



OVERSEAS DECISIONS BULLETIN

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

Volume 14 Number 4 (1 July 2017 – 31 August 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.

Administrative Law

Quebec (Attorney General) v Guerin
Supreme Court of Canada: [\[2017\] SCC 42](#)

Judgment delivered: 27 July 2017

Coram: McLachlin CJ, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ

Catchwords:

Administrative law – Judicial review – Standing – Where Federation of Medical Specialists of Quebec and Ministry of Health and Human Services entered into Framework Agreement – Where Protocol in schedule to Framework Agreement provided for payment of fee to laboratories designated by Federation and Ministry to modernise equipment – Where respondent radiologist applied for declaration certain clinics eligible for fee – Where application denied – Where respondent submitted dispute to arbitration – Where s 54 of *Health Insurance Act*, C.Q.L.R, c A-29 provides for submission of disputes “resulting from the interpretation or application” of Framework Agreement to “a council of arbitration, to the exclusion of any court of civil jurisdiction” – Where arbitrator held respondent lacked standing and no jurisdiction to grant declaration clinics eligible – Where primary judge held arbitrator’s decision unreasonable – Where Court of Appeal upheld primary judge’s decision – Whether arbitrable dispute – Whether respondent has standing to submit dispute to arbitration.

Held (6:1): Appeal allowed.

R (on the application of Hemming (t/a Simply Pleasure Ltd) & Ors) v Westminster City Council

United Kingdom Supreme Court: [\[2017\] UKSC 50](#)

Judgment delivered: 19 July 2017

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

Catchwords:

Administrative law – Licence fees – *Provision of Services Regulation 2009* – Where fees charged by Council for sex shop licences included fees for cost of enforcing licensing scheme against unlicensed third parties (“enforcement costs”) – Where Court of Appeal held Council not entitled to levy enforcement costs – Where Council made repayments to licence holders – Where Supreme Court in 2015 held Council entitled to levy enforcement costs upon applications being granted and referred question to European Court of Justice whether Council entitled to levy enforcement costs at time of making application – Where Court of Justice answered question in negative – Whether Council entitled to be repaid sums it repaid to licence holders in 2013.

Held (4:0): Question answered (Lord Toulson died before judgment was delivered).

Auckland Council v Wendco (NZ) Limited & Anor

New Zealand Supreme Court: [\[2017\] NZSC 113](#)

Judgment delivered: 17 July 2017

Coram: William Young, Glazebrook, Arnold, O'Regan and Ellen France JJ

Catchwords:

Administrative law – *Resource Management Act 1991* – Manukau Operative District Plan 2002 – Redevelopment consent – Where Council granted consent for redevelopment under Act without notifying first respondent – Where first respondent sought judicial review of non-notification and grant of resource consent on basis it should have been notified because adversely affected by reconfigured on-site circulation and parking arrangements associated with access point alterations – Where Court of Appeal held Council was required to notify first respondent of application – Whether adverse effects complained of “relate to” matters in respect of which Council reserved discretion under Plan – Whether Council asked itself correct question and had sufficient evidence to justify conclusion in making non-notification decision.

Held (3:2): Appeal allowed.

Hawke's Bay Regional Investment Company Limited v Royal Forest and Bird Protection Society of New Zealand Incorporated & Anor
New Zealand Supreme Court: [\[2017\] NZSC 106](#)

Judgment delivered: 6 July 2017

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

Catchwords:

Administrative law – *Conservation Act* 1987 s 18(7) – Improper purpose – Irrelevant considerations – Where Ruahine Forest Park deemed under Act to be held by Minister for conservation purposes as “conservation park” – Where appellant proposed privately owned land adjacent to Forest Park be exchanged for 22 hectares of Forest Park to facilitate water storage scheme – Where Director-General of Conservation, as Minister’s delegate, revoked “conservation park” status for 22 hectares of Forest Park to enable exchange – Where Court of Appeal found Director-General acted unlawfully in revoking “conservation park” status – Whether statutory power to revoke protection may be used for purpose of allowing land to be exchanged as “stewardship land” – Whether proposed land exchange and “net benefit” to conservation estate may be taken into account in making revocation decision – Whether Director-General acted unlawfully in failing to observe planning instruments adopted under Act – Whether Director-General erred in law in failing to address statutory requirements in relation to “marginal strips” that would be created by land exchange.

Held (3:2): Appeals dismissed.

Constitutional Law

Jordaan & Ors v City of Tshwane Metropolitan Municipality & Ors; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Ltd & Ors; Ekurhuleni Metropolitan Municipality v Livanos & Ors

Constitutional Court of South Africa: [\[2017\] ZACC 31](#)

Judgment delivered: 29 August 2017

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

Catchwords:

Constitutional law – Constitution s 25 – Right not to be arbitrarily deprived of property – *Local Government: Municipal Systems Act 2000 s 118(3)* – Where new property owners denied services on basis of s 118(3) until historical debts relating to property paid – Where s 118(3) provides amount due for municipal service fees, surcharges, property rates and other municipal taxes, levies and duties is “a charge upon the property” – Where High Court declared s 118(3) invalid – Whether upon transfer of property, new owner liable for debts arising before transfer due to charge upon property under s 118(3) – If yes, whether s 118(3) unconstitutional because arbitrarily deprives new owners of property.

Held (11:0): Appeals allowed.

Tan Cheng Bock v Attorney-General

Court of Appeal of Singapore: [\[2017\] SGCA 50](#)

Judgment delivered: 23 August 2017

Coram: Sundaresh Menon CJ, Judith Prakash, Steven Chong JJA, Chua Lee Ming and Kannan Ramesh JJ

Catchwords:

Constitutional law – Constitution arts 19B, 164 – Interpretation – Where art 19B provides for “reserved election” whereby Presidency reserved for candidates of particular community if no person from that community has held office of President in five most recent terms – Where art 164 requires Parliament to specify “first term of office of the President to be counted for the purposes of deciding whether an election is reserved under art 19B” – Where Parliament specified President Wee Kim Wee’s last term of office as “first term” for purposes of art 19B – Where effect of specification is that next presidential election will be reserved for candidates of Malay community – Where primary judge dismissed appellant’s application for declaration Parliament’s specification of President Wee Kim Wee’s last term was void – Whether discretion under art 164 restricted such that Parliament can only designate as “first term” term of President elected directly by citizens of Singapore rather than by Parliament.

Held (5:0): Appeal dismissed.

Chippewas of the Thames First Nations v Enbridge Pipelines Inc & Ors

Supreme Court of Canada: [\[2017\] SCC 41](#)

Judgment delivered: 26 July 2017

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

Catchwords:

Constitutional law – *Constitution Act* 1982 s 35(1) – Treaty rights – *National Energy Board Act*, R.S.C. 1985, c N-7, s 58 – Where National Energy Board approved application to modify pipeline – Where Board issued notice to indigenous groups including appellant – Where appellant group participated in consultation process – Where Board concluded indigenous groups adequately consulted and potential impact on rights and interests of groups likely to be minimal – Where majority of Federal Court of Appeal dismissed appellant’s appeal – Whether Crown’s duty to consult triggered – Whether duty able to be fulfilled through Board process – Whether adequate notice given to appellant that Crown relying on Board’s process to fulfil duty to consult – Whether consultation adequate – Whether Board’s written reasons sufficient to satisfy Crown’s obligation.

Held (9:0): Appeal dismissed.

Clyde River (Hamlet) v Petroleum Geo-Services Inc

Supreme Court of Canada: [\[2017\] SCC 40](#)

Judgment delivered: 26 July 2017

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

Catchwords:

Constitutional law – *Constitution Act* 1982 s 35(1) – Treaty rights – *Canada Oil and Gas Operations Act*, R.S.C. 1985, c 0-7, s 5(1)(b) – Where National Energy Board granted authorisation to conduct offshore seismic testing for oil and gas – Where proposed testing could negatively affect treaty rights of Inuit of Clyde River – Where Federal Court of Appeal found Crown’s duty to consult triggered but satisfied by Board’s consultation process – Whether Board’s approval process triggered Crown’s duty to consult – Whether Crown able to rely on Board’s consultation processes to fulfil duty – Whether consultation adequate.

Held (9:0): Appeal allowed.

South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. & Ors

Constitutional Court of South Africa: [\[2017\] ZACC 26](#)

Judgment delivered: 24 July 2017

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

Catchwords:

Constitutional law – Constitution ss 22, 25 – *Diamonds Act 1986 s 20A* – Where members of appellant organisation are licensed diamond dealers who developed mode of operation whereby non-licensed “experts” attend premises on behalf of prospective foreign buyers – Where mode of operation prohibited by s 20A of Act – Where High Court declared s 20A unconstitutional – Whether s 20A unconstitutional because infringes rights of members under s 25 of Constitution not to be deprived of property arbitrarily by preventing members from realising full market value of diamonds – Whether s 20A unconstitutional because infringes rights of members under s 22 of Constitution by limiting right to practice trade freely without rational basis.

Held (11:0): Appeal allowed.

Baron & Ors v Claytile (Pty) Limited & Anor

Constitutional Court of South Africa: [\[2017\] ZACC 24](#)

Judgment delivered: 13 July 2017

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

Catchwords:

Constitutional law – Constitution s 26 – Right to access to adequate housing – *Extension of Security of Tenure Act 1997* – Where appellants were employees or relatives of employees of brick manufacturing business carried on by first respondent at farm – Where appellants evicted from farm following termination of employment – Where City of Cape Town Municipality made offer of alternative accommodation – Where appellants rejected offer on basis structures inadequate and accommodation too distant from appellants’ places of employment and children’s school – Where first respondent offered to transport children to school – Whether City fulfilled duty to provide suitable alternative accommodation – Whether private landowner obliged to provide alternative accommodation – Meaning of “suitable alternative accommodation”.

Held (11:0): Appeal dismissed.

Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs

Hong Kong Court of Final Appeal: [\[2017\] HKCFA 44](#)

Judgment delivered: 11 July 2017

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

Catchwords:

Constitutional law – Basic Law of the Hong Kong Special Administrative Region Art 26 – Hong Kong Bill of Rights Art 21 – Right to stand for election and participate in public life – Where Legislative Council Ordinance s 39(2A) barred legislator who resigned from Legislative Council from standing in by-election within 6 months of resignation – Whether s 39(2A) inconsistent with Art 26 of Basic Law and/or Art 21 of Bill of Rights and therefore unconstitutional – Whether encroachment on constitutional rights proportional to legitimate aim of preventing legislators undermining electoral system by resigning in order to cause by-election in which they would stand.

Held (5:0): Appeal dismissed.

Contracts

MT Hojgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd & Anor

United Kingdom Supreme Court: [\[2017\] UKSC 59](#)

Judgment delivered: 3 August 2017

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

Catchwords:

Contracts – Remedial costs – Where appellants sent tender documents to respondent that included “technical requirements” – Where “technical requirements” specified foundation structures for offshore wind turbines to be constructed in accordance with J101 international standard – Where J101 contained erroneous formula that overestimated strength of foundation structures – Where respondent and appellant subsequently entered into contract which stated works shall be “fit for purpose” and foundations shall have lifetime of 20 years – Where “fit for purpose” defined to include adherence to “technical requirements” – Where foundation structures failed shortly after completion of project – Where High Court found respondent liable for remedial costs as foundations did not have lifetime of 20 years – Where Court of Appeal allowed appeal – Whether respondent breached contract despite complying with J101.

Held (5:0): Appeal allowed.

Uniprix Inc v Gestion Gosselin et Berube Inc & Anor

Supreme Court of Canada: [\[2017\] SCC 43](#)

Judgment delivered: 28 July 2017

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

Catchwords:

Contracts – Interpretation – Intention of parties – Contract of affiliation – Where respondents entered into contract of affiliation with appellant in 1998 for fixed term of five years – Where contract contained clause stipulating that contract would be renewed automatically unless respondents gave notice to contrary – Where appellant notified respondents in July 2012 that contractual relationship would terminate in January 2013 – Where trial judge found renewal clause represented common intention to grant respondents unilateral option to renew contract every five years which appellant unable to oppose – Where majority of Court of Appeal affirmed trial judge’s decision – Whether trial judge erred in construing renewal clause – Whether possibility of contract of affiliation having perpetual effect unlawful in Quebec civil law as contrary to *Civil Code of Quebec*, C.Q.L.R c CCQ-1991, arts 1425, 1512 or public order.

Held (6:3): Appeal dismissed.

Corporations

David Browne Contractors Ltd & Anor v Petterson as liquidator of Polyethylene Pipe Systems Ltd (in liq)

New Zealand Supreme Court: [\[2017\] NZSC 116](#)

Judgment delivered: 7 August 2017

Coram: William Young, Glazebrook, Arnold, O'Regan and Ellen France JJ

Catchwords:

Corporations – *Companies Act* 1993 s 292 – Insolvent trading – Where appellants and Polyethylene Pipe Systems Ltd (“Polyethylene”) part of same group of companies – Where Polyethylene entered into subcontract to weld pipes for third party – Where third party informed Polyethylene in May 2008 that it intended to seek recovery of costs due to weld failures in accordance with indemnity provisions of subcontract – Where Polyethylene’s directors resolved to make payments to appellants in June 2008 – Where third party succeeded in claim against Polyethylene – Where Polyethylene put into liquidation in October 2009 – Where liquidator sought to set aside payments made to appellants as insolvent transactions under s 292 – Where High Court held third party claim was not “due debt” – Where Court of Appeal overturned decision and ordered appellants to repay sums received – Whether claim brought by third party was “due debt” for purposes of s 292(2)(a) – Whether appellants should have been ordered to repay sums received.

Held (5:0): Appeal dismissed.

Wilson v Alharayeri

Supreme Court of Canada: [\[2017\] SCC 39](#)

Judgment delivered: 13 July 2017

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

Catchwords:

Corporations – Oppression – Remedies – *Canada Business Corporations Act*, R.S.C. 1985, c C-44, s 241(3) – Where corporation’s board refused to convert preferred shares held by respondent before issuing private replacement of convertible secured notes – Where board discussions resulting in refusal led by appellant whose preferred shares converted so as to benefit from private placement – Where respondent filed application under s 241 – Where trial judge held appellant and another director solely liable for oppression and ordered them to pay compensation to respondent – Where Court of Appeal dismissed directors’ appeal – Whether trial judge erred in exercising statutory remedial powers by holding corporate directors personally liable for oppression – Whether pleadings sufficient to ground imposition of personal liability.

Held (9:0): Appeal dismissed.

Costs

Hamish McIntosh v John Fisk & Anor

New Zealand Supreme Court: [\[2017\] NZSC 129](#)

Judgment delivered: 31 August 2017

Coram: William Young, Glazebrook, Arnold, O'Regan and Ellen France JJ

Catchwords:

Costs – Interest – *Judicature Act* 1908 s 87 – Where appellant provided funds to company that purported to offer investment management services – Where company was to invest funds on appellant’s behalf – Where appellant later sought to withdraw funds – Where company repaid appellant initial investment plus “profits” – Where company was in fact operating Ponzi scheme – Where liquidators brought claim to set aside payment to appellant – Where High Court allowed liquidators to recover fictitious profits but held appellant entitled to retain initial investment – Where Court of Appeal and Supreme Court upheld High Court’s order –

Whether appellant should be ordered to pay interest on profits – If yes, whether interest should be paid from date of appointment of liquidators at rate set by s 87(3) of *Judicature Act* 1908.

Held (5:0): Orders made.

Criminal Law

Khanye & Anor v S

Constitutional Court of South Africa: [\[2017\] ZACC 29](#)

Judgment delivered: 10 August 2017

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

Catchwords:

Criminal law – Evidence – Admissions – *Law of Evidence Amendment Act* 1988 s 3(1)(b) – *Criminal Procedure Act* 1977 s 219A – Where appellants and five co-accused convicted of murder, aggravated robbery and possession of firearms based on doctrine of common purpose – Where trial judge admitted statements made by co-accused to investigating officer and magistrate – Where appellants allege statements not made voluntarily – Where Full Bench of High Court dismissed appeal on basis statements automatically admissible under s 3(1)(b) because co-accused confirmed portions of statements in oral testimony – Where Supreme Court of Appeal dismissed applications for leave to appeal – Whether extra-curial admissions by co-accused inadmissible against appellants – If yes, whether insufficient evidence to sustain convictions.

Held (11:0): Appeal allowed.

R v M; R v C; R v T

United Kingdom Supreme Court: [\[2017\] UKSC 58](#)

Judgment delivered: 3 August 2017

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

Catchwords:

Criminal law – Statutory construction – *Trade Marks Act* 1994 s 92(1) – Unauthorised use of trademarks – Where s 92(1) prohibits application of “a sign identical to, or likely to be mistaken for, a registered trademark” and sale of goods bearing “such a sign” – Where appellants allegedly imported and sold goods bearing registered trademark manufactured with permission of trademark proprietor but sold without proprietor’s consent

("grey market" goods) – Whether s 92(1) applies only to "true counterfeits" not "grey market" goods.

Held (5:0): Appeals dismissed.

Mark David Chisnall v Chief Executive of the Department of Corrections
New Zealand Supreme Court: [\[2017\] NZSC 114](#)

Judgment delivered: 1 August 2017

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

Catchwords:

Criminal law – Interim detention orders – *Public Safety (Public Protection Orders) Act 2014* – *Parole Act 2002* – Where appellant convicted of serious sexual offending and sentenced to 11 years imprisonment – Where sentence due to expire on 27 April 2016 – Where respondent applied for public protection order under *Public Safety (Public Protection Orders) Act* or alternatively extended supervision order under *Parole Act* – Where respondent further applied for interim orders to cover period between date of release and hearing of applications under Acts – Where High Court ordered interim detention under s 107 of *Public Safety (Public Protection Orders) Act 2014* on basis appellant posed "very high risk of imminent serious sexual or violent offending" – Where Court of Appeal upheld interim order – Whether evidence established basis for making public protection order – Whether lesser restriction such as interim supervision order sufficient to meet risk posed by appellant's release – Whether possibility of appellant having disability or mental disorder made interim detention inappropriate.

Held (4:1): Appeal dismissed.

HKSAR v Chui Shu Shing

Hong Kong Court of Final Appeal: [\[2017\] HKCFA 43](#)

Judgment delivered: 11 July 2017

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

Catchwords:

Criminal law – Guesthouse Accommodation Ordinance s 5(1) – Where appellant employed as "Front Office Management Trainee" by guesthouse – Where duties included processing check-in/check-out formalities, dealing with complaints and responding to guests' requests – Where appellant convicted in Magistrates' Court of managing guesthouse without licence or certificate of exemption contrary to s 5(1) of Ordinance – Where

Court of First Instance dismissed appeal against conviction and ordered appellant to pay respondent's costs – Whether appellant was “managing” guesthouse within meaning of s 5(1) – Whether Court of First Instance erred in making costs orders in favour of prosecution in appeal against conviction.

Held (5:0): Appeal allowed.

R v George

Supreme Court of Canada: [\[2017\] SCC 38](#)

Judgment delivered: 7 July 2017

Coram: Abella, Moldaver, Karakatsanis, Gascon and Côté JJ

Catchwords:

Criminal law – Defences – Mistake of age – Appeals – *Criminal Code*, R.S.C. 1985, c C-46, s 150.1(4) – Where appellant charged with sexually assaulting and sexually interfering with male child aged 14 years – Where appellant presumed child was about 17 years – Where trial judge acquitted appellant on basis Crown failed to prove beyond reasonable doubt appellant failed to take all reasonable steps to determine child's age – Where Court of Appeal allowed Crown appeal and ordered new trial – Whether Court of Appeal erred in finding trial judge erred in law – If no, whether errors sufficiently material to justify appellate intervention.

Held (5:0): Appeal allowed.

R v Alex

Supreme Court of Canada: [\[2017\] SCC 37](#)

Judgment delivered: 6 July 2017

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

Catchwords:

Criminal law – Evidence – Admissibility – *Criminal Code*, R.S.C. 1985, c C-46, s 258 – Certificate of analysis for breath test results – Where accused charged with driving with blood-alcohol level over legal limit – Where s 258(1)(c) and (g) provide “evidentiary shortcuts” which permit Crown to establish blood-alcohol concentration by filing certificate recording test results so Crown not required to call breath technician and expert toxicologist as witnesses – Where trial judge held police had insufficient grounds for making breath demand but, applying *Rilling v The Queen* [1976] 2 SCR 183, held Crown not required to prove lawful demand in order to rely on evidentiary shortcuts – Where appeals to British Columbia

Supreme Court and Court of Appeal dismissed – Whether phrase “pursuant to a demand made under subsection 254(3)” means demand for breath sample must be lawful for evidentiary shortcuts to apply – Whether *Rilling v The Queen* remains good law.

Held (5:4): Appeal dismissed.

Employment Law

Lowe v Director-General of Health & Anor
New Zealand Supreme Court: [\[2017\] NZSC 115](#)

Judgment delivered: 7 August 2017

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

Catchwords:

Employment law – *Employment Relations Act 2000* – Statutory interpretation – Where appellant provided relief care under carer support scheme operated by Ministry of Health and District Health Boards – Where appellant paid either by primary carer who would be reimbursed by Ministry or Board, or directly by Ministry or Board – Where Employment Relations Authority found appellant was not “homeworker” within definition of s 5 of Act and therefore not “employee” of Ministry or Board – Where Employment Court found appellant was “homeworker” – Where Court of Appeal allowed appeal – Whether appellant was “homeworker” within meaning of s 5 when providing relief care pursuant to carer support scheme.

Held (3:2): Appeal dismissed.

R (on the application of UNISON) v Lord Chancellor
United Kingdom Supreme Court: [\[2017\] UKSC 51](#)

Judgment delivered: 26 July 2017

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

Catchwords:

Employment law – Access to justice – *Employment Tribunals and the Employment Appeals Tribunal Fees Order 2013* – Where prior to July 2013, claimants able to bring proceedings in employment tribunals and appeal without paying fees – Where Lord Chancellor made Order under *Tribunals, Courts and Enforcement Act 2007* requiring payment of fees with stated aims of deterring unmeritorious claims and encouraging earlier

settlement – Where under Order, amount payable depends on whether claim brought by single claimant or group and type of claim – Whether Order unlawful because fees unjustifiably interfere with right of access to justice – Whether Order unlawful because Order frustrates statutory employment rights – Whether Order unlawful because discriminates against women and other protected grounds contrary to *Equality Act 2010* by charging higher fees for “type B” claims.

Held (7:0): Appeal allowed.

Walker v Innospec Limited & Ors

United Kingdom Supreme Court: [\[2017\] UKSC 47](#)

Judgment delivered: 12 July 2017

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

Catchwords:

Employment law – EU Directive 2000/78/EC – *Equality Act 2010* sch 9 para 18 – Where appellant employed by respondent from 1980 until retirement in 2003 – Where appellant entered into civil partnership with same-sex partner in 2006 – Where appellant asked respondent to confirm that, in event of appellant’s death, respondent would pay spouse’s pension to civil partner – Where respondent refused because appellant’s service predated introduction of civil partnerships in United Kingdom and therefore discriminatory treatment permitted by sch 9 para 18 of Act – Where Employment Tribunal upheld appellant’s claim for discrimination – Where Employment Appeals Tribunal allowed appeal – Whether sch 9 para 18 incompatible with Directive.

Held (5:0): Appeal allowed; declaration of incompatibility made.

O’Brien v Ministry of Justice

United Kingdom Supreme Court: [\[2017\] UKSC 46](#)

Judgment delivered: 12 July 2017

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

Catchwords:

Employment law – Council Directive 97/81/EC – *Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000* – Where appellant worked as daily fee-paid part-time judge of Crown Court between 1978 and 2005 – Where no pension provision made for fee-paid part-time judges – Where Regulations expressly did not apply to fee-paid part-time judges – Where Court of Justice of European Union held distinction between salaried and daily fee-paid judges for purposes of

pension provision impermissible – Where Supreme Court held appellant entitled to pension on terms equivalent to comparable full-time judge and remitted matter to Employment Tribunal to determine amount of pension – Where Employment Tribunal held calculation should take into account whole 27 year period of service – Where Employment Appeal Tribunal held calculation should only take into account service since 2000 deadline for transposing Directive – Whether pension should be calculated from beginning of service or deadline for transposing Directive.

Held (5:0): Question referred to Court of Justice of European Union.

Family Law

Birch v Birch

United Kingdom Supreme Court: [\[2017\] UKSC 53](#)

Judgment delivered: 26 July 2017

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

Catchwords:

Family law – Jurisdiction – Where parties entered into consent order – Where consent order provided husband would transfer interest in matrimonial home to wife and wife would discharge all mortgage payments and use best endeavours to release husband from mortgage covenants – Where wife applied to “vary” undertaking – Where County Court held no jurisdiction to hear application – Where Court of Appeal held scope for exercise of jurisdiction to hear application “extremely limited” and no basis for exercise – Whether courts below erred in dismissing application.

Held (4:1): Appeal allowed.

McDonald v Newton or McDonald

United Kingdom Supreme Court: [\[2017\] UKSC 52](#)

Judgment delivered: 26 July 2017

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

Catchwords:

Family law – *Family Law (Scotland) Act 1985 – Divorce etc (Pensions) (Scotland) Regulations 2000* – Pensions sharing order – Where respondent made contributions to superannuation scheme between December 1978 and retirement in August 1985 – Where respondent married appellant in March 1985 – Where parties separated in September 2010 – Where reg 4

contains formula for calculation of value of rights or interests in pension arrangement – Where formula refers to “period of membership ... in the pension arrangement” – Whether “period of membership” means period in which respondent was “active member” by making contributions.

Held (5:0): Appeal allowed.

Human Rights

Khuja v Times Newspapers Limited & Ors

United Kingdom Supreme Court: [\[2017\] UKSC 49](#)

Judgment delivered: 19 July 2017

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

Catchwords:

Human Rights – European Convention on Human Rights art 8 – Where nine men charged with child sex grooming and child prostitution – Where appellant arrested at same time as other nine men – Where newspapers sought to publish information identifying appellant – Where trial judge made order under *Contempt of Court Act 1981 s 4(2)* prohibiting publication of report which might identify or tend to identify appellant until decision made whether or not to charge him – Where police released appellant without charge – Where newspapers applied to lift order on ground no pending or imminent proceedings against appellant which might be prejudiced by publication – Where High Court declined to grant interim injunction restraining publication – Where Court of Appeal dismissed appellant’s appeal – Whether injunction necessary to protect appellant against misuse of private information and infringement of right to private and family life under art 8 of Convention.

Held (5:2): Appeal dismissed.

Immigration

Sadovska & Anor v Secretary of State for the Home Department

United Kingdom Supreme Court: [\[2017\] UKSC 54](#)

Judgment delivered: 26 July 2017

Coram: Lord Neuberger, Lady Hale, Lord Kerr, Lord Clarke, Lord Reed

Catchwords:

Immigration – *Immigration (European Economic Area) Regulations 2006* reg 19(3)(c) – Marriage of convenience – Where first appellant, citizen of Lithuania, moved to United Kingdom in 2007 and acquired right of permanent residence under EU Directive 2004/38/EC – Where second appellant, citizen of Pakistan, remained in United Kingdom unlawfully after visa expired in April 2013 in breach of *Immigration and Asylum Act 1999* s 10(1)(a) – Where appellants maintain they have been in a relationship since February 2013 and decided to marry in January 2014 – Where appellants notified liable to removal on basis Secretary of State had reasonable grounds to suspect first appellant abused right of residence by attempting to enter into marriage of convenience – Where appellants appealed to First-tier Tribunal – Where judge held burden of proof on appellants to establish proposed marriage not marriage of convenience – Whether Tribunal erred in requiring appellants to establish relationship genuine.

Held (5:0): Appeal allowed.

Jurisdiction

New Zealand Air Line Pilots' Association Incorporated v Air New Zealand Limited

New Zealand Supreme Court: [\[2017\] NZSC 111](#)

Judgment delivered: 14 July 2017

Coram: William Young, Glazebrook, Arnold, O'Regan and Ellen France JJ

Catchwords:

Jurisdiction – Court of Appeal – *Employment Relations Act 2000* s 214(1) – Where appellant entered into collective agreement with respondent – Where cl 24.2 provided that, if respondent entered into more favourable “agreement” with other pilot association, that “agreement” would be passed on to pilots in appellant association on request – Where respondent entered into agreement with other pilot association in 2013 which provided higher rates of pay for B737-300 first officers and all second officers – Where appellant requested higher rates of pay be passed on to pilots in appellant association – Where respondent refused on basis cl 24.2 only allowed passing on of whole collective agreement, not particular terms – Where Employment Relations Authority accepted respondent’s interpretation – Where Employment Court reversed Authority’s decision – Where Court of Appeal allowed appeal – Where s 214(1) provides Court of Appeal cannot hear appeal on “construction of ... a collective employment agreement” – Whether Court of Appeal had jurisdiction to hear appeal.

Held (4:1): Appeal dismissed.

Patent Law

Actavis UK Limited & Ors v Eli Lilly and Company; Eli Lilly and Company v Actavis UK Limited & Ors

United Kingdom Supreme Court: [\[2017\] UKSC 48](#)

Judgment delivered: 12 July 2017

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

Catchwords:

Patent law – European Patent Convention 2000 – Where Eli Lilly & Company marketed “Alimta” product for use in cancer treatment – Where product avoids damaging side effects of chemical “pemetrexed” by administering pemetrexed disodium with vitamin B12 – Where Actavis group’s proposed products involve pemetrexed compounds being used with vitamin B12 for cancer treatment but active ingredient is pemetrexed diacid, pemetrexed ditromethamine or pemetrexed dipotassium – Where trial judge decided proposed products would not directly or indirectly infringe patent in United Kingdom, France, Italy or Spain – Where Court of Appeal found products would indirectly infringe patent in all four jurisdictions – Whether proposed products would directly or indirectly infringe patents.

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

Procedure

Goldtrail Travel Limited (in liq) v Onur Air Tasimacilik AS

United Kingdom Supreme Court: [\[2017\] UKSC 57](#)

Judgment delivered: 2 August 2017

Coram: Lord Neuberger, Lord Clarke, Lord Wilson, Lord Carnwath, Lord Hodge

Catchwords:

Procedure – *Civil Procedure Rules* 1998 – Where trial judge found appellant dishonestly assisted in defrauding respondent and ordered appellant to pay damages – Where r 52.9(1)(c) granted discretion to “impose ... conditions upon which an appeal may be brought” – Where Court of Appeal ordered appellant to pay sum into court as condition for continuation of appeal – Where appellant failed to pay sum – Where respondent applied for dismissal of appeal – Where Court of Appeal dismissed appeal on basis third party who largely owed appellant able to provide funds and “has decided not to fund the payment” – Whether Court

of Appeal erred in concluding ability of third party to fund payment defeated complaint condition would stifle appeal.

Held (3:2): Appeal allowed.

Real Property

Mokone v Tassos Properties CC & Anor

Constitutional Court of South Africa: [\[2017\] ZACC 25](#)

Judgment delivered: 24 July 2017

Coram: Nkabinde ADCJ, Froneman, Jafta, Khampepe, Madlanga, Mhlantla JJ, Mojapelo, Pretorius AJJ and Zondo J

Catchwords:

Real property – Right of pre-emption – Where appellant and first respondent entered into written lease for term of one year in March 2004 – Where cl 6 granted appellant right of first refusal to purchase premises if first respondent wished to sell – Where appellant and first respondent subsequently concluded oral agreement on same terms – Where appellant and first respondent further agreed to extension of lease in May 2006 by endorsement “Extend till 31/5/2014 monthly rent RS 500” written on first page of original lease and signed by representative of first respondent – Where first respondent sold premises to second respondent – Where High Court held endorsement extended period of lease but not right of pre-emption – Whether right of pre-emption renewed when lease extended – Whether endorsement invalid because failed to comply with formalities in *Alienation of Land Act 1981 s 2(1)*.

Held (9:0): Appeals allowed.

Tai Fat Development (Holding) Co Ltd & Ors v The Incorporated Owners of Gold King Industrial Building

Hong Kong Court of Final Appeal: [\[2017\] HKCFA 42](#)

Judgment delivered: 4 July 2017

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

Catchwords:

Real property – Construction of deed – Estoppel by convention – Parking spaces – Where trial judge concluded that, on proper construction of deed, parking spaces are part of common areas of building – Where Court of Appeal affirmed decision – Whether courts below erred in construction

of deed – Whether owners’ corporation estopped from asserting ownership of parking spaces because owners’ corporation leased spaces from appellants before and after disputing ownership of spaces.

Held (5:0): Appeal dismissed.

Statutory Interpretation

R (on the application of Forge Care Homes Ltd & Ors) v Cardiff and Vale University Health Board & Ors

United Kingdom Supreme Court: [\[2017\] UKSC 56](#)

Judgment delivered: 2 August 2017

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

Catchwords:

Statutory interpretation – *Health and Social Care Act 2001 s 49* – Where s 49 provides local authorities not required to provide “nursing care by a registered nurse” defined as care “other than any services which, having regard to their nature and the circumstances in which they are provided, do not need to be provided by a registered nurse” – Where *Care Homes (Wales) Regulation 2002 reg 18(3)* requires care homes to ensure registered nurse working at all times – Where Local Health Boards decided to pay flat weekly rate which excluded payment for non-nursing care time and other time such as stand-by – Where High Court held Boards should fund all services in fact provided by registered nurse – Where Court of Appeal by majority allowed Boards’ appeal – Whether Boards’ decisions to exclude non-nursing care time from payment based on misinterpretation of s 49.

Held (5:0): Appeal allowed.

Taxation

BPP Holdings & Ors v Commissioners for Her Majesty’s Revenue and Customs

United Kingdom Supreme Court: [\[2017\] UKSC 55](#)

Judgment delivered: 26 July 2017

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

Catchwords:

Taxation – Where Commissioners issued VAT assessments against respondent group of companies – Where respondent group appealed assessments – Where Commissioners failed to reply to questions contained in request for further information and supplied defective disclosure statement and list of documents – Where First-tier Tribunal made order debaring Commissioners from defending appeal – Where Upper Tribunal allowed appeal from order – Where Court of Appeal restored debaring order – Whether decision to make debaring order unjustifiable.

Held (5:0): Appeal dismissed.

RFC 2012 Plc (in liq) (formerly The Rangers Football Club Plc) v Advocate General for Scotland

United Kingdom Supreme Court: [\[2017\] UKSC 45](#)

Judgment delivered: 5 July 2017

Coram: Lord Neuberger, Lady Hale, Lord Reed, Lord Carnwath, Lord Hodge

Catchwords:

Taxation – *Income Tax (Earnings and Pensions) Act 2003* – *Income Tax (Employments) Regulations 1993* – *Income Tax (Pay As You Earn) Regulations 2003* – Where appellant paid sums into Remuneration Trust – Where sums resettled on sub-trust for specified members of employees' families – Where employees able to obtain loans from trust rather than being paid through payroll – Where loans and interest repayable out of employees' estates upon death – Where First-tier Tribunal held scheme effective in avoiding liability to income tax and national insurance contributions because employees only received loan of moneys paid into trusts – Where Inner House allowed appeal – Whether employee must receive, or be entitled to receive, remuneration for work in order for payment to amount to taxable earnings.

Held (5:0): Appeal dismissed.
