Where petitioners were awarded judgment against Jevic Holding Corp for failure to provide proper notice of termination in violation of state and federal Worker Adjustment and Retraining Notification Acts – Where judgment entitled petitioners to payment ahead of general unsecured claims – Where unsecured creditors negotiated settlement agreement for structured dismissal of bankruptcy under which petitioners would receive nothing – Where Bankruptcy Court approved settlement agreement – Whether Bankruptcy Court may approve structural dismissal that provides for distributions that do not follow ordinary priority rules without consent of affected creditors.

Held (6:2): Reversed and remanded.

Constitutional Law

Nelson v Colorado

Supreme Court of the United States: [Docket No 15-1256](#)

Judgment delivered: 19 April 2017

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

Catchwords:

Constitution – Fourteenth Amendment – Where petitioners convicted by jury, sentenced to imprisonment and ordered to pay costs, fees and restitution – Where convictions reversed on appeal – Where first petitioner acquitted on retrial and State elected not to retry second petitioner – Where petitioners sought return of funds held by Department of Corrections allocated to costs, fees and restitution – Whether *Compensation for Certain Exonerated Persons Act*, which requires claimant to prove innocence by “clear and convincing evidence”, consistent with Fourteenth Amendment guarantee of “due process” – Application of *Mathews v Eldridge* 424 US 319 (1976).

Held (7:1): Reversed and remanded.

Hotz & Others v University of Cape Town

Constitutional Court of South Africa: [\[2017\] ZACC 10](#)

Judgment delivered: 12 April 2017

Coram: Nkabinde ACJ, Cameron, Froneman, Jafta, Khampepe, Madlanga JJ, Mbha AJ, Mhlantla J, Musi AJ and Zondo J

Catchwords:

Constitution – Right to education – Right to freedom of expression – Right to assembly, demonstration, picket and petition – Right to freedom of association – Where applicants were part of group of students that participated in protest seeking free education – Where High Court ordered final interdict against applicants and ordered applicants to pay respondent’s costs – Whether High Court correctly exercised costs discretion.

Held (10:0): Appeal allowed in respect of costs order.

National Union of Metal Workers of South Africa & Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Limited)

Constitutional Court of South Africa: [\[2017\] ZACC 9](#)

Judgment delivered: 30 March 2017

Coram: Mogoeng CJ, Froneman, Jafta, Khampepe, Madlanga JJ, Mbha AJ, Mhlantla and Zondo JJ

Catchwords:

Constitution – Right of access to courts – Right to fair labour practices – Where employees dismissed for participating in strike – Where Labour Court ordered reinstatement under *Labour Relations Act 1995 s 193(1)(a)* – Where employer did not allow employees to return to working pending appeal – Where employees subsequently claimed for payment of wages for period they did not work – Where Labour Court ordered employer to pay back-dated remuneration – Whether obligation to pay back-dated remuneration constitutes a judgment debt – If not, whether claim has prescribed.

Held (8:0): Appeal allowed.

Expressions Hair Design et al v Schneiderman, Attorney General of New York et al

Supreme Court of the United States: [Docket No 15-1391](#)

Judgment delivered: 29 March 2017

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

Catchwords:

Constitution – First Amendment – Unconstitutional “vagueness” – New York General Business Law §518 – Where legislation prohibited imposing surcharge for payment by credit card – Where petitioners used “single-sticker regime” where cash price displayed and credit card user charged more than sticker price – Whether §518 prohibits petitioners’ pricing regime – Whether §518 regulates “speech” – If so, whether §518 unconstitutionally vague in application to petitioners.

Held (8:0): Vacated and remanded.

Moore v Texas

Supreme Court of the United States: [Docket No 15-797](#)

Judgment delivered: 28 March 2017

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

Catchwords:

Constitution – Eighth Amendment – Prohibition of “cruel and unusual punishments” – Where petitioner convicted of capital murder and sentenced to death – Where habeas court determined petitioner qualified as intellectually disabled such that death sentence violated Eighth Amendment – Where habeas court relied on medical diagnostic standards set out in current medical manuals – Where Texas Court of Criminal

Appeals held habeas court erred in not following *Ex parte Briseno* 135 SW 3d 1 (2004) which adopted definition and standards for assessing intellectual disability contained in earlier manual – Whether *Briseno* standard is consistent with Eighth Amendment.

Held (5:3): Vacated and remanded.

National Labor Relations Board v SW General, Inc, DBA Southwest Ambulance

Supreme Court of the United States: [Docket No 15-1251](#)

Judgment delivered: 21 March 2017

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

Catchwords:

Constitution – Requirement of “advice and consent” of Senate for Presidential appointment of “Officers of the United States” under Constitution §2 – Temporary appointments where President and Senate cannot promptly agree under *Federal Vacancies Reform Act* 1998 – Where President appointed Lafe Solomon to vacancy of General Counsel of National Labor Relations Board – Where President later nominated Solomon to serve on permanent basis but Senate took no action – Where President subsequently nominated new candidate whom Senate confirmed – Where Board on behalf of Solomon issued unfair labor practices complaint – Whether *Federal Vacancies Reform Act* 1998 prohibited Solomon from serving as acting General Counsel once nominated by President to fill position permanently.

Held (6:2): Affirmed.

Manuel v City of Joliet, Illinois et al

Supreme Court of the United States: [Docket No 14-9496](#)

Judgment delivered: 21 March 2017

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

Catchwords:

Constitution – Fourth Amendment – Where police searched petitioner at traffic stop and found vitamin bottle – Where test for controlled substances returned negative result – Where police arrested petitioner – Where subsequent test returned negative result but reported “positive for the probable presence of ecstasy” – Where arresting officer reported that based on “training and experience” he “knew the pills to be ecstasy” –

Where petitioner charged and detained pending trial – Where further police laboratory test returned negative result – Where petitioner spent 48 days in pretrial detention before case dismissed – Whether claim barred by two-year limitation period – Whether pretrial detention can give rise to Fourth Amendment claim.

Held (6:2): Reversed and remanded.

Black Sash Trust v Minister of Social Development & Others
Constitutional Court of South Africa: [\[2017\] ZACC 8](#)

Judgment delivered: 17 March 2017

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron, Froneman, Jafta, Khampepe, Madlanga, Mhlantla JJ, Mojabelo, Pretorius AJJ, and Zondo J

Catchwords:

Constitutional law – Constitution s 27 – Right to social security – Social grants under *Social Assistance Act* 2004 – Where contract for provision of services in respect of social grants declared invalid – Where declaration of invalidity suspended on premise new tender would be awarded after proper procurement process or government agency would take over payment of grants itself – Where government agency now incapable of paying grants itself – Whether constitutional duty to continue payment of social grants.

Held (11:0): Declaration and orders made.

South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs
Constitutional Court of South Africa: [\[2017\] ZACC 7](#)

Judgment delivered: 9 March 2017

Coram: Nkabinde ACJ, Cameron, Froneman, Jafta, Khampepe, Madlanga JJ, Mbha AJ, Mhlantla J, Musi AJ and Zondo J

Catchwords:

Constitutional law – *Local Government: Municipal Systems Amendment Act* 2011 – Where Act “tagged” by Joint Tagging Mechanism as “not affecting provinces” – Whether Act incorrectly passed under s 75 Constitution as “not affecting provinces” – Whether Act required to comply with procedures under s 76 Constitution for bills “affecting provinces” – Application of test in *Tongoane v National Minister for Agriculture and Land Affairs* [2010] ZACC 10 – Whether retrospective effect of declaration of invalidity should be limited – Whether declaration of invalidity should be

suspended – Whether s 56A of Act inconsistent with Constitution, including right to “make political choices” under Constitution s 19.

Held (8:2): Declaration of invalidity affirmed.

Beckles v United States

Supreme Court of the United States: [Docket No 15-8544](#)

Judgment delivered: 6 March 2017

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

Catchwords:

Constitutional law – Due Process Clause – Void for vagueness doctrine – Federal Sentencing Guidelines – Where petitioner convicted of possession of firearm by convicted felon – Where presentence investigation report concluded petitioner eligible for sentencing enhancement as “career offender” because offence was “crime of violence” – Where Guidelines defined “crime of violence” as offence involving “conduct that presents a serious potential risk of physical injury to another” – Where identically worded legislation declared unconstitutionally vague in *Johnson v United States* 135 SCt 2551 (2015) – Whether advisory guidelines amenable to vagueness challenge.

Held (7:0): Affirmed.

Pena-Rodriguez v Colorado

Supreme Court of the United States: [Docket No 15-606](#)

Judgment delivered: 6 March 2017

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

Catchwords:

Constitutional law – Sixth Amendment – Where petitioner convicted of harassment and unlawful sexual conduct – Where two jurors told defence counsel that another juror expressed anti-Hispanic bias toward petitioner and alibi witness – Where defence counsel obtained affidavits from jurors – Where trial court denied motion for new trial – Whether prohibition under Colorado Rule of Evidence 606(b) against jurors testifying as to statements made during deliberations in proceeding inquiring into validity of verdict inconsistent with Sixth Amendment where juror indicates he or she relied on racial stereotype – Threshold for setting aside no-impeachment rule.

Held (5:3): Reversed and remanded.

Mogaila v Coca Cola Fortune (Pty) Limited

Constitutional Court of South Africa: [\[2017\] ZACC 6](#)

Judgment delivered: 2 March 2017

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J

Catchwords:

Constitutional law – Direct access to Court under Constitution s 167(6)(a) – Where applicant dismissed from employment – Where Commissioner found dismissal unfair and ordered reinstatement of applicant and back pay of wages – Where applicant sought certification of award under *Labour Relations Act 1995* s 143(3) – Whether award constituted “debt” for purposes of *Prescription Act 1969* – Whether *Prescription Act 1969* inconsistent with *Labour Relations Act 1995* – Application of *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus* [2016] ZACC 49.

Held (11:0): Declaration that award not “prescribed” in terms of *Prescription Act 1969*.

Bethune-Hill et al v Virginia State Board of Elections et al

Supreme Court of the United States: [Docket No 15-680](#)

Judgment delivered: 1 March 2017

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

Catchwords:

Constitutional law – Fourteenth Amendment – Equal protection – Where boundaries of twelve voting districts redrawn with goal of ensuring “black voting-age population” of at least 55% in each – Where District Court found target necessary in one district to avoiding diminishing ability of black voters to elect preferred candidate contrary to *Voting Rights Act 1965* s 5 – Whether race was “predominant factor” in drawing boundaries – Whether conflict with traditional redistricting principles must be established – Whether state required to show boundaries “necessary” to comply with *Voting Rights Act 1965* s 5.

Held (7:1): Vacated in part and remanded.

R v Paterson

Supreme Court of Canada: [\[2017\] SCC 15](#)

Judgment delivered: 17 March 2017

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

Catchwords:

Constitutional law – Canadian Charter of Rights and Freedoms ss 8, 24(2)
Evidence – Search and seizure – Where accused admitted to having marijuana in residence – Where accused allowed police to seize marijuana cigarette butts after being told would be “no case” seizure – Where accused arrested after police located other drugs and weapon – Whether Crown required to prove voluntariness of accused’s admission to having marijuana in residence prior to admission at voir dire considering lawfulness of entry and search of residence – Whether common law confessions rule applies to statements tendered in voir dire under Charter – Whether “exigent circumstances” within meaning of s 11(7) *Controlled Drugs and Substances Act* S.C. 1996 c 19 made it “impracticable” to obtain warrant before entering and searching residence – Whether Charter right to be secure against unreasonable search or seizure infringed – If infringed, whether evidence obtained from warrantless entry and search should be excluded.

Held (5:2): Appeal allowed.

Contract Law

Wood v Capita Insurance Services Limited

United Kingdom Supreme Court: [\[2017\] UKSC 24](#)

Judgment delivered: 29 March 2017

Coram: Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

Catchwords:

Contract law – Contractual interpretation – Where parties entered into contract for sale by respondent to appellant of share capital in motor insurance company – Where review by company revealed telephone operators had misled customers – Where company and appellant agreed to pay compensation to affected customers – Where appellant brought claim against respondent under cl 7.11 of contract – Where cl 7.11 required respondent to indemnify appellant for compensation required to be made by company “following and arising out of claims or complaints” that “relate to the period prior to the Completion Date” – Whether outside scope of cl 7.11 because requirement to compensate did not arise out of claim or complaint by customers.

Held (5:0): Appeal dismissed.

Costs

Goodyear Tire & Rubber Co v Haeger et al

Supreme Court of the United States: [Docket No 15-1406](#)

Judgment delivered: 18 April 2017

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

Catchwords:

Costs – Where petitioner sued by respondents alleging tyre failure caused motorhome to swerve and flip – Where parties settled litigation – Where respondents' lawyer discovered petitioner withheld information requested by respondents – Where respondents sought sanctions for discovery fraud – Where District Court awarded respondents entire sum spent on legal fees and costs since petitioner's first dishonest discovery response without establishment of "causal link" between expenses and conduct because "particularly egregious" conduct – Where Ninth Circuit affirmed District Court award – Whether inherent authority of federal court to sanction bad-faith conduct by ordering payment of legal fees limited to fees party would not have incurred "but for" the bad faith.

Held (8:0): Reversed and remanded.

Times Newspaper Limited v Flood; Miller v Associated Newspapers Limited; Frost & Ors v MGN Limited

United Kingdom Supreme Court: [\[2017\] UKSC 32](#)

Judgment delivered: 11 April 2017

Coram: Lord Neuberger, Lord Mance, Lord Sumption, Lord Hughes, Lord Hodge

Catchwords:

Costs – Where newspaper publishers ordered to pay claimants' costs – Where claimants took advantage of costs regime introduced by *Access to Justice Act 1999* (UK) – Where regime permitted conditional fee agreements, "after-the-event" insurance against risk of having to pay defendant's costs, and recovery of "success fee" against defendant if claim succeeded – Where regime now largely replaced except for defamation and privacy claims – Whether regime infringes right to freedom of expression under European Convention on Human Rights art 10 – Whether *MGN Ltd v United Kingdom* (2011) 53 EHRR 5 should be applied.

Held (5:0): Appeals dismissed.

Plevin v Paragon Personal Finance Limited

United Kingdom Supreme Court: [\[2017\] UKSC 23](#)

Judgment delivered: 29 March 2017

Coram: Lady Hale, Lord Clarke, Lord Sumption, Lord Carnwath, Lord Hodge

Catchwords:

Costs – Supreme Court Rules r 53 – Application for review of costs assessment – Where respondent’s solicitors acted under “conditional fee agreement” (CFA) with “after the event” (ATE) insurance – Where recoverability of success fee under CFA and ATE insurance premium depended on costs regime that was brought to end by *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) – Where respondent changed solicitors – Where deed of variation extended CFA to cover appeals to Court of Appeal and Supreme Court – Whether success fee validly assigned to firms that replaced respondent’s original solicitors – Whether success fee and ATE premium not recoverable because payable under arrangements made by respondent after Act came into force.

Held (4:1): Appeal dismissed.

Criminal Law

Isle of Wight Council v Platt

United Kingdom Supreme Court: [\[2017\] UKSC 28](#)

Judgment delivered: 6 April 2017

Coram: Lord Neuberger, Lady Hale, Lord Mance, Lord Reed, Lord Hughes

Catchwords:

Criminal law – *Education Act 1996* (UK) s 444(1) – Where s 444(1) provides that a parent is guilty of an offence if child of compulsory school age “fails to attend regularly” – Where respondent sought permission to take daughter on holiday – Where teacher refused request – Where respondent took daughter on holiday causing her to miss seven days of school – Where respondent failed to pay penalty notice – Where Magistrates’ Court held daughter attended school “regularly” because daughter had over 90% attendance rate that academic year – Meaning of “fails to attend regularly”.

Held (5:0): Appeal allowed.

Dean v United States

Supreme Court of the United States: [Docket No 15-9260](#)

Judgment delivered: 3 April 2017

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

Catchwords:

Criminal law – Sentencing – Where petitioner convicted of multiple robbery and firearms counts, as well as two counts of possessing firearm in furtherance of crime of violence in violation of 18 USC §924(c) – Where §924(c)(1)(A) provides that a distinct penalty must be imposed “in addition to the punishment provided for such crime of violence or drug trafficking crime” – Where District Court declined petitioner’s request that it impose concurrent one-day sentences for other counts – Whether §924(c) prevents a sentencing court from considering a mandatory minimum imposed under that provision when calculating appropriate sentence for predicate offence.

Held (8:0): Reversed and remanded.

R v Oland

Supreme Court of Canada: [\[2017\] SCC 17](#)

Judgment delivered: 23 March 2017

Coram: McLachlin CJ, Abella, Moldaver, Karakatsanis, Wagner, Gascon, Cote, Brown and Rowe JJ

Catchwords:

Criminal law – Interim release – Appeals – Where appellant convicted of second degree murder – Where appeal judge dismissed application for release pending appeal because applicant failed to establish detention “not necessary in the public interest” under s 679(3)(c) Criminal Code, RSC 1985, c C-46 – Where Chief Justice of Court of Appeal directed panel to review dismissal decision under s 680(1) – Where appeal against conviction subsequently allowed and appellant released pending retrial – Whether appeal from decision refusing release rendered moot – Whether Supreme Court should exercise discretion to hear appeal – Standard of review to be applied by panel – Principles and policy considerations by which appellate courts should be guided in deciding whether person convicted of serious crime and sentenced to lengthy term of imprisonment should be released pending determination of appeal.

Held (9:0): Appeal allowed.

HKSAR v Nguyen Anh Nga

Hong Kong Court of Final Appeal: [\[2017\] HKCFA 17](#)

Judgment delivered: 14 March 2017

Coram: Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Fok PJ, Mr Justice Bokhary NPJ and Lord Walker NPJ

Catchwords:

Criminal law – Jury directions – Circumstantial evidence – Inferential reasoning – Where appellant’s suitcase contained dangerous drugs – Where prosecution urged jury to infer from evidence of appellant’s reaction when confronted by customs officer that appellant knew drugs concealed in suitcase – Whether jury adequately directed in accordance with *Tang Kwok Wah v HKSAR* (2002) 5 HKCFAR 209 – Whether “substantial and grave injustice”.

Held (5:0): Appeal allowed.

Secretary for Justice v Chan Chi Wan Stephen; Secretary for Justice v Tseng Pei Kun

Hong Kong Court of Final Appeal: [\[2017\] HKCFA 15](#) and [\[2017\] HKCFA 16](#)

Judgment delivered: 14 March 2017

Coram: Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Fok PJ, Mr Justice Stock NPJ and Lord Walker NPJ

Catchwords:

Criminal law – *Prevention of Bribery Ordinance* s 9 – Where first appellant’s contract of employment with television company required approval for outside work – Where first appellant voluntarily hosted talk show produced by employer for no additional remuneration – Where first appellant acquired celebrity status – Where second appellant acted as agent for first appellant in respect of external events – Where third party agreed to pay appellants for first appellant appearing on special episode of talk show – Where first appellant, as agent of television company, charged with accepting or conspiring to accept advantage contrary to s 9 – Where second appellant charged with inducing first appellant, or conspiring with first appellant for first appellant to accept, advantage contrary to s 9 – Elements of s 9 – Application of *Commissioner of the ICAC v Ch’ng Poh* [1997] HKLRD 652 – Whether necessary relationship between transaction and principal’s affairs or business established – Whether conduct must be adverse to principal’s interests – Whether, in cases of conspiracy, s 24 operates to reverse onus to prove lawful authority or reasonable excuse.

Held (5:0): Appeals allowed.

Discrimination

Essop & Ors v Home Office (UK Border Agency); Naeem v Secretary of State for Justice

United Kingdom Supreme Court: [\[2017\] UKSC 27](#)

Judgment delivered: 5 April 2017

Coram: Lady Hale, Lord Clarke, Lord Wilson, Lord Carnwath, Lord Hodge

Catchwords:

Discrimination – Indirect discrimination – Application of provision, criterion or practice which puts people with protected characteristic at disadvantage – Where appellants in *Essop* appeal required to pass Core Skills Assessment as prerequisite for promotion – Where report established ethnic minorities and older candidates had lower pass rates but did not explain why – Whether *Equality Act* 2010 (UK) s 19(2)(b) required appellants to prove reason for lower pass rate to establish indirect discrimination on grounds of race or age – Where Mr Naeem employed as Muslim chaplain by Prison Service – Where pay scheme incorporated pay progression over time – Where average length of service of Christian chaplains was longer leading to higher average pay – Whether indirectly discriminatory against Muslim or Asian chaplains.

Held (5:0): *Essop* appeal allowed; *Naeem* appeal dismissed.

McLane Co, Inc v Equal Employment Opportunity Commission

Supreme Court of the United States: [Docket No 15-1248](#)

Judgment delivered: 3 April 2017

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

Catchwords:

Discrimination – Where employee fired by petitioner after failing physical evaluation upon return from maternity leave – Where employee filed sex discrimination claim under *Civil Rights Act* 1964 – Where petitioner refused to provide “pedigree information” to Equal Employment Opportunity Commission – Whether subpoenas issued by Commission should be enforced – Whether “pedigree information” relevant to claims – Whether Ninth Circuit erred in reviewing District Court’s decision to quash subpoenas *de novo*.

Held (7:1): Vacated and remanded.

Andrew F, a minor, by and through his parents and next friends, Joseph F et al v Douglas County School District

Supreme Court of the United States: [Docket No 15-827](#)

Judgment delivered: 22 March 2017

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

Catchwords:

Discrimination – “Free appropriate public education” under *Individuals with Disabilities Education Act* – Where petitioner, a child with autism, received annual “individualized education programs” at public school – Where petitioner’s parents enrolled petitioner in private school because progress had “stalled” – Where petitioner made “significant progress” at private school – Where school district presented parents with new “individualized education program” but parents did not consider plan adequate – Where petitioner filed complaint under Act – Whether requirement to provide “free appropriate public education” satisfied if “individualized education program” calculated to confer educational benefit that is more than de minimis – Whether child must be provided with opportunities “substantially equal” to children without disabilities – Application of *Board of Education of Hendrick Hudson Central School District, Westchester City v Rowley* 458 US 176 (1982).

Held (8:0): Vacated and remanded.

Equity

Ivan Vladimir Joseph Erceg v Lynette Therese Erceg and Darryl Edward Gregory as Trustees of Acorn Foundation Trust and Lynette Therese Erceg and Darryl Edward Gregory as Trustees of Independent Group Trust

New Zealand Supreme Court: [\[2017\] NZSC 28](#)

Judgment delivered: 8 March 2017

Coram: Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ

Catchwords:

Equity – Trusts – Where appellant’s deceased brother established two trusts prior to death – Where appellant was not named as beneficiary but

was one of class of discretionary beneficiaries – Where appellant was undischarged bankrupt when trusts wound up – Where appellant did not receive distributions – Where appellant sought access to documents related to trusts – Where trustees refused request – Whether trustees should be required to disclose documents to appellant – Whether appellant had standing to bring claim.

Held (5:0): Appeal dismissed.

Family Law

In the matter of EV (A Child) (Scotland); In the matter of EV (A Child) (No 2) (Scotland)

United Kingdom Supreme Court: [\[2017\] UKSC 15](#)

Judgment delivered: 1 March 2017

Coram: Lady Hale, Lord Kerr, Lord Wilson, Lord Reed, Lord Hodge

Catchwords:

Family law – *Adoption and Children (Scotland) Act 2008* ss 80, 84 – Application for permanence order under s 80 – Where child in care since birth – Where application opposed by birth parents – Whether primary judge erred in failing to make findings of fact in relation to threshold test in s 84(5)(c)(ii) – If so, whether application should be remitted rather than refused.

Held (5:0): Appeals allowed.

Financial Services

Financial Conduct Authority v Macris

United Kingdom Supreme Court: [\[2017\] UKSC 19](#)

Judgment delivered: 22 March 2017

Coram: Lord Neuberger, Lord Mance, Lord Wilson, Lord Sumption, Lord Hodge

Catchwords:

Financial services – *Financial Services and Markets Act 2000* – Where respondent was International Chief Investment Officer of bank – Where Financial Conduct Authority issued notices to bank before imposing penalty – Where notices did not identify respondent by name or job title but referred to a category to which he belonged – Where respondent not supplied with copy of notice or given opportunity to make representations

– Whether respondent entitled to notification under s 393 of Act on basis that notice “identified” respondent.

Held (4:1): Appeal allowed.

Guardianship

N v ACCG & Ors

United Kingdom Supreme Court: [\[2017\] UKSC 22](#)

Judgment delivered: 22 March 2017

Coram: Lady Hale, Lord Wilson, Lord Reed, Lord Carnwath, Lord Hughes

Catchwords:

Guardianship – *Mental Capacity Act 2005* – Best interests – Where orders made under Act that profoundly disabled man reside in care home and contact with parents be regulated – Where respondent considered parents’ request for man to visit family home and mother to assist in care not in “best interests” because home visits would require additional carers and parents declined offer of training in manual handling – Whether Court of Protection erred in discontinuing hearing on basis it was inappropriate to try to obtain best interest declaration to put pressure on respondent to make further funding available.

Held (5:0): Appeal dismissed.

Human Rights

McCann v The State Hospitals Board for Scotland (Scotland)

United Kingdom Supreme Court: [\[2017\] UKSC 31](#)

Judgment delivered: 11 April 2017

Coram: Lady Hale, Lord Mance, Lord Wilson, Lord Reed, Lord Hodge

Catchwords:

Human Rights – European Convention on Human Rights arts 8, 14 – Where appellant detained in Hospital due to mental disorder following conviction for several offences – Where State Hospitals Board implemented smoking ban – Whether ban unlawful as incompatible with *Mental Health (Care and Treatment) (Scotland) Act 2003* s 1 or *Mental Health (Safety and Security) (Scotland) Regulations 2005* – Whether s 1 inapplicable because Board acted under power of management under *National Health Service (Scotland) Act 1978* s 102(4) – Whether

unjustifiable interference with right to respect for private life under art 8 – Whether appellant subject to discriminatory treatment contrary to art 14.

Held (5:0): Appeal allowed in part.

SXH v The Crown Prosecution Service

United Kingdom Supreme Court: [\[2017\] UKSC 30](#)

Judgment delivered: 11 April 2017

Coram: Lord Mance, Lord Kerr, Lord Reed, Lord Hughes, Lord Toulson

Catchwords:

Human Rights – Right to respect for private and family life, home and correspondence under European Convention on Human Rights art 8 – Where appellant, member of minority clan in Somalia, fled from Holland to United Kingdom on false passport – Where appellant had spent one year in Yemen before travelling to Holland and then United Kingdom – Where appellant arrested on suspicion of being in possession of identity card relating to someone else with intention of using it to establish identity as that person's identity, contrary to *Identity Cards Act 2006 (UK) s 25(1)* – Where *Immigration and Asylum Act 1999 (UK) s 31* provides defence for refugee charged under s 25 if he or she came "directly" from a country where life or freedom threatened and made claim for asylum as soon as reasonably practicable – Where Crown Prosecution Service initially considered s 31 defence unlikely to succeed because appellant spent year in Yemen – Where Crown Prosecution Service later concluded prosecution was not in public interest – Where appellant brought claim against Crown Prosecution Service alleging decision to prosecute infringed art 8 – Whether institution of criminal proceedings may be open to challenge on art 8 grounds.

Held (5:0): Appeal dismissed.

AB v Her Majesty's Advocate (Scotland)

United Kingdom Supreme Court: [\[2017\] UKSC 25](#)

Judgment delivered: 5 April 2017

Coram: Lord Kerr, Lord Wilson, Lord Reed, Lord Hughes, Lord Hodge

Catchwords:

Human Rights – European Convention on Human Rights arts 6, 8, 14 – Where appellant charged with sexual intercourse with child under 16 years contrary to *Sexual Offences (Scotland) Act 2009 ss 28, 30* – Where appellant sought to rely on defence under s 39(1)(a) that appellant reasonably believed girl was aged 16 years – Where s 39(2)(a)(i) provides

that reasonable belief defence is unavailable to person previously charged with "relevant sexual offence" – Where appellant previously charged with sexual offences when aged 14 but not prosecuted – Whether s 39(2)(a)(i) incompatible with presumption of innocence under art 6(2) of Convention – Whether s 39(2)(a)(i) incompatible with right to privacy under art 8 – Whether s 39(2)(a)(i) unjustifiably discriminatory for purposes of art 14 – Whether interference with Convention rights justified by interest of protecting children from sexual exploitation.

Held (5:0): Appeal allowed.

Inheritance

Ilott v The Blue Cross & Ors

United Kingdom Supreme Court: [\[2017\] UKSC 17](#)

Judgment delivered: 15 March 2017

Coram: Lord Neuberger, Lady Hale, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hughes

Catchwords:

Inheritance – Family provision – *Inheritance (Provision for Family and Dependents) Act 1985* – Where respondent estranged from mother for 26 years prior to mother's death in 2004 – Where mother's last will of 2002 left no provision for daughter – Where mother decided to make no provision as early as 1984 – Where primary judge found will failed to make "reasonable financial provision" for daughter – Whether primary judge erred in failing to identify amount of reduction in award attributed to long estrangement and lack of expectation of benefit – Whether primary judge erred in making award without knowing effect it would have on respondent's benefits entitlement.

Held (7:0): Appeals allowed.

Insurance Law

Coventry Health Care of Missouri, Inc., FKA Group Health Plan, Inc. v Nevils

Supreme Court of the United States: [Docket No 16-149](#)

Judgment delivered: 18 April 2017

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

Catchwords:

Insurance law – Health insurance – *Federal Employees Health Benefits Act 1959* – Where Act authorised Office of Personnel Management to contract with private carriers for federal employees’ health insurance – Where Act provided that terms of contract supersede any State or local law relating to health insurance or plans – Where respondent insured under Act by plan offered by petitioner – Where petitioner paid medical expenses when respondent injured in automobile accident – Where petitioner asserted lien against part of settlement respondent recovered from driver who caused injuries – Where Missouri law did not permit subrogation or reimbursement in such cases – Whether terms of contract under Act overrode Missouri law.

Held (8:0): Reversed and remanded.

Godbout v Page

Supreme Court of Canada: [\[2017\] SCC 18](#)

Judgment delivered: 24 March 2017

Coram: McLachlin CJ, Abella, Karakatsanis, Wagner, Gascon, Cote and Brown JJ

Catchwords:

Insurance law – Automobile insurance – Bodily injury – No-fault public automobile insurance scheme – Where victims suffered aggravated or separate injuries because of subsequent faults attributable to third parties – Whether injuries “suffered ... in an accident” within meaning of *Automobile Insurance Act*, CQLR c A-25 – Type of causal link required in case of subsequent fault committed by third party – Whether civil action against third parties barred by application of public compensation scheme.

Held (6:1): Appeals dismissed.

AIG Europe Limited v Woodman & Ors

United Kingdom Supreme Court: [\[2017\] UKSC 18](#)

Judgment delivered: 22 March 2017

Coram: Lord Mance, Lord Clarke, Lord Sumption, Lord Reed, Lord Toulson

Catchwords:

Insurance law – Professional indemnity insurance – *Solicitors Act 1974* – Where development of two holiday resorts funded by private investors – Where developers’ solicitors released tranches of investment funds to developers – Where developers unable to complete purchase of either site and subsequently wound up – Where investors brought two claims against

developers' solicitors, one in respect of each site – Whether solicitors failed to comply with “cover test” before releasing funds – Whether proceedings should be considered as a single claim under cl 2.5(a)(iv) of Minimum Terms and Conditions set by Law Society under Act.

Held (5:0): Appeal allowed.

Intellectual Property

Star Athletica, LLC v Varsity Brands, Inc et al
Supreme Court of the United States: [Docket No 15-866](#)

Judgment delivered: 22 March 2017

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

Catchwords:

Intellectual property – Copyright – *Copyright Act 1976* – Where respondents had copyright registrations for two-dimensional designs appearing on cheerleading uniforms – Whether designs can be “identified separately from, and are capable of existing independently of” uniforms for purpose of Act – Whether two-dimensional designs always “separable” – Whether designs are “pictorial, graphic or sculptural features” for purposes of Act.

Held (6:2): Affirmed.

SCA Hygiene Products Aktiebolag et al v First Quality Baby Products, LLC et al
Supreme Court of the United States: [Docket No 15-927](#)

Judgment delivered: 21 March 2017

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

Catchwords:

Intellectual property – *Patent Act 1952* – Where petitioners notified respondents that products infringed patent in 2003 – Where respondents contended patent was invalid – Where Patent and Trademark Office confirmed validity of patent in 2007 – Where petitioners subsequently sued for patent infringement in 2010 – Whether laches can be invoked as a defence against a claim for damages brought within 6-year limitation period.

Held (7:1): Vacated in part and remanded.

Judicial review

Gordon v Scottish Criminal Cases Review Commission
United Kingdom Supreme Court: [\[2017\] UKSC 20](#)

Judgment delivered: 22 March 2017

Coram: Lord Kerr, Lord Clarke, Lord Reed, Lord Hughes, Lord Hodge

Catchwords:

Judicial review – *Criminal Procedure (Scotland) Act* 1995 – European Convention on Human Rights art 6 – Where appellant interviewed by police without offer to consult solicitor – Where appellant admitted to having sexual intercourse with complainant but maintained it was consensual – Where appellant convicted – Where appellant unsuccessfully appealed against conviction – Where Commission decided not to refer conviction to High Court – Where appellant applied to Commission for referral again after decision in *Cadder v HM Advocate* [2010] UKSC 43 – Where Commission refused to refer conviction on basis that although there may have been a miscarriage of justice, not in interests of justice due to time passed since conviction and fact appellant did not dispute veracity or fairness of police interview.

Held (5:0): Appeal dismissed.

Jurisdiction

Lewis et al v Clarke
Supreme Court of the United States: [Docket No 15-1500](#)

Judgment delivered: 25 April 2017

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

Catchwords:

Jurisdiction – Sovereign immunity – Where petitioners struck by vehicle driven by respondent – Where respondent was employee of Mohegan Tribal Gaming Authority – Where Authority entitled to sovereign immunity – Where Supreme Court of Connecticut held tribal sovereign immunity barred suit because respondent was acting within scope of employment when accident occurred – Whether respondent entitled to sovereign

immunity – If not, whether Authority bound by tribal law to indemnify respondent.

Held (8:0): Reversed and remanded.

Manrique v United States

Supreme Court of the United States: [Docket No 15-7250](#)

Judgment delivered: 19 April 2017

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

Catchwords:

Jurisdiction – Appeal against order imposing restitution – Where District Court sentenced petitioner to term of imprisonment – Where District Court acknowledged restitution mandatory but deferred determination of amount – Where petitioner filed notice of appeal – Where District Court subsequently entered amended judgment ordering payment of restitution – Where petitioner did not file second notice of appeal from amended judgment but challenged restitution amount in Eleventh Circuit – Where Eleventh Circuit held petitioner could not challenge restitution amount in absence of second notice of appeal – Whether restitution order may be challenged in absence of notice of appeal from that order.

Held (6:2): Affirmed.

AMT Futures Limited v Marzillier, Dr Meier & Dr Guntner Rechtsanwalts-gesellschaft mbH

United Kingdom Supreme Court: [\[2017\] UKSC 13](#)

Judgment delivered: 1 March 2017

Coram: Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

Catchwords:

Jurisdiction – Council Regulation No 44/2001 art 5.3 – Inducing breach of contract – Where contracts between appellant and clients contained clauses providing that English law governed contract and that English courts would have exclusive jurisdiction – Where clients commenced legal proceedings in Germany – Whether English courts have jurisdiction to hear claim that respondent induced appellant's clients to bring proceedings in Germany in breach of contract.

Held (5:0): Appeal dismissed.

Legal Profession

Green v Law Society of Manitoba

Supreme Court of Canada: [\[2017\] SCC 20](#)

Judgment delivered: 30 March 2017

Coram: McLachlin CJ, Abella, Moldaver, Karakatsanis, Wagner, Gascon and Cote JJ

Catchwords:

Legal Profession – *The Legal Profession Act* 2002 CCSM c L107 – Where lawyer suspended by Law Society for failure to comply with Rules of The Law Society of Manitoba imposing mandatory professional development – Whether Rules invalid because impose suspension for non-compliance without right to hearing or right to appeal – Standard of review applicable to rules made by Law Society.

Held (5:2): Appeal dismissed.

Negligence

Lowick Rose LPP (in liquidation) v Swynson Ltd & Anor

United Kingdom Supreme Court: [\[2017\] UKSC 32](#)

Judgment delivered: 11 April 2017

Coram: Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

Catchwords:

Negligence – Where first respondent loaned funds to third party for buyout of another company – Where appellant negligently failed to draw first respondent’s attention to other company’s financial problems – Where second respondent, who controlled first respondent, personally loaned further funds to third party to enable repayment of original loan to first respondent – Whether appellant has no liability on basis that first respondent suffered no loss because original loan repaid – Collateral payments exception (*res inter alios acta*) – Whether appellant unjustly enriched such that second respondent may be subrogated to first respondent’s claims.

Held (5:0): Appeal allowed in part.

BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)

United Kingdom Supreme Court: [\[2017\] UKSC 21](#)

Judgment delivered: 22 March 2017

Coram: Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

Catchwords:

Negligence – Professional negligence – Causation of loss – Where businessman instructed solicitors to draft loan agreement with property developer – Where solicitors received further information from property developer as to proposed use of loan moneys and incorporated information into loan agreement – Where solicitors did not confirm information with client – Where transaction failed – Where primary judge found solicitors liable in negligence for including reference to proposed use of loan moneys and failing to explain effect of documentation to client – Where primary judge found client entitled to entire loss suffered by entered into transaction on basis he would not have entered into transaction if not misled about proposed use of loan moneys – Where Court of Appeal reduced damages to nil on basis whole loss attributable to client’s misjudgements – Whether losses recoverable from solicitors.

Held (5:0): Appeal dismissed.

Real Property

Ostiguy v Allie

Supreme Court of Canada: [\[2017\] SCC 22](#)

Judgment delivered: 6 April 2017

Coram: McLachlin CJ, Moldaver, Karakatsanis, Wagner, Gascon, Cote and Brown JJ

Catchwords:

Real property – Acquisitive prescription – *Civil Code of Québec* arts 922, 2910 and 2918 – Where respondent and family used parking spaces on neighbouring lot for more than 10 years – Where new owners of neighbouring lot applied for injunction to prevent use of parking spaces – Where Superior Court and Court of Appeal dismissed application for injunction – Where art 2918 provides that a person who has possessed an immovable as its owner for 10 years “may acquire the ownership of it only upon a judicial application” – Whether right of ownership acquired by prescription that has not been subject of judicial application may be set up against new owner of immovable who has registered title in land register.

Held (6:1): Appeal dismissed.

Remedies

Nuclear Decommissioning Authority v EnergySolutions EU Ltd (now called ATK Energy EU Ltd)

United Kingdom Supreme Court: [\[2017\] UKSC 34](#)

Judgment delivered: 11 April 2017

Coram: Lord Neuberger, Lady Hale, Lord Mance, Lord Sumption, Lord Carnwath

Catchwords:

Remedies – Directive No 89/665/EEC (“Remedies Directive”) – Where parties agree that Authority wrongly failed to award contract to consortium to which respondent belongs in breach of *Public Procurement Regulations* 2006 (UK) (which give effect to Public Procurement Directive No 2004/18/EC and Remedies Directive) – Where Remedies Directive requires effective remedies for economic operators to be made in such cases – Whether r 47J(2)(c) of 2006 Regulations requires breach to be “sufficiently serious” before damages awarded – Whether damages award under r 47J(2)(c) may be refused on basis that economic operator issued proceedings within 30 day period prescribed by r 47D but not before contracting authority entered into contract.

Held (5:0): Appeal allowed; cross-appeal dismissed.

Taxation

The Commissioners for Her Majesty’s Revenue and Customs v Investment Trust Companies (in liquidation)

United Kingdom Supreme Court: [\[2017\] UKSC 29](#)

Judgment delivered: 11 April 2017

Coram: Lord Neuberger, Lord Mance, Lord Reed, Lord Carnwath, Lord Hodge

Catchwords:

Taxation – *Value Added Tax Act* 1994 (UK) s 80 – Where respondents paid VAT on investment management services – Where investment managers paid VAT to Commissioners after deducting input tax – Where services were in fact exempt from VAT under EU law – Where respondents sought refunds of VAT – Whether respondents could claim in unjust enrichment against Commissioners – Whether claim excluded by s 80 – Whether lack of claim incompatible with EU law.

Held (5:0): Appeal allowed; cross-appeal dismissed.

Volkswagen Financial Services (UK) Ltd v Commissioners for Her Majesty's Revenue and Customs
United Kingdom Supreme Court: [\[2017\] UKSC 26](#)

Judgment delivered: 5 April 2017

Coram: Lord Neuberger, Lord Kerr, Lord Reed, Lord Carnwath, Lord Gill

Catchwords:

Taxation – Exemptions – Where respondent provided hire purchase finance for sale of vehicles manufactured by Volkswagen Group – Where vehicle acquired by respondent as part of finance arrangements then supplied to customer on deferred payment terms – Whether residual input tax paid by respondent in respect of general business overheads deductible against output tax paid on taxable supply of vehicles to customers – Whether Tribunal failed to consider challenge by appellant to apportionment formula contained in proposed “partial exemption special method”.

Held (5:0): Appeal partly referred to Court of Justice of the European Union and partly dismissed.

Commissioner of Rating and Valuation v CLP Power Hong Kong Ltd
Hong Kong Court of Final Appeal: [\[2017\] HKCFA 18](#)

Judgment delivered: 17 March 2017

Coram: Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Fok PJ and Lord Walker NPJ

Catchwords:

Taxation – Rating Ordinance Cap 116 ss 8, 8A – Statutory construction – Where respondent had four generating stations in Hong Kong with fixed equipment – Whether fixed equipment was “plant” under s 8A and therefore part of respondent’s tenement for rating assessment – Meaning of “plant” and “machinery” under ss 8 and 8A – Whether s 8A is “deeming provision” – Relationship between ss 8 and 8A – Whether regard may be had to function of item as part of larger whole in determining whether item is “plant”.

Held (5:0): Appeal allowed.

Newbigin (Valuation Officer) v S J & J Monk (a firm)
United Kingdom Supreme Court: [\[2017\] UKSC 14](#)

Judgment delivered: 1 March 2017

Coram: Lord Neuberger, Lord Kerr, Lord Reed, Lord Carnwath, Lord Hodge

Catchwords:

Taxation – Rateable value – *Local Government Finance Act 1988* sch 6 – Where appellant owned freehold of first floor of office building – Where premises previously occupied by tenants as single office suite – Where appellant commenced reconstruction work and marketed premises as available for rental as three separate office suites or as a whole – Where property vacant and reconstruction in process on date rateable value determined – Proper application of assumption in para 2(1)(b) of Sch 6 that property is in state of reasonable repair.

Held (5:0): Appeal allowed.
