OVERSEAS DECISIONS BULLETIN

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

Administrative Law

Department of Homeland Security & Ors v Regents of the University of California & Ors

United States Supreme Court: Docket No. 18-587

Judgment delivered: 18 June 2020

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

Catchwords:

Administrative law – Judicial review – Administrative Procedure Act ("APA") – Due Process Clause – Where in 2012 Department of Homeland Security ("DHS") issued memorandum announcing immigration relief program called Deferred Action for Childhood Arrivals ("DACA") – Where DACA allowed certain unauthorised aliens who had arrived in United States as children to apply for two-year forbearance of removal – Where successful applicants became eligible for work authorisation and some federal benefits – Where two years later DHS announced expansion of eligibility requirements for DACA and related program called Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") – Where DAPA, if implemented, would have made 4.3 million people eligible for same forbearance, work rights, and benefits as successful DACA applicants – Where 26 states sought and obtained nationwide preliminary injunction preventing implementation of DACA expansion and DAPA – Where Court of Appeals for Fifth Circuit upheld injunction on basis

that programs violated Immigration and Nationality Act – Where Supreme Court of United States affirmed Fifth Circuit's decision by equally divided vote, with proceedings then continuing in District Court – Where in June 2017 DHS rescinded DAPA Memorandum, citing, among other factors, ongoing litigation and new policy priorities – Where in September 2017 Acting Secretary of Homeland Security acted on advice from Attorney General to rescind DACA on basis that it shared DAPA's purported legal flaws – Where Acting Secretary terminated DACA with transitional arrangements such that DHS would no longer accept new DACA applicants, existing DACA recipients whose benefits would expire within six months could apply for two-year renewal, and in all other cases, previously issued relief would expire in due course with no option of renewal – Where several groups of plaintiff's challenged Secretary's decision to terminate program – Where claims included that decision was arbitrary and capricious in breach of APA and infringed equal protection guarantee in Due Process Clause of Fifth Amendment – Where District Courts in California, New York, and District of Columbia ruled in favour of plaintiffs – Where each of those District Courts rejected Government's position that claims were unreviewable under APA and that Immigration and Nationality Act deprived courts of jurisdiction – Where District Courts in California and New York considered that equal protection claims were adequately alleged, and, considering that APA claims likely to succeed, issued nationwide preliminary injunctions – Where District Court in District of Columbia deferred judgment on equal protection claim but granted partial summary judgment on APA claim on basis that decision to rescind DACA was insufficiently explained – Where new Secretary of Homeland Security stood by predecessor's decision to rescind program and offered further justifications for that decision – Where District Court in District of Columbia did not consider additional reasons significantly elaborated on administration's earlier inadequate reasons for rescission – Where Government appealed decisions of District Courts to Courts of Appeals for Second, Ninth and District of Columbia Circuits respectively – Where while appeals pending, Government filed in Supreme Court petitions for certiorari before judgment – Where Ninth Circuit affirmed New York District Court's decision – Where Supreme Court then granted certiorari – Whether DHS's rescission decision reviewable under APA – Whether DHS's rescission decision arbitrary and capricious under APA – Whether respondents' claims established plausible inference that rescission was motivated by animus in violation of equal protection guarantee in Due Process Clause.

Held (5:4 on APA issue; 8:1 on equal protection issue): Judgment of Court of Appeals for Ninth Circuit vacated in part and reversed in part. Judgment of District Court of Columbia affirmed. Order of District Court of California of 13 February 2018 vacated; order of 9 November 2017 affirmed in part; order of 29 March 2018 reversed in part. All cases remanded.

United States Forest Service & Ors v Cowpasture River Preservation Association & Ors
United States Supreme Court: Docket No. 18-1584

Judgment delivered: 15 June 2020

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

Catchwords:

> Administrative law – Judicial review – Special use permits – Where one of petitioners (Atlantic Coast Pipeline, LLC) wished to construct pipeline along route that included land in George Washington National Forest – Where that petitioner obtained special use permit from United States Forest Service (another petitioner) – Where special use permit provided right-of-way for segment of pipe approximately 600 ft below part of Appalachian National Scenic Trail (which crosses part of Forest) – Where respondents sought review in Court of Appeals for Fourth Circuit, contending, among other things, that issue of special use permit in circumstances violated Mineral Leasing Act – Where Fourth Circuit vacated permit, holding that Forest Service lacked power to grant right-of-way – Whether Department of Interior's decision to assign responsibility for Appalachian Trail to National Park Service had consequence that relevant land formed part of National Park System, thereby taking that land beyond Forest Service's powers under Mineral Leasing Act.

Held (7:2): Judgment of Court of Appeals for Fourth Circuit reversed; case remanded.

Dill v Secretary of State for Housing, Communities and Local Government & Anor

United Kingdom Supreme Court: [2020] UKSC 20

Judgment delivered: 20 May 2020

Coram: Lords Wilson and Carnwath, Lady Arden, Lords Kitchin and Sales

Catchwords:

> Administrative law – Planning law – Criteria relevant to classification as "building" – Where pair of 18th century lead urns atop limestone pedestals ("items") moved to garden of Idlicote House in 1973 – Where in June 1986 items included among "listed buildings" pursuant to s 54 of *Town and Country Planning Act 1971* – Where no record of notice of listing having been served though it was included in register of local land charges – Where appellant acquired house and items in 1993 – Where appellant, unaware that items were listed, sold them in 2009 – Where in April 2015 district council informed appellant that listed building consent had been required for items to be removed – Where appellant's retrospective application for such consent refused – Where council then issued enforcement notice requiring reinstatement of items to Idlicot House – Where appellant appealed against refusal decision and issuing of

enforcement notice – Where planning inspector rejected appeals, holding that listing of items was conclusive of their status as "buildings" – Where High Court and Court of Appeal rejected subsequent appeals – Whether fact of listing conclusive of status of items as "buildings", or whether it was open to appellant to contend that items were not "buildings" within meaning of *Planning (Listed Buildings and Conservation Areas) Act 1990*.

Held (5:0): Appeal allowed.

R v Adams
United Kingdom Supreme Court: [2020] UKSC 19

Judgment delivered: 13 May 2020

Coram: Lord Kerr, Lady Black, Lords Lloyd-Jones, Kitchin and Burnett

Catchwords:

Administrative law – Delegation – *Carltona* principle – Internment – Where art 4 of Detention of Terrorists (Northern Ireland) Order 1972 empowered Secretary of State to make interim custody order ("ICO") with respect to person where Secretary considered that that person involved in terrorism – Where on 21 July 1973, ICO made in respect of appellant – Where appellant detained under ICO, twice attempted to escape detention, and was twice convicted of attempting to escape lawful custody – Where, following disclosure thirty years later of legal opinion from 1974, appellant commenced proceedings challenging validity of ICO of 21 July 1973 and lawfulness of subsequent detention and convictions – Where challenges dismissed – Where Court of Appeal in Northern Ireland dismissed appeal – Whether ICO of 21 July 1973 invalid because Secretary did not personally consider whether appellant involved in terrorism.

Held (5:0): Appeal allowed; convictions quashed.

Arbitration

BBA & Ors v BAZ & another matter
Singapore Court of Appeal: [2020] SGCA 53

Judgment delivered: 28 May 2020

Coram: Menon CJ, Prakash JA, Loh J

Catchwords:

Arbitration – Setting aside awards – Where respondent Japanese corporation, BAZ, entered sale and purchase agreement to buy 64% of

shares in Indian pharmaceutical company from appellants – Where appellants were family members of that company's founder, together with several companies controlled by them – Where appellant sellers led by BBA, grandson of founder, and where five sellers were minors – Where sale and purchase agreement contained clause providing for arbitration in Singapore – Where cl 13.14.1 prohibited arbitrators from awarding "punitive, exemplary, multiple or consequential damages" – Where cl 13.14.4 provided that arbitral awards "shall include interest from the date of any breach or other violation of this Agreement and the rate of such interest shall be specified by the arbitral tribunal" – Where disputes arose in relation to circumstances in which agreement entered – Where on 29 April 2016, majority of arbitral tribunal made award in favour of respondent – Where tribunal rejected appellants' argument that respondent's claim was time-barred under Indian Limitation Act 1963 – Where tribunal awarded approximately INR 25 billion in damages to respondent – Where tribunal awarded pre-award interest of approximately INR 8 billion – Where respondent sought and obtained ex parte order for enforcement of award – Where appellants who were minors sought to have both enforcement order and award set aside – Where remaining appellants separately sought to have enforcement order and award set aside – Where primary judge allowed minors' claims, but dismissed claims of other appellants – Where other appellants split into two groups, each appealing from primary judge's orders – Whether tribunal, in making its awards of damages and/or pre-award interest, breached cl 13.14.1 and therefore exceeded jurisdiction – Whether seat court entitled to conduct de novo review of whether respondent's fraud claim time-barred under Indian law, and if so, whether claim was time-barred – Whether tribunal's finding of joint and several liability among appellants vulnerable to challenge on grounds of breach of natural justice, excess of jurisdiction, or public policy.

Held (3:0): Appeals dismissed.

PUBG Corp v Garena International I Pte Ltd & Ors

Singapore Court of Appeal: [2020] SGCA 51

Judgment delivered: 19 May 2020

Coram: Menon CJ, Loh J

Catchwords:

Arbitration – Stay of proceedings – Where appellant commenced proceedings in High Court against five respondents alleging copyright infringement and passing off – Where parties attempted negotiated settlement – Where respondents considered settlement agreement concluded – Where purported agreement contained arbitration clause – Where appellant disputed that valid settlement agreement reached and sought to continue to pursue High Court claim – Where respondents commenced arbitral proceedings against appellant to determine validity of

purported settlement agreement – Where respondents sought and obtained stay of High Court proceedings pending resolution of arbitral proceedings – Whether High Court judge erred in staying curial proceedings.

Held (2:0): Appeal dismissed.

Civil Procedure

Banister v Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division
United States Supreme Court: Docket No. 18-6943

Judgment delivered: 1 June 2020

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

Catchwords:

Civil procedure – Time limits – Habeas corpus – Where Federal Rule of Civil Procedure 59(e) allows litigant to seek alteration or amendment of District Court judgment within 28 days of judgment being entered – Where Rule enables District Court to rectify mistakes but not to consider new argument or evidence that could have been raised prior to decision date – Where timely motion suspends finality of original judgment for purposes of appeal – Where 30 day time limit for filing appeal only starts when District Court disposes of r 59(e) motion – Where Antiterrorism and Effective Death Penalty Act (AEDPA) governs federal habeas corpus proceedings – Where state prisoner entitled to one fair opportunity to seek federal habeas corpus relief against conviction – Where second or successive claims strictly limited – Where 28 USC §2244(b) provides for limits including that prisoner may not reassert claims "presented in a prior application" and may only bring second or successive claim in certain circumstances – Where Federal Rules of Civil Procedure apply to habeas corpus claims generally, though statutory restrictions on availability of federal habeas corpus claims (including §2244(b)) trump inconsistent Rules of Civil Procedure (see AEDPA §2254) – Where petitioner convicted by Texas court of aggravated assault and sentenced to 30 years' imprisonment – Where petitioner exhausted state remedies and sought federal habeas corpus – Where District Court refused – Where petitioner filed r 59(e) motion in time, which District Court also denied – Where petitioner then filed appeal within 30 days of disposition of r 59(e) motion – Where Court of Appeal for Fifth Circuit treated petitioner's r 59(e) motion as successive habeas corpus petition and so dismissed appeal as filed out of time – Whether petitioner's r 59(e) motion was successive habeas corpus petition such that it was caught by limitations in 28 USC §2244(b).

Held (7:2): Judgment of Court of Appeals for Fifth Circuit reversed; case remanded.

Thole & Ors v US Bank N. A. & Ors

United States Supreme Court: Docket No. 17-1712

Judgment delivered: 1 June 2020

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

Catchwords:

> Civil procedure – Standing – Where petitioners retired participants in defined benefit retirement plan administered by respondent bank – Where plan guarantees monthly fixed payment regardless of plan's value or fiduciaries' investment decisions – Where petitioners received all benefits so far and will continue to – Where petitioners filed putative representative proceedings against respondent bank and others alleging breaches of statutory duties of loyalty and prudence in relation to investment decisions – Where petitioner sought repayment of approximately $750 million to plan for losses said to be due to mismanagement, injunctive relief restraining current fiduciaries from continuing in that capacity, and costs – Where District Court dismissed proceedings – Where Court of Appeal for Eighth Circuit affirmed that decision on basis that petitioners lacked standing – Whether petitioners had standing under Art III of Constitution.

Held (5:4): Judgment of Court of Appeals for Eighth Circuit affirmed.

Lucky Brand Dungarees, Inc & Ors v Marcel Fashions Group, Inc

United States Supreme Court: Docket No. 18-1086

Judgment delivered: 14 May 2020

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

Catchwords:

> Civil procedure – *Res judicata* – Defence preclusion – Where both petitioners and respondent use word "Lucky" as part of marks on jeans and other clothes – Where respondent used registered trademark "Get Lucky" and petitioners used registered mark "Lucky Brand" and other marks with word "Lucky" – Where initial dispute between parties resulted in 2003 settlement where petitioners agreed to stop using phrase "Get Lucky" and respondent agreed to release claims in relation to petitioners' use of their own marks – Where in 2005, petitioners sued respondent and respondent's licensee for infringing petitioners' intellectual property –

Where respondent made counter-claims relating to petitioners' alleged ongoing use of "Get Lucky" mark – Where petitioners sought dismissal of counterclaims but also answered them by arguing counterclaims were precluded by 2003 settlement – Where petitioners lost 2005 dispute, with court making orders enjoining them from copying or imitating "Get Lucky" mark, and jury finding against petitioners on counterclaims – Where in 2011 respondent sued petitioners alleging ongoing infringements of "Get Lucky" mark – Where petitioners sought dismissal of proceedings on basis that in 2003 settlement respondent had released claims against petitioners in relation to use of their own marks – Where respondent contended petitioners could not rely on release defence, not having pursued defence fully in 2005 proceedings – Where District Court granted petitioners' motion to dismiss – Where Court of Appeals for Second Circuit vacated that decision and remanded, holding that doctrine of "defense preclusion" prevented petitioners from running defence that could have been run in earlier proceedings – Whether subject matter of 2011 proceedings was same as that of 2005 proceedings, such that they raised same claims – Whether petitioners precluded from relying on 2003 settlement as defence in 2011 proceedings.

Held (9:0): Judgment of Court of Appeals for Second Circuit reversed; case remanded.

Competition Law

Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited

Constitutional Court of South Africa: [2020] ZACC 14

Judgment delivered: 24 June 2020

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

Catchwords:

Competition law – *Competition Act 1998* – Time-bars – Where Competition Commission initiated complaints against furniture removal companies, alleging anti-competitive behaviour contrary to s 4 of *Competition Act* – Where complaints initiated on 3 November 2010 and 1 June 2011 – Where respondent only named in complaints initiated in June 2011 – Where respondent contended that fourteen of alleged incidents occurred more than three years before June 2011 and so were time-barred by s 67(1) of *Competition Act* – Where Commission contended *Prescription Act* had effect that three-year period only commenced once Commission came to know of alleged prohibited conduct – Where Commission further contended 2010 date was relevant date for purposes of s 67, because 2011 complaints were amendments to 2010 complaints – Where Competition Tribunal held three-year period in s 67 runs from end

of consequences of event in question not from date of occurrence, rejected Commission's reliance on *Prescription Act*, considered it lacked power to dispense with compliance with s 67, and held 2011 complaints not amendments to 2010 complaints – Where Tribunal accordingly found 1 June 2011 relevant date for purposes of s 67 – Where Commission appealed to Competition Appeal Court – Where Appeal Court declined to read a "knowledge" requirement into s 67, held that purpose of s 67 is to prevent investigations into conduct that no long affects public interest and held Tribunal was correct in holding it lacked power to cure non-compliance with s 67 – Where Appeal Court held Tribunal erred as to principles governing identification of relevant date for purposes of s 67, but agreed that 1 June 2011 was relevant date – Whether for purposes of s 67 2010 date or 2011 date is correct – Whether 2011 complaints independent of, or amendments to, 2010 complaints – Whether approach of Appeal Court to interpretation of s 67 unduly restricts right of access to courts – Whether Tribunal has power to dispense with compliance with s 67 in appropriate cases.

Held (10:0): Leave to appeal granted; appeal allowed.

Sainsbury's Supermarkets Ltd v Visa Europe Services LLC & Ors

United Kingdom Supreme Court: [2020] UKSC 24

Judgment delivered: 17 June 2020

Coram: Lords Reed, Hodge, Lloyd-Jones, Sales and Hamblen

Catchwords:

Competition law – Anti-competitive agreement – Treaty on Functioning of European Union – *Competition Act 1998* – Where appellants (Visa and Mastercard) operate payment card schemes where issuers (usually banks) issue debit and credit cards to customers and acquirers (usually banks) provide merchants with payment services – Where issuer and cardholders agree to certain terms – Where merchants and acquirers enter contracts that enable merchants to accept card payments, with merchant service charge ("MSC") going to acquirer – Where transactions between cardholder and merchant settled by issuer paying acquirer purchase price, and acquirer passing on that amount to merchant, less MSC – Where rules of scheme impose default fee (multilateral interchange fee ("MIF")), paid by acquirer to issuer on each transaction – Where there is no requirement to contract on basis of MIF, though issuers and acquirers usually do so – Where appellant operators receive none of MSC or MIF, their payment coming from issuers and acquirers' scheme fees – Where for most of relevant period, MIF accounted for approximately 90% of MSC – Where acquirers passed on all of MIF to merchants through MSC – Where negotiation between acquirers and merchants in relation to MSC limited to negotiation as to acquirer's margin – Where art 101(1) of Treaty prohibits agreements between companies that may affect trade between EU member states and which have restriction of competition as their object or

effect – Where prohibition subject to exception in art 101(3) for agreements which improve production or distribution of goods, or promote technical or economic progress, while allowing consumers fair share of resulting benefit – Where art 101 reflected in ss 2 and 9 of *Competition Act* – Where three proceedings brought in relation to scheme – Where in first, Competition Appeal Tribunal held Mastercard's MIFs in UK had effect of restricting competition, and awarded damages to Sainsbury's Supermarkets Ltd – Where in second, Commercial Court held Mastercard's MIFs in UK, European Economic Area, and Republic of Ireland did not infringe art 101(1) and came within art 101(3) in any event – Where in third, Commercial Court held Visa's MIFs in UK did not restrict competition amongst acquirers, though also held that if they did, the MIFs did not come within art 101(3) – Where in consolidated proceedings, Court of Appeal overturned decisions below holding there was restriction of competition, ruling on interpretation and operation of art 101(3), and remitting questions as to art 101(3) to Competition Appeal Tribunal – Where appellants appealed on four grounds and claimants in second proceedings cross-appealed against remittal order – Whether in each case there was restriction of competition contrary to art 101(1) and *Competition Act* – Whether, in order to avail themselves of exception in art 101(3), appellants required to satisfy more onerous evidential standard than ordinary civil standard – Whether, for purposes of showing that art 101(3) satisfied, appellants had to prove benefits provided to merchants alone resulting from MIFs outweighed associated costs, without taking into account benefits received by cardholders resulting from MIFs – Whether defendant has to prove exact amount of loss mitigated in order to reduce damages – Whether Court of Appeal erred in remitting second proceedings on art 101(3) questions.

Held (5:0): Appeal dismissed on all grounds except in relation to mitigation issue on which it was allowed; cross-appeal allowed.

Constitutional Law

Espinoza & Ors v Montana Department of Revenue & Ors

United States Supreme Court: Docket No. 18-1195

Judgment delivered: 30 June 2020

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

Catchwords:

Constitutional law – Religious discrimination – Free Exercise Clause – Where Montana law established program whereby persons who donated to organisations that award scholarships for private schools were granted tax credits – Where Art X of Montana Constitution prohibits government aid to schools "controlled in whole or in part by any church, sect, or

denomination" – Where to reconcile program with Art X, Montana Department of Revenue issued "Rule 1" prohibiting families from using program scholarships at religious schools – Where Rule 1 prevented petitioner mothers from using scholarship fund for their children's tuition at religious school – Where petitioners commenced proceedings against Department of Revenue alleging that Rule 1 discriminated on basis of religious views and religious nature of school – Where District Court issued injunction suspending operation of Rule 1, holding that it had been issued based on mistaken understanding of Art X – Where on appeal, Montana Supreme Court reversed District Court's decision – Where Montana Supreme Court held that Rule 1 was invalid, and further held that, without Rule 1, program violated Art X, and that such violation invalidated whole program – Whether Free Exercise Clause of Federal Constitution precluded Montana Supreme Court from applying Art X to exclude religious schools from program.

Held (5:4): Judgment of Montana Supreme Court reversed; case remanded.

Agency for International Development & Ors v Alliance for Open Society International, Inc & Ors

United States Supreme Court: Docket No. 19-177

Judgment delivered: 29 June 2020

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

Catchwords:

Constitutional law – Free speech – Where United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act only allowed funding of American and foreign NGOs with "policy explicitly opposing prostitution and sex trafficking" ("Policy Requirement") – Where in 2013, Supreme Court held Policy Requirement unconstitutional limit on free speech with respect to American NGOs – Where American NGOs commenced proceedings challenging validity of Policy Requirement as applied to their legally distinct foreign affiliates – Where District Court held Government prohibited from enforcing Policy Requirement against foreign affiliates – Where Court of Appeals for Second Circuit affirmed that decision – Whether applying Policy Requirement to foreign affiliates breaches First Amendment rights.

Held (5:3): Judgment of Court of Appeals for Second Circuit reversed.

June Medical Services LLC & Ors v Russo, Interim Secretary, Louisiana Department of Health and Services

United States Supreme Court: Docket No. 18-1323

Judgment delivered: 29 June 2020

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

Catchwords:

> Constitutional law – Undue burdens – Abortion – Where Louisiana's Act 620 requires doctors who perform abortions to hold "active admitting privileges at a hospital … located not further than thirty miles from the location at which the abortion is performed or induced" – Where "active admitting privileges" defined as being "member in good standing" of relevant hospital's "medical staff … with the ability to admit a patient and to provide diagnostic and surgical services to such patients" – Where petitioners (abortion providers and two doctors) challenged validity of Act 620 on basis it imposed undue burden on right of patients to obtain abortion – Where petitioners sought temporary restraining order followed by preliminary injunction preventing law from commencing operation – Where District Court provisionally prohibited respondent state from enforcing Act's penalties while directing petitioner physicians to continue seeking admitting privileges – Where, after trial, District Court declared Act 620 unconstitutional on its face and preliminarily enjoined enforcement – Where, after Supreme Court's decision in *Whole Woman's Health v Hellerstedt*, District Court granted permanent injunction, holding that Act 620 imposes unconstitutional undue burden, and finding that Act 620 offers no significant health benefit, that conditions on admitting privileges throughout Louisiana will effectively make it impossible for abortion providers to obtain appropriate privileges for reasons unconnected with promoting women's health and safety, and such conditions present substantial obstacle to obtaining abortions – Where Court of Appeals for Fifth Circuit reversed decision – Whether it was open in Supreme Court for respondent state to challenge petitioners' standing – Whether, in light of District Court's factual findings and Supreme Court's decision in *Whole Woman's Health*, Act 620 unconstitutional.

Held (5:4): Judgment of Court of Appeals for Fifth Circuit reversed.

Seila Law LLC v Consumer Financial Protection Bureau

United States Supreme Court: Docket No. 19-7

Judgment delivered: 29 June 2020

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

Catchwords:

> Constitutional law – Separation of powers – Executive power – Where following 2008 financial crisis, Congress passed legislation establishing Consumer Financial Protection Bureau ("CFPB") – Where CFPB established as independent regulatory agency overseeing consumer debt products –

Where Congress vested CFPB with broad range of rulemaking, enforcement, and adjudicatory powers in relation to consumer-finance matters – Where, unlike other independent agencies with multimember boards or commissions, CFPB led by single Director (12 USC §5491(b)(1)), appointed by President with advice and consent of Senate (§5491(b)(2)) for five year terms, during which Director may only be removed for "inefficiency, neglect of duty, or malfeasance in office" (§§5491(c)(1), (3)) – Where petitioner law firm provides debt-related legal services – Where CFPB issued civil investigative demand to petitioner – Where petitioner asked CFPB to set aside demand on basis that agency's leadership structure violated separation of powers – Where CFPB declined to do so and petitioner refused to comply with demand – Where CFPB sought enforcement of demand in District Court – Where District Court ordered compliance by petitioners – Where Court of Appeals for Ninth Circuit affirmed that decision – Whether provisions relating to Director's removal violate separation of powers – Whether provisions relating to Director's removal severable from other provisions of Dodd-Frank Wall Street Reform and Consumer Protection Act that established CFPB and define its powers.

Held (5:4 on separation of powers issue; 7:2 on severability issue): Judgment of Court of Appeals for Ninth Circuit vacated; case remanded.

AB & Anor v Pridwin Preparatory School & Ors

Constitutional Court of South Africa: [2020] ZACC 12

Judgment delivered: 17 June 2020

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

Catchwords:

Constitutional law – Right to basic education – Best interests of child – Private schools and parental contracts – Where applicant parents had enrolled two children at respondent private school – Where school received no state funding – Where parents signed "Parent Contracts" with respect to each child as condition of enrolment – Where cl 9.3 of Parent Contracts provided that respondent school had right to cancel contract at any time, for any reason, on one term's notice – Where consequence of cancellation was that students had to be withdrawn – Where misconduct by applicants led headmaster (second respondent) to terminate contracts pursuant to cl 9.3 – Where applicants commenced proceedings in High Court seeking to have termination decision set aside – Where applicants contended termination decision was unreasonable, procedurally unfair, and breached arts 28 (child's best interests of paramount importance in every matter concerning child) and 29 (right to basic education) of Constitution – Where High Court dismissed application to set aside termination decision holding headmaster had due regard to children's best interests and art 29 not engaged because school not providing "basic"

education – Where appeal to Supreme Court of Appeal dismissed – Whether in interests of justice for Constitutional Court to hear matter given that students had left respondent school – Whether termination decision breached arts 28 and 29.

Held (10:0 on orders; 6:4 on reasons): Leave to appeal granted; appeal allowed.

Conseil scolaire francophone de la Colombie-Britannique & Ors v British Columbia & Ors

Supreme Court of Canada: 2020 SCC 13

Judgment delivered: 12 June 2020

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

Catchwords:

Constitutional law – *Canadian Charter of Rights and Freedoms* ss 1, 23 – Minority language educational rights – Remedies – Provincial funding of minority language education system – Sliding scale – Substantive equivalence – Justification of infringements – Approach to take in order to situate given number of students on sliding scale so as to determine level of services that must be provided to them – Where trial judge decided province had to pay damages to school board to make up deficit incurred because of freeze on funding for school transportation – Whether test used to assess quality of educational experience provided to official language minorities varies with number of minority language students – Whether infringements of this right are justified – Whether limited government immunity from damages awards applies to decisions made in accordance with government policies found to be contrary to s 23.

Held (9:0; 7:2 (Brown and Rowe JJ dissenting in part)): Appeal allowed in part.

New Nation Movement NPC & Ors v President of the Republic of South Africa & Ors

Constitutional Court of South Africa: [2020] ZACC 11

Judgment delivered: 11 June 2020

Coram: Cameron, Froneman, Jafta, Khampepe and Madlanga JJ, Mathopo AJ, Mhlantla and Theron JJ, Victor AJ

Catchwords:

Constitutional law – Elected offices – Political parties and independent candidates – Freedom of association – Where applicants commenced

proceedings in High Court of South Africa, challenging constitutionality of *Electoral Act 1998* – Where applicants contended *Electoral Act* unconstitutional to extent that it does not provide for adult citizens to run for election to national and provincial legislatures as independents – Where application dismissed – Whether *Electoral Act* unjustifiably limits right to stand for public office in s 19 of Constitution by requiring candidates to be members of political parties – Whether *Electoral Act* infringes rights to freedom of association in s 18 of *Constitution*.

Held (8:1): Leave to appeal granted; appeal allowed.

Financial Oversight and Management Board for Puerto Rico v Aurelius Investment, LLC, & Ors

United States Supreme Court: Docket No. 18-1334

Judgment delivered: 1 June 2020

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

Catchwords:

Constitutional law – Appointments Clause – De facto officer doctrine – Where in 2016, in response to fiscal crisis in Puerto Rico, Congress invoked Art IV of Constitution to enact Puerto Rico Oversight, Management and Economic Stability Act ("PROMESA") – Where PROMESA created Financial Oversight and Management Board and empowered President to appoint voting members of Board without Senate's advice and consent – Where Congress authorised Board to file for bankruptcy on behalf of Puerto Rico, alter Puerto Rico's laws and budget, and conduct investigations to those ends – Where President appointed Board members – Where Board filed for bankruptcy on behalf of Puerto Rico and five of its entities – Where several decisions subsequently taken by court and Board – Where some creditors then sought dismissal of bankruptcy proceedings on basis that selection of Board members violated Appointments Clause of Constitution – Where motion for dismissal denied – Where Court of Appeal for First Circuit reversed, holding that selection of Board members violated Appointments Clause, but that actions prior to First Circuit's decision were valid under de facto officer doctrine – Whether selection of Board violated Appointments Clause – If so, whether de facto officer doctrine applicable.

Held (9:0): Judgment of Court of Appeals for First Circuit reversed; case remanded.

Economic Freedom Fighters v Gordhan & Ors; Public Protector & Anor v Gordhan & Ors

Constitutional Court of South Africa: [2020] ZACC 10

Judgment delivered: 29 May 2020

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

Catchwords:

Constitutional law – Integrity branch – Where constitution provides for Office of Public Protector – Where Public Protector issued report on allegations of violations of Executive Ethics Code by MP and allegations of maladministration, corruption, and improper conduct by South African Revenue Service – Where report directed President to take appropriate disciplinary action against MP – Where MP commenced proceedings in High Court of South Africa seeking interim interdict preventing Public Protector from enforcing remedial recommendations pending outcome of judicial review proceedings in which MP sought to have report set aside – Where Economic Freedom Fighters ("EFF") obtained leave to intervene in High Court proceedings – Where High Court granted interim interdict – Where High Court ordered costs against EFF, Public Protector, and Public Protector in her personal capacity – Where EFF and Public Protector applied for leave to appeal directly to Constitutional Court – Whether High Court's decision impermissibly interfered with Office of Public Protector – Whether existing test for interim interdicts appropriate in cases involving Public Protector – Whether High Court erred as to costs.

Held (9:0): Leave to appeal on merits refused; leave to appeal on costs allowed; appeal allowed on costs.

United States v Sineneng-Smith

United States Supreme Court: Docket No. 19-67

Judgment delivered: 7 May 2020

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

Catchwords:

Constitutional law – Role of courts – Adversarial system – Principle of party presentation – Where respondent charged with offences relating to operation of immigration consulting firm – Where at trial before District Court, respondent argued relevant offences did not cover her conduct and if they did, they violated Petition and Free Speech Clauses of First Amendment – Where District Court rejected those arguments and respondent convicted – Where respondent appealed and ran substantially similar arguments before Court of Appeals for Ninth Circuit – Where Ninth Circuit appointed three *amici curae* to brief and argue issues framed by the Court – Where those issues included question not raised by respondent, namely, whether statute containing offence provisions overbroad under First Amendment – Where Ninth Circuit accepted *amici*'s arguments, holding one of offence provisions overbroad – Whether Ninth

Circuit's departure from principle of party presentation constituted abuse of discretion.

Held (9:0): Judgment of Court of Appeals for Ninth Circuit vacated; case remanded.

Contracts

Uber Technologies Inc & Ors v Heller
Supreme Court of Canada: 2020 SCC 16

Judgment delivered: 26 June 2020

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

Catchwords:

Contracts – Contracts of adhesion – Arbitration clause – Validity – Unconscionability – Where mandatory clause in standard form contract between driver and multinational corporation required that disputes be submitted to arbitration in the Netherlands and imposed substantial up-front costs for arbitration proceedings – Where driver commenced action in Ontario court against corporation – Where corporation sought stay of proceedings based on arbitration clause – Whether action should be stayed – Whether validity of arbitration agreement should be decided by court or arbitrator – Whether arbitration agreement unconscionable – *Arbitration Act 1991*, S.O. 1991, c 17, s 7(2).

Held (8:1): Appeal dismissed.

Beadica 231 CC & Ors v Trustees for the time being of the Oregon Trust & Ors
Constitutional Court of South Africa: [2020] ZACC 13

Judgment delivered: 17 June 2020

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

Catchwords:

Contracts – Enforcement – Public policy – Where applicants four corporations that entered into ten-year franchise agreements with second respondent – Where applicants acquired businesses by means of empowerment initiative financed by third respondent – Where franchise agreements required that applicants operated businesses from premises leased from first respondent – Where leases were for five year term with

option to renew for further five year period – Where leases provided that option to be exercised by giving notice six months prior to termination – Where applicants purported to exercise option after time period for doing so elapsed – Where first respondent considered options had lapsed and leases terminated – Where applicants commenced proceedings in High Court against first and second respondents seeking declarations that options validly exercised and orders restraining their eviction – Where first respondent commenced proceedings seeking eviction – Where High Court granted applicants relief sought, holding strict terms of lease agreement should not be enforced in circumstances where doing so would cause applicants to lose businesses and undermine empowerment initiative, these being disproportionate consequences for failure to exercise option – Where Supreme Court of Appeal allowed appeal and directed eviction, holding no considerations of public policy rendered renewal clause unenforceable – Whether enforcement of terms of lease agreements would be contrary to public policy.

Held (8:2): Leave to appeal granted; appeal dismissed.

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127 Hobson Street Ltd & Anor v Honey Bees Preschool Ltd & Anor
Supreme Court of New Zealand: [2020] NZSC 53

Judgment delivered: 5 June 2020

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

Catchwords:

Contracts – Penalties – Where first respondent operates childcare business on fifth floor of high-rise building – Where first appellant leased premises to respondent – Where second respondent, director of first respondent, guaranteed obligations under lease – Where in collateral deed to lease, first appellant and second appellant (director of first appellant) agreed to install second lift in building, providing further access to first respondent's business – Where appellants agreed if they failed to install lift by certain date, appellants would indemnify respondents for rent and outgoings under lease until its expiry – Where appellants failed to install lift by date specified – Where respondents commenced proceedings in High Court to enforce indemnity – Where appellants contended indemnity unenforceable because it breached penalties rule – Where High Court enforced indemnity – Where Court of Appeal dismissed appeal – Whether obligation to indemnify in collateral deed breached penalties rule.

Held (5:0): Appeal dismissed.

GE Energy Power Conversion France SAS, Corp. formerly known as Converteam SAS v Outokumpu Stainless USA USA, LLC, & Ors
United States Supreme Court: Docket No. 18-1048

Judgment delivered: 1 June 2020

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

Catchwords:

Contracts – Arbitration – Relationship between Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and domestic equitable estoppel principles – Where ThyssenKrupp Stainless USA, LLC ("TKS") owned steel manufacturing plant – Where TKS entered into three contracts with F. L. Industries, Inc ("FLI") concerning cold rolling mills – Where each contract contained arbitration clause – Where FLI engaged petitioner as subcontractor to supply motors for rolling mills – Where motors allegedly failed – Where respondent acquired plant and commenced proceedings against petitioner in Alabama state court – Where petitioner successfully applied to have case removed to federal court – Where in federal court petitioner moved to have proceedings dismissed and orders compelling arbitration made, relying on arbitration clauses in agreement between TKS and FLI – Where District Court dismissed proceedings, holding petitioner and respondent were parties to agreement containing arbitration clause – Where Court of Appeals for Eleventh Circuit reversed decision, holding New York Convention only allowed enforcement of arbitration agreement by signatories to arbitration agreement and that allowing petitioner to rely on domestic equitable estoppel doctrines would conflict with Convention's signatory requirement – Whether New York Convention conflicts with domestic equitable estoppel principles which allow nonsignatories to enforce arbitration agreements.

Held (9:0): Judgment of Court of Appeals for Eleventh Circuit reversed; case remanded.

Criminal Law

HKSAR v Chu Ang

Hong Kong Court of Final Appeal: [2020] HKCFA 18

Date of orders: 1 June 2020

Reasons delivered: 30 June 2020

Coram: Ma CJ, Ribeiro and Fok PJJ, Chan and Stock NPJJ

Catchwords:

Criminal law – Prevention of Bribery Ordinance, CAP 201 s 9(1)(a) – Where respondent violin teacher helped student's parent to buy violin – Where respondent recommended instrument seller, arranged viewing of certain violins, attended viewing with parent and student, and helped

negotiate purchase price – Where violin purchased at discount and respondent received commission from seller – Where respondent did not disclose commission to parent – Where greater discount for parent meant reduced commission for respondent – Where respondent charged with offence of accepting advantage as agent contrary to s 9(1)(a) of Prevention of Bribery Ordinance – Where "agent" includes someone "acting for" another – Where magistrate held no case to answer on basis that no pre-existing legal relationship between respondent and parent such that respondent acted as "agent" for parent – Where Court of First Instance upheld magistrate's decision, holding that respondent taught violin as independent contractor and had assisted with purchase on voluntary and non-commercial basis – Whether pre-existing legal relationship required for person to be "agent" within meaning of s 9(1)(a) – Whether respondent acted as "agent" for parent within meaning of s 9(1)(a).

Held (5:0): Appeal allowed; respondent's acquittal undisturbed on basis of appellant's concession that this was test case as to meaning of s 9(1)(a).

R v Zora

Supreme Court of Canada: 2020 SCC 14

Judgment delivered: 18 June 2020

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

Catchwords:

Criminal law – Failure to comply with conditions of undertaking or recognizance – Elements of offence – Mens rea – Where accused convicted of failure to comply with conditions of undertaking or recognizance after failing to answer door when police attended his residence – Whether mens rea for offence of failure to comply with conditions of undertaking or recognizance is to be assessed on subjective or objective standard – *Criminal Code,* R.S.C. 1985, c C-46, s 145(3).

Held (9:0): Appeal allowed; convictions quashed, new trial ordered on failure to attend door offences.

R v Ahmad

Supreme Court of Canada: 2020 SCC 11

Judgment delivered: 29 May 2020

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

Catchwords:

Criminal law – Abuse of process – Entrapment – Dial-a-dope operations – Where police received tips of unknown reliability that phone numbers of two accused associated with drug trafficking – Where undercover officers phoned each accused and arranged for drug transactions – Where accused arrested and charged with drug-related offences – Where accused sought stays of proceedings on basis of entrapment – Whether police had reasonable suspicion that accused or phone numbers were engaged in drug trafficking at time police provided opportunity to commit offences – Application of entrapment framework to dial-a-dope investigations.

Held (9:0; 5:4): A's appeal dismissed; W's appeal allowed by majority, convictions set aside and stay reinstated.

Kelly v United States & Ors

United States Supreme Court: Docket No. 18-1059

Judgment delivered: 29 May 2020

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

Catchwords:

Criminal law – Fraud – Elements of offences – Purpose of obtaining money or property – Where petitioners were Deputy Chief of Staff of former Governor of New Jersey and Deputy Executive Director of Port Authority – Where mayor of Fort Lee refused to back Governor's campaign for re-election – Where petitioners, together with another Port Authority official, devised plan to exercise Port Authority's powers to reduce number of lanes of traffic on George Washington Bridge reserved for Fort Lee commuters – Where purpose of plan was political retribution – Where petitioners devised cover story for lane realignment, claiming it was part of traffic study – Where plan was implemented and caused four days of gridlock in Fort Lee – Where petitioners were convicted of wire fraud, fraud on federally funded program or entity, and conspiracy to commit those offences – Where Court of Appeals for Third Circuit affirmed convictions – Whether petitioners committed fraud offences when they did not devise and implement plan in order to obtain money or property.

Held (9:0): Judgment of Court of Appeals for Third Circuit reversed; case remanded.

HKSAR v Zhou Limei

Hong Kong Court of Final Appeal: [2020] HKCFA 15

Date of orders: 27 April 2020

Reasons delivered: 14 May 2020

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

Catchwords:

Criminal law – Drug offences – Hardship to defendants – Where appellant charged with trafficking prohibited drugs into Hong Kong – Where appellant convicted in jury trial, but conviction quashed and retrial ordered by Court of Final Appeal on basis of inadequate directions in relation to evidence – Where appellant convicted at second jury trial, but conviction quashed and retrial ordered by Court of Appeal on basis that jury misdirected as to relevance of lies allegedly told by appellant or acts of concealment allegedly committed – Where appellant remained in custody from November 2012 onwards – Whether ordering of second retrial without adequate consideration of hardship to appellant given her mental condition constituted substantial and grave injustice within meaning of s 32(2) of Hong Kong Court of Final Appeal Ordinance, CAP 484.

Held (5:0): Appeal allowed.

Damages

Opati, in her own right and as executrix of the Estate of Opati, Deceased & Ors v Republic of Sudan & Ors

United States Supreme Court: Docket No. 17-1268

Judgment delivered: 18 May 2020

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

Catchwords:

Damages – Punitive damages – Claims against foreign states – Where in 1998 US embassies in Kenya and Tanzania were bombed – Where victims and family members (here, petitioners) sued Republic of Sudan pursuant to state-sponsored terrorism exception to Foreign Sovereign Immunities Act, alleging Sudan assisted al Qaeda in bombings – Where 28 USC §1606 then precluded punitive damages awards in cases brought under an exception to foreign sovereign immunity – Where in 2008 National Defense Authorization Act amended Foreign Sovereign Immunity Act, creating federal cause of action for acts of terror which could sound in punitive damages – Where 2008 Act provided that existing suits that had been "adversely affected" by prior laws could be treated "as if" filed under new provisions – Where 2008 Act provided time-limited opportunity for plaintiffs to file new actions arising out of same act or incident in order to take advantage of new regime – Where petitioners amended complaint to include new federal cause of action – Where District Court found for petitioners and awarded approximately $10.2 billion in damages, including

approximately $4.3 billion in punitive damages – Where Court of Appeals for District of Columbia Circuit held petitioners not entitled to punitive damages as 2008 Act did not include statement clearly authorising punitive damages for conduct that occurred prior to amending Act – Whether plaintiffs in federal cause of action introduced by 2008 Act can obtain punitive damages.

Held (8:0): Judgment of Court of Appeals on punitive damages vacated; case remanded.

Defamation

Serafin v Malkiewicz & Ors
United Kingdom Supreme Court: [2020] UKSC 23

Judgment delivered: 3 June 2020

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

Catchwords:

Defamation – Fair trial – Public interest defence – Where respondent sued appellants for libel in relation to articles published about him in newspaper distributed in Polish community in UK – Where respondent self-represented before primary judge – Where primary judge dismissed claim finding appellants established public interest defence under s 4 of *Defamation Act 2013* – Where Court of Appeal allowed appeal and ordered remittal of assessment of damages, holding primary judge erred in finding s 4 defence established and that "nature, tenor and frequency of the judge's interventions were such as to render [the trial] unfair" – Whether primary judge's conduct prevented fair trial of issues in dispute – Whether Court of Appeal was correct to only order remittal on damages – Whether Court of Appeal erred in significance attributed to *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 in construing s 4.

Held (5:0): Appeal dismissed; in place of Court of Appeal's partial remittal on damages, remittal for full retrial ordered.

Discrimination

Bostock v Clayton County, Georgia
United States Supreme Court: Docket No. 17-1618

Judgment delivered: 15 June 2020

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

Catchwords:

Discrimination – Civil Rights Act 1964 Title VII – Where Clayton County, Georgia, dismissed petitioner Bostock for conduct "unbecoming" county employees shortly after he began playing in gay softball league – Where Altitude Express, Inc fired one of its employees after he mentioned that he was gay – Where R. G. & G. R. Harris Funeral Homes fired transgender employee who presented as male when hired, but later informed her employer that she planned to "live and work full-time as a woman" – Where each employee brought proceedings, alleging unlawful sex discrimination contrary to Title VII – Where Court of Appeals for Eleventh Circuit dismissed Mr Bostock's case, holding that Title VII contains no prohibition on dismissal from employment on basis of sexual orientation – Where Courts of Appeals for Second and Sixth Circuit allowed other two claims to proceed – Whether Title VII prohibits employers from dismissing employees solely on basis that they are gay or transgender.

Held (6:3): Judgment of Court of Appeals for Eleventh Circuit reversed; case remanded. Judgments of Court of Appeals for Second and Sixth Circuits affirmed.

Employment Law

Association of Mineworkers and Construction Union and Others v Ngululu Bulk Carriers (Pty) Limited (In Liquidation) and Others

Constitutional Court of South Africa: [2020] ZACC 8

Judgment delivered: 6 May 2020

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

Catchwords:

Employment law – Jurisdiction of Labour Court – *lis alibi pendens* – Where in January 2016 employees of respondents, including members of applicant union, engaged in unprotected strike – Where respondents dismissed 476 employees for participating in strike – Where applicant union referred unfair dismissal claim to relevant bargaining council – Where conciliation failed and council issued certificate of non-resolution – Where respondents re-employed some dismissed employees, but no union members – Where union and members considered selective re-employment to amount to further dismissal and referred dispute to same bargaining council for conciliation – Where respondents objected to council's jurisdiction – Where council rejected objection to jurisdiction, proceeded with conciliation which was unsuccessful, and issued certificate of non-resolution – Where respondents sought review in Labour Court of council's decision on jurisdiction and of validity of second certificate –

Where appellant union and members brought unfair dismissal claims in Labour Court – Where, in relation to first dismissal, appellants claimed they were dismissed for affiliation with union and dismissal was automatically unfair under s 187(1) of *Labour Relations Act* – Where respondent objected to Labour Court's jurisdiction on basis that automatic unfair dismissal claim not referred to conciliation – Where respondents also relied on *lis alibi pendens* principle, contending issues in relation to second unfair dismissal claim were subject-matter of respondents' pending review application – Where Labour Court accepted both respondents' contentions – Whether Labour Court had jurisdiction to hear automatic unfair dismissal claim in circumstances – Whether *lis alibi pendens* principle correctly applied.

Held (10:0): Leave to appeal granted; Labour Court's order set aside; remitted to Labour Court for determination of merits.

Equity

Liu & Ors v Securities and Exchange Commission
United States Supreme Court: Docket No. 18-1501

Judgment delivered: 22 June 2020

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

Catchwords:

Equity – Equitable relief – Disgorgement – Where Securities and Exchange Commission ("SEC") empowered to seek "equitable relief" in civil proceedings (15 USC §78u(d)(5)) in order to punish securities fraud – Where petitioners solicited foreign nationals to invest in cancer-treatment centre – Where SEC found that petitioners misappropriated invested monies in violation of private offering memorandum – Where SEC brought civil proceedings against petitioners – Where SEC sought disgorgement equal to full amount petitioners raised from investors – Where petitioners argued disgorgement of full amount would fail to take into account legitimate business expenses – Where District Court held petitioners to be jointly and severally liable to pay full amount – Where Court of Appeals for Ninth Circuit affirmed decision – Whether disgorgement order that does not exceed wrongdoer's net profit falls within meaning of "equitable relief" under §78u(d)(5).

Held (8:1): Judgment of Court of Appeals for Ninth Circuit vacated; case remanded.

Human Rights

ABC (AP) v Principal Reporter & Anor; In the matter of XY
United Kingdom Supreme Court: [2020] UKSC 26

Judgment delivered: 18 June 2020

Coram: Lady Hale, Lords Kerr, Wilson and Hodge, Lard Arden

Catchwords:

Human rights – Right to respect for family life in art 8 of *European Convention on Human Rights* ("ECHR") – Right to fair hearing in art 6 ECHR – Where *Children's Hearings (Scotland) Act 2011* ("CHS Act") facilitates making of compulsory supervision orders ("CSOs") – Where CSOs can direct where child resides and can regulate contact with others – Where "relevant person" under CHS Act has right to be notified of and obligation to attend children's hearings in relation to child – Where "relevant person" also has rights to access papers, make submissions, and seek review of CSOs – Where s 81(3) of CHS Act deems someone to be "relevant person" if they have or have recently had significant involvement in child's upbringing – Where ABC was 16 year old with younger sibling who was subject to CSO regulating contact with ABC – Where ABC not deemed "relevant person" with respect to sibling – Where ABC challenged "relevant person" scheme on basis it was incompatible with art 8 of ECHR and beyond power of Scottish Parliament – Where Lord Ordinary dismissed ABC's judicial review petition but held test in s 81(3) for deemed relevant persons had to be read as including broader range of people to be compatible with art 8 of ECHR – Where First Division of Inner House of Court of Session dismissed appeal and reversed Lord Ordinary's approach to reading s 81(3) – Where in separate proceedings XY is 24 year old with three younger siblings subject to CSOs – Where XY obtained deemed relevant person status briefly but where, after some proceedings, XY no longer deemed relevant person – Where XY appealed against decision revoking that status but appeal dismissed by First Division of Inner House – Whether provisions of CHS Act governing grant and removal of deemed relevant person status incompatible with arts 6 and 8 of ECHR and unable to be read down such that they exceed legislative power of Scottish Parliament.

Held (5:0): Appeals dismissed.

Insolvency

Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd
United Kingdom Supreme Court: [2020] UKSC 25

Judgment delivered: 17 June 2020

Coram: Lords Reed, Briggs, Kitchin, Hamblen and Leggatt

Catchwords:

Insolvency – Relationship between insolvency set-off rule and adjudication in building and construction disputes – Where in 2014 appellant did electrical work for respondent on construction site in London – Where in 2016 appellant entered insolvent liquidation – Where appellant and respondent claimed to be owed money by each other – Where respondent claimed appellant had abandoned project, requiring respondent to spend £325,000 on replacement contractors – Where appellant said respondent had never paid for some work done, claiming £219,000 for unpaid fees and damages for lost profits – Where in 2018 appellant's liquidators referred claim to adjudicator – Where respondent objected to adjudication, and sought injunctive relief – Where respondent claimed insolvency set-off rule had effect that there was no longer any claim or dispute under contract, so adjudicator lacked jurisdiction and adjudication futile because any decision would not be enforced until liquidator had calculated net balance – Where primary judge granted injunction – Where Court of Appeal rejected jurisdiction point but affirmed appropriateness of injunction on futility ground – Where appellant appealed and respondent cross-appealed – Whether insolvency set-off meant no dispute under contract such that adjudicator lacked jurisdiction – Whether adjudication would be futile in circumstances.

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

9354-9186 Québec Inc & Anor v Callidus Capital Corp & Ors
Supreme Court of Canada: 2020 SCC 10

Judgment delivered: 8 May 2020

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

Catchwords:

Insolvency – Bankruptcy – *Companies' Creditors Arrangement Act*, R.S.C. 1985, c C-36, ss 11 , 11.2 – Discretionary authority of supervising judge in proceedings under *Companies' Creditors Arrangement Act* – Appellate review of decisions of supervising judge – Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose – Whether supervising judge can approve third party litigation funding as interim financing.

Held (7:0): Appeal allowed.

Intellectual Property

United States Patent and Trademark Office & Ors v Booking.com B V

United States Supreme Court: Docket No. 19-46

Judgment delivered: 30 June 2020

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

Catchwords:

Intellectual property – Trademarks – Generic names – Where respondent sought federal registration of trademarks including "Booking.com" – Where US Patent and Trademark Office ("PTO") refused registration on basis that "Booking.com" was generic name and ineligible for registration – Where respondent sought judicial review – Where District Court determined that while "booking" was generic term, "Booking.com" was not – Where Court of Appeals for Fourth Circuit affirmed decision, rejecting PTO's argument that combining generic term (like "booking") with ".com" creates generic composite – Whether term styled "generic.com" is generic term for federal trademark registration purposes, and whether consumer understanding of meaning of such terms bears upon that issue.

Held (8:1): Judgment of Court of Appeals for Fourth Circuit affirmed.

Regeneron Pharmaceuticals Inc v Kyamb Ltd

United Kingdom Supreme Court: [2020] UKSC 27

Judgment delivered: 24 June 2020

Coram: Lords Reed and Hodge, Lady Black, Lords Briggs and Sales

Catchwords:

Intellectual property – Patents – Sufficiency – Where respondent filed patents for genetically modified mouse – Where respondent had made hybrid version of antibody-producing gene, combining mouse DNA with human DNA – Where resulting mouse can produce antibodies suitable for human treatment but which do not cause immunological sickness in mouse – Where respondent sued appellant company for infringing patents – Where respondent alleged appellant's modified mice ("Kymice") had similar genetic structure to respondent's mice – Where appellant contended respondent's patents invalid on basis that documents filed insufficiently detailed to enable skilled readers to make invention themselves – Where Court of Appeal found respondent's patents contained enough information to allow skilled readers to insert some human material in mice genes (which would make one type of hybrid mouse), but did not contain enough detail to explain how to incorporate whole part of necessary human material into mouse genome to make kind of hybrid mice respondent claimed to have invented in patents – Where Court of Appeal held patents valid on basis that respondent's idea was

"principle of general application" so it was unnecessary for patents to explain how to make full range of mice – Whether Court of Appeal erred with respect to sufficiency requirement.

Held (4:1): Appeal allowed.

Migration Law

Department of Homeland Security & Ors v Thuraissigiam
United States Supreme Court: Docket No. 19-161

Judgment delivered: 25 June 2020

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

Catchwords:

Migration law – Asylum claims – Privative clauses – Where Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") provides for expedited removal of certain applicants for admission to United States (see 8 USC §1225(a)(1)) – Where pursuant to §1225(b)(1)(B)(v) applicant may avoid expedited removal by demonstrating to asylum officer "credible fear of persecution", understood as "significant possibility … that the alien could establish eligibility for asylum" – Where applicant who demonstrates credible fear of persecution entitled to "full consideration" of asylum claim in standard removal hearing – Where asylum officer rejects credible-fear claim, supervisor reviews that decision, and it may be appealed to immigration judge – Where IIRIRA limits review powers of federal court on habeas corpus application (§1252(e)(2)), preventing review of "determination" that applicant lacks credible fear of persecution (§1252(a)(2)(A)(iii)) – Where respondent Sri Lankan national was stopped after entering United States without inspection or entry document – Where he was detained for expedited removal – Where asylum officer rejected respondent's credible-fear claim, supervisor agreed, and immigration judge rejected respondent's appeal – Where respondent filed federal habeas corpus petition – Where respondent claimed for first time he feared persecution based on being Tamil and on his political views, and sought new opportunity to apply for asylum – Where District Court dismissed habeas corpus petition – Where Court of Appeals for Ninth Circuit reversed that decision – Whether, as applied here, limitations on review in §1252(e)(2) violate Suspension Clause and Due Process Clause of Constitution.

Held (7:2): Judgment of Court of Appeals for Ninth Circuit reversed; case remanded.

Nasrallah v Barr, Attorney General
United States Supreme Court: Docket No. 18-1432

Judgment delivered: 1 June 2020

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

Catchwords:

Migration law – Removal on basis of criminal record – Privative clauses – Convention Against Torture ("CAT") – Where federal immigration law provides noncitizens who commit certain crimes liable to removal from United States – Where in removal proceedings noncitizen can demonstrate likelihood of torture in country of removal, noncitizen is entitled to relief under CAT and may not be removed to that country – Where immigration judge orders removal and denies CAT relief, noncitizen may appeal both orders to Board of Immigration Appeals ("Board"), and further to federal court of appeals – Where noncitizen has committed specified crimes, scope of judicial review of removal order limited by statute to constitutional and legal challenges (8 USC §§1252(a)(2)(C), (D)) – Where petitioner pleaded guilty to specified crime and authorities subsequently sought to remove him – Where petitioner sought CAT relief to prevent removal to Lebanon – Where immigration judge ordered removal and granted CAT relief – Where on appeal Board vacated CAT relief order and ordered petitioner be removed to Lebanon – Where Court of Appeals for Eleventh Circuit refused to review petitioner's factual challenges to Board's decision on CAT relief on basis that petitioner had committed specified crime and Circuit precedent prevented review of factual challenges to both removal order and CAT relief orders – Whether §§1252(a)(2)(C), (D) preclude judicial review of noncitizen's factual challenges to CAT order.

Held (7:2): Judgment of Court of Appeals for Eleventh Circuit reversed.

Prisons

Lomax v Ortiz-Marquez & Ors
United States Supreme Court: Docket No. 18-8369

Judgment delivered: 8 June 2020

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

Catchwords:

Prisons – Rights of prisoners to bring suits – Prison Litigation Reform Act 1995 ("Act") – Where Act provides prisoners cannot bring suit *in forma*

pauperis if they have had three or more prior suits dismissed for being frivolous or malicious or for failing to state claim upon which relief may be granted (28 USC §1915(g)) – Where petitioner inmate in Colorado prison – Where petitioner commenced proceedings against respondent prison officials challenging expulsion from prison's sex-offender treatment program – Where petitioner sought to bring suit *in forma pauperis* – Where petitioner had already brought three unsuccessful suits while imprisoned – Where petitioner argued that dismissal of two of those suits should not count towards "three strikes" in §1915(g) because those suits were dismissed without prejudice – Where petitioner's argument dismissed, with consequence he could not proceed *in forma pauperis* – Where Court of Appeals for Tenth Circuit affirmed decision – Whether dismissals of suits "without prejudice" fall within §1915(g) for purpose of determining applicability of restrictions on prisoner's opportunity to proceed *in forma pauperis*.

Held (9:0): Judgment of Court of Appeals for Tenth Circuit affirmed.

Real Property

Duval v 11-13 Randolph Crescent Ltd
United Kingdom Supreme Court: [2020] UKSC 18

Judgment delivered: 6 May 2020

Coram: Lady Hale, Lord Carnwath, Lady Black, Lords Kitchin and Sales

Catchwords:

Real Property – Covenants – Collateral contracts – Where respondent (Dr Duval) held two leases in block of nine flats and Mrs Winfield held another – Where each lease for 125 years from 24 June 1981 – Where appellant company owns freehold of block of flats and is management company for flats – Where all shares in management company owned by leaseholders – Where each lease contains covenant (cl 2.6) which prevents lessee from altering, improving, or adding to premises without prior written consent of landlord company – Where each lease contains absolute covenant (cl 2.7) preventing lessee from cutting into roofs, walls, ceilings, or service media – Where cl 3.19 of each lease requires landlord, at request and cost of any lessee, to enforce certain covenants in other lessees' leases, including the covenant in cl 2.7 – Where Mrs Winfield sought licence from landlord to carry out works, including removing part of wall – Where licence refused after respondent and her husband had notice of it – Where landlord decided to grant licence, subject to Mrs Winfield obtaining insurance – Where respondent commenced proceedings against landlord, seeking declaration it lacked power to license Mrs Winfield to breach cl 2.7 – Where primary judge held that landlord lacked such power – Where appeal to Central London County Court allowed – Where appeal to Court of Appeal allowed – Whether landlord's grant of licence to lessee to carry

out work which would otherwise breach covenant in cl 2.7 amounts to breach of cl 3.19 of collateral contracts with other lessees.

Held (5:0): Appeal dismissed.

Securities

Toronto-Dominion Bank v Young
Supreme Court of Canada: 2020 SCC 15

Judgment delivered: 19 June 2020

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

Catchwords:

Securities – Hypothecs – Exercise of hypothecary rights – Taking in payment – Prescription – Where loans to debtor secured by first hypothec in favour of bank and by second hypothec in favour of two individuals – Where debtor defaulted on payments to individuals, and individuals took immovable in payment subject to first hypothec – Where debtor defaulted on payments to bank – Where bank filed and served motion for forced surrender and taking in payment against individuals only – Where Superior Court heard motion more than three years after it was filed – Where individuals argued bank's claim against debtor had been extinguished by virtue of three-year prescription, with result that hypothec securing claim had been extinguished and that motion had to be dismissed – Where Superior Court found that failure to serve motion on debtor was not fatal, that bank had instituted its action in timely manner and that delay between filing of motion and judgment could not be attributed to it – Where Court of Appeal set aside Superior Court's judgment – Where Superior Court held bringing of hypothecary action against person who holds immovable but is not debtor of personal obligation does not interrupt prescription of obligation, which continues to run during proceeding – Where Court of Appeal held that on date of Superior Court's judgment, secured claim was prescribed and hypothecary action was barred because obligation secured by hypothec had been extinguished – Where Court of Appeal dismissed Bank's hypothecary action – Whether obligation secured by hypothec had been extinguished.

Held (8:1): Appeal dismissed.

Taxation

The Advocate General representing the Commissioners of Her Majesty's Revenue and Customs v K E Entertainments Ltd

United Kingdom Supreme Court: [2020] UKSC 28

Judgment delivered: 24 June 2020

Coram: Lords Reed, Hodge, Lloyd-Jones, Sales and Leggatt

Catchwords:

Taxation – VAT – Council Directive (EC) 2006/112 ("Principal VAT Directive") – Where appellant taxpayer operates bingo clubs where customers pay fee entitling them to participate in number of games of bingo ("session"), and where prizes paid to winners – Where no obligation to play every game in session – Where under Principal VAT Directive and UK national legislation (primarily *Value Added Tax Act 1994* and *Value Added Tax Regulations 1995*), VAT ordinarily charged on full amount paid by customer – Where in case of commercial gambling, taxable amount is net sum retained by organiser once winnings paid out – Where bingo fees accordingly divided into stake (contribution of each customer to cash prizes) and participation fee (total fee received minus stake) – Where at all relevant times VAT payable on participation fee and not on stake – Where prior to 2007 tax authorities' guidance indicated participation fees for bingo should be calculated separately for each game (not for each session) – Where in February 2007 authorities issued guidance indicating participation fees should be calculated on sessional basis – Where new guidance more favourable to bingo operators – Where guidance stated providers who calculated VAT on game-by-game basis could make claim for overpayment subject to three year time limit – Where appellant calculated VAT on game-by-game basis until 2007 – Where following change in guidance, appellant made claim under s 80 of *Value Added Tax Act 1994* for repayment of sums overpaid in previous three years on basis of game-by-game approach – Where in 2011, First-tier Tribunal (Tax Chamber) determined appeal brought by another bingo operator and held taxpayer entitled to adjustment without time limit – Where present appellant, relying on that decision, sought repayment for period 1996-2004 – Where tax authorities rejected claim – Whether taxpayer entitled to make adjustment sought.

Held (5:0): Appeal dismissed.

Cardtronics UK Ltd & Ors v Sykes & Ors

United Kingdom Supreme Court: [2020] UKSC 21

Judgment delivered: 20 May 2020

Coram: Lords Reed, Kerr and Carnwath, Lady Black, Lord Kitchin

Catchwords:

Taxation – Rates – Where banking companies contracted with retailers to install and operate ATMs in supermarkets or shops owned by retailers – Where ATMs fell into different categories – Where some ATMs external to store, accessible at all times, connected to store's electricity supply, chained to store's cash room floor, with money being owned and dispensed by bank but kept in store's cash room – Where some ATMs similar to previous category, but inside store and only accessible during store's business hours – Where some ATMs similar to first category, but located in small convenience stores such that maintenance and loading of ATM affected operation of store to greater extent – Where some ATMs moveable – Where for purposes of *General Rate Act 1967*, hereditament defined as "property which is or may become liable to a rate, being a unit of such property which is, or would fall to be, shown as a separate item on the valuation list" – Where *Local Government Finance Act 1988* adopted definition from 1967 Act and provided "whether a hereditament is occupied, and who is the occupier" to be determined by reference to 1967 Act – Where Valuation Tribunal for England held ATMs were situated on hereditaments that were rateably occupied separately from host stores – Where Upper Tribunal (Lands Chamber) held other than moveable ones, ATMs situated on hereditaments distinct from the host stores, but only those in first category were rateably occupied separately from host stores – Where Court of Appeal held none of ATMs rateably occupied separately from host stores – Whether sites of ATMs separate hereditaments from stores – If so, whether banking companies, retailers, or ATM operators in rateable occupation of separate hereditaments.

Held (5:0): Appeals dismissed.

Fowler v Commissioners for Her Majesty's Revenue and Customs

United Kingdom Supreme Court: [2020] UKSC 22

Judgment delivered: 20 May 2020

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

Catchwords:

Taxation – Income tax – Double taxation – Where respondent taxpayer diver resident in South Africa – Where in 2011-12 and 2012-13 tax years respondent undertook diving engagements in waters off UK's continental shelf – Where art 7 of Double Taxation Treaty between UK and South Africa provides persons self-employed only taxed in place of residence – Where art 14 provides employees may be taxed in place of employment – Where parties assumed for purposes of appeal respondent was employee – Where s 15 of *Income Tax (Trading and Other Income) Act 2005* (UK) provides employed seabed divers "treated" as self-employed for purposes of UK income tax – Where First-tier Tribunal (Tax Chamber) accepted respondent's argument he was not liable to pay income tax in UK – Where Upper Tribunal (Tax and Chancery Chamber) allowed tax authorities' appeal – Where majority of Court of Appeal allowed appeal – Whether

treatment of respondent as self-employed for income tax purposes (pursuant to s 15) means he must be treated as self-employed under Treaty, with consequence that he is not liable to pay income tax in UK.

Held (5:0): Appeal allowed.
