



# OVERSEAS DECISIONS BULLETIN

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

Volume 19 Number 4 (1 August – 31 October 2022)

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

*Competition Commission of South Africa v Group Five Construction Ltd*  
**Constitutional Court of South Africa:** [\[2022\] ZACC 36](#)

**Reasons delivered:** 27 October 2022

**Coram:** Kollapen, Madlanga, Majiedt, Mathopo, Mhlantla JJ, Mlambo AJ, Theron, Tshiqi JJ and Unterhalter AJ

### Catchwords:

Administrative law – *Ultra vires* – Jurisdiction – Ambit of review by Competition Tribunal – Interpretation and application of chapters 2, 3 and 5 of *Competition Act 89 of 1998* – Where Competition Commission of South Africa, regulatory body established in terms of section 19(1) of *Competition Act*, applied for leave to appeal judgment and order of Supreme Court of Appeal – Where Supreme Court of Appeal upheld decision of High Court, which found jurisdiction to determine review application brought by respondent in respect of referral to Tribunal (of complaint against it) by Commission – Where s 62(1) of *Competition Act* relevantly provided Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of interpretation and application of chapters 2, 3 and 5, other than question or matter referred to in subsection (2) – Where s 62(2) of *Competition Act* relevantly provided Court has jurisdiction over question whether an action taken or proposed to be taken by Competition Commission or Competition Tribunal within respective jurisdictions in terms of *Competition Act* – Whether Supreme Court of Appeal and High Court

wrongly pronounced on scope of Competition Commission and Competition Tribunal' exclusive jurisdiction in terms of section 62(1) of *Competition Act* for conduct of proceedings in Competition Tribunal.

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

---

## Company Law

*BTI 2014 LLC v Sequana SA*

**Supreme Court of the United Kingdom:** [\[2022\] UKSC 25](#)

**Judgment delivered:** 5 October 2022

**Coram:** Lord Reed, Lord Hodge, Lord Briggs, Lady Arden and Lord Kitchin

### Catchwords:

Company law – Directors' duties – Duty to act in interests of company – Interests of creditors – "Creditor duty" – Where s 172(1) of *Companies Act 2006* (UK) requires directors to act in good faith to promote success of company for benefit of members as whole – Where, in *West Mercia Safetywear Ltd (in liq) v Dodd* [1988] BCLC 250, Court of Appeal held company's interests include interests of creditors as whole where company insolvent or bordering on insolvency ("creditor duty" or "rule in *West Mercia*") – Where company directors caused distribution of dividend to sole shareholder – Where dividend complied with statutory scheme regulating payment of dividends and capital maintenance requirements – Where dividend paid in circumstances where company had long-term contingent liabilities which gave rise to "real risk", although not probability, that company might become insolvent at uncertain but not imminent date in future – Whether common law creditor duty exists – Proper approach to content of creditor duty and timing at which creditor duty engaged – Whether duty applies to decision by directors to pay otherwise lawful dividend.

**Held (5:0):** Appeal dismissed.

---

## Constitutional Law

*Blind SA v Minister of Trade, Industry and Competition & Ors*

**Constitutional Court of South Africa:** [\[2022\] ZACC 33](#)

**Reasons delivered:** 21 September 2022

**Coram:** Kollapen, Madlanga, Majiedt, Mathopo, Mhlantla JJ, Mlambo AJ, Theron, Tshiqi JJ and Unterhalter AJ

**Catchwords:**

Constitutional law – Discrimination – Visual and print disabilities – Where *Copyright Act 98 of 1978* requires consent of copyright owner to convert works into formats suitable for use of persons with print and visual disabilities, such that such persons suffer limitations in accessing works – Where ss 9(3), 10, 16(1)(b), 29(1) and 30 of *Constitution* respectively prohibit unfair discrimination on ground of disability, provide right to human dignity, provide freedom to receive and impart information, provide right to further education and provide right to use of language – Where High Court declared *Copyright Act* unconstitutional, to extent that *Copyright Act*: (a) limits and/or prevents persons with visual and print disabilities from accessing works under copyright that persons without such disabilities are able to access; and (b) does not include provisions designed to ensure that persons with visual and print disabilities are able to access works under copyright in manner contemplated by Marrakesh Treaty – Whether *Copyright Act* unconstitutional in manner declared by High Court.

**Held (9:0):** Order of the High Court confirmed.

---

*Centre for Child Law v Director of Public Prosecutions, Johannesburg & Ors*

**Constitutional Court of South Africa:** [\[2022\] ZACC 35](#)

**Reasons delivered:** 29 September 2022

**Coram:** Kollapen, Madlanga, Majiedt, Mathopo JJ, Mlambo AJ, Mhlantla, Theron, Tshiqi JJ and Unterhalter AJ

**Catchwords:**

Constitutional law – Best interests of child – Criminalisation of use and/or possession of cannabis by child – Where s 28(2) of *Constitution* states child's best interests are of paramount importance in every matter concerning child – Where s 4(b) of *Drugs and Drug Trafficking Act 140 of 1992* prohibits use and possession of "any dangerous dependence-producing substance" or "any undesirable dependence-producing substance", including cannabis – Where High Court declared s 4(b) to be inconsistent with *Constitution* and invalid to extent s 4(b) criminalises use and/or possession of cannabis by child – Whether to confirm High Court order – Whether s 4(b) inconsistent with *Constitution*.

**Held (9:0):** Order of the High Court confirmed.

---

*R v Ndhlovu*

**Supreme Court of Canada:** [\[2022\] SCC 38](#)

**Judgment delivered:** 28 October 2022

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

**Catchwords:**

Constitutional law – Charter of Rights – Right to liberty – Fundamental justice – Remedy – Where s 490.012 of *Criminal Code* required mandatory registration on national sex offender registry of offenders found guilty of designated sexual offences – Where s 490.013(2.1) of *Criminal Code* required lifetime registration for offenders convicted of more than one designated offence – Whether provisions infringe right to liberty of offenders – Whether, if so, infringement justified – Appropriate remedy if right to liberty unjustifiably infringed – *Constitution Act, 1982, s 52(1)* – *Canadian Charter of Rights and Freedoms, ss 1, 7* – *Criminal Code, RSC 1985, c C-46, ss 490.012, 490.013(2.1)* – *Sex Offender Information Registration Act, SC 2004, c 10*.

**Held (5:4):** Appeal allowed.

---

*Rafoneke & Ors v Minister of Justice and Correctional Services & Ors*  
**Constitutional Court of South Africa:** [\[2022\] ZACC 29](#)

**Reasons delivered:** 2 August 2022

**Coram:** Kollapen, Madlanga, Majiedt, Mathopo, Mhlantla JJ, Mlambo AJ, Tshiqi J and Unterhalter AJ

**Catchwords:**

Constitutional law – Discrimination – Legal profession – Where s 24(2)(b), read with s 115, of *Legal Practice Act 28 of 2014* precludes persons who neither citizens nor permanent residents of South Africa and who not admitted as legal practitioners in designated foreign jurisdictions, from being admitted and enrolled as legal practitioners in South Africa – Where s 9(1) of *Constitution* provides everyone equal before law and has right to equal protection and benefit of law – Where s 9(3) of *Constitution* prohibits direct and indirect discrimination by State against anyone on any of enumerated grounds – Where parties conceded there to be differentiation on basis of citizenship and permanent residency – Where High Court declared provisions of s 24(2) to be unconstitutional and invalid to limited extent – Whether differentiation bears rational connection to legitimate government purpose – Whether s 24(2)(b), read with s 115, of *Legal Practice Act* inconsistent with *Constitution* and invalid.

**Held (8:0):** Appeal dismissed; declaration of the High Court confirmed.

---

*Xu Yuan Chen (alias Terry Xu) v Attorney-General*  
**Court of Appeal of Singapore:** [\[2022\] SGCA 59](#)

**Reasons delivered:** 25 August 2022

**Coram:** Prakash JCA, Tay JCA and Chong JCA

**Catchwords:**

Constitutional law – Equality before law – Article 12(1) of *Constitution of the Republic of Singapore* – Attorney-General ("AG") – Prosecutorial discretion – Where Article 12(1) provides all persons equal before law and entitled to equal protection of law – Where Court explained concept of equality under Article 12(1) does not mean that all persons to be treated equally, but that all persons in like situations be treated alike – Where two-step test developed to determine whether executive action breached Article 12(1), with first step requiring party alleging breach to show they had been treated differently from other equally situated persons (*Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809) – Where appellant Chief Editor of The Online Citizen news media platform and reposted letter titled "Concerning Omissions – Open letter to Singapore's Chief Justice" originally posted on blog – Where AG declared reasonable grounds to suspect contempt of court under s 3(1)(a) of *Administration of Justice (Protection) Act 2016* (Act 19 of 2016) ("AJPA") by publishing of letter – Where AG filed for committal order against appellant and associated orders ("Committal Application") – Whether Committal Application unlawful and irrational where AG only applied for committal for contempt of court against appellant and not original poster of letter – Whether Committal Application in breach of Article 12(1) – Proper approach to two-step test in *Syed Suhail*.

**Held (3:0):** Appeal dismissed.

---

## Courts and Judges

*United Democratic Movement & Anor v Lebashe Investment Group (Pty) Ltd & Ors*

**Constitutional Court of South Africa:** [\[2022\] ZACC 34](#)

**Reasons delivered:** 22 September 2022

**Coram:** Zondo ACJ, Madlanga J, Madondo AJ, Majiedt, Mhlantla JJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

**Catchwords:**

Constitutional law – Courts and judges – Strike out – Interim order – Where applicants sought leave to appeal against order of Supreme Court of Appeal striking appeal off Supreme Court of Appeal's roll on grounds that appeal from interim order and therefore not appealable – Where striking off occurred notwithstanding that High Court granted applicants leave to appeal to Supreme Court of Appeal against same – Where striking off of appeal had effect of preventing applicants from having case determined –

Whether Supreme Court of Appeal has power to interfere with decision of High Court to grant leave to appeal – Whether interim order appealable – Whether High Court ought to have granted impugned interim order.

**Held (9:0):** Leave to appeal granted; appeal upheld.

---

## Criminal Law

*Ellis v The King*

**Supreme Court of New Zealand:** [\[2022\] NZSC 114](#)

**Reasons delivered:** 7 October 2022

**Coram:** Winkelmann CJ, Glazebrook, O'Regan, Williams and Arnold JJ

**Catchwords:**

Criminal law – Continuation of appeal – Death of appellant – Where appellant granted leave to appeal against convictions of sexual offending – Where appellant died before appeal could be heard – Whether appeal should continue despite appellant's death – Whether tikanga Māori relevant to issue of continuation of appeal.

**Held (3:2):** Application for continuation of appeal granted.

---

*Ellis v The King*

**Supreme Court of New Zealand:** [\[2022\] NZSC 115](#)

**Judgment delivered:** 7 October 2022

**Coram:** Winkelmann CJ, Glazebrook, O'Regan, Williams and Arnold JJ

**Catchwords:**

Criminal law – Appeal – Expert evidence – Where appellant convicted in 1993 of 16 counts of sexual offending against seven children – Where appellant appealed against convictions to Court of Appeal and, in 1994, three convictions set aside, but appeal otherwise dismissed – Where, in 2019, appellant granted extension of time to apply for leave to appeal to Supreme Court and leave granted – Where s 23G of *Evidence Act 1908* permitted expert evidence in cases involving allegations of sexual offending against children, including evidence relating to whether child complainant's behaviour consistent or inconsistent with behaviour of sexually abused children of same age group as complainant – Where Crown's expert gave evidence as expert witness under s 23G, but also involved in supervising interviewers who interviewed complainants and assisted police during investigation – Where, during investigation, meetings involving parents of complainants, discussions about allegations between parents and

complainants, parent-to-parent discussions and complainant-to-complainant discussions – Whether miscarriage of justice arising from expert evidence on reliability of children complainants' evidence – Whether miscarriage of justice due to unreliable expert evidence being led at trial – Whether miscarriage of justice arising from risks of contamination of or improperly obtained complainant evidence.

**Held (5:0):** Applications to adduce further evidence granted; appeal allowed; convictions quashed.

---

*R v Andrewes*

**Supreme Court of the United Kingdom:** [\[2022\] UKSC 24](#)

**Judgment delivered:** 18 August 2022

**Coram:** Lord Hodge, Lord Kitchin, Lord Hamblen, Lord Burrows and Lord Stephens

**Catchwords:**

Criminal law – Proceeds of crime – Fraud – "CV fraud" – Confiscation orders – Where respondent obtained remuneration (wages) through employment following fraud, being false representations and non-disclosure – Where, by s 6(5) of *Proceeds of Crime Act 2002* (UK), court must, if it decides defendant benefitted from criminal conduct, decide recoverable amount and make confiscation order – Where, s 6(5) contains proviso that confiscation order not to be made if it "disproportionate" to require defendant to pay recoverable amount – Whether confiscation order based on wages earned disproportionate under s 6(5) of *Proceeds of Crime Act* or contrary to Article 1, Protocol 1 of *European Convention on Human Rights* – Whether confiscation order stripping respondent of wages disproportionate.

**Held (5:0):** Appeal allowed; confiscation order restored.

---

*R v Nahanee*

**Supreme Court of Canada:** [\[2022\] SCC 37](#)

**Judgment delivered:** 27 October 2022

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

**Catchwords:**

Criminal law – Sentencing – Sentencing procedure – Guilty plea – Contested sentencing hearing – Where judge imposed sentence that exceeded range proposed by Crown – Whether framework for departure from joint submissions following guilty plea applies to contested sentencing hearings following guilty plea – Whether sentencing judge required to give notice to

parties and provide further opportunity for submissions if they intend to impose sentence in excess of range proposed by Crown.

**Held (7:2):** Appeal dismissed.

---

*R v Schneider*

**Supreme Court of Canada:** [\[2022\] SCC 34](#)

**Judgment delivered:** 7 October 2022

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

**Catchwords:**

Criminal law – Evidence – Admissibility – Hearsay – Party admission – Where accused charged with second degree murder – Where Crown sought to adduce at trial hearsay evidence from accused’s brother concerning incriminating statements he overheard accused make in telephone conversation with wife – Where trial judge admitted brother’s testimony into evidence – Where accused convicted by jury – Whether trial judge erred in admitting overheard statements into evidence.

**Held (7:2):** Appeal allowed; conviction restored.

---

*R v Tessier*

**Supreme Court of Canada:** [\[2022\] SCC 35](#)

**Judgment delivered:** 14 October 2022

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

**Catchwords:**

Criminal law – Evidence – Admissibility – Confessions rule – Voluntariness – Caution – Where police did not caution individual during interviews in connection with murder investigation about right to remain silent and consequences of speaking to authorities – Where individual later charged with first degree murder and sought exclusion of statements made to police as involuntary – Where trial judge admitted statements as voluntary despite lack of caution – Whether absence of caution during police questioning of individual affected voluntariness of statements under confessions rule – Whether statements admissible at trial.

Constitutional law – Charter of Rights – Detention – Right to counsel – Where police questioned individual at police station in connection with murder investigation – Where police did not inform individual of right to obtain and instruct counsel without delay – Where individual claimed

psychological detention and seeking exclusion of statements at first degree murder trial as having been obtained in violation of right to counsel – Whether individual psychologically detained such that statements should be excluded at trial – *Canadian Charter of Rights and Freedoms*, s 10(b).

**Held (7:2):** Appeal allowed; conviction restored.

---

---

## Electoral Law

*AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa*

**Constitutional Court of South Africa:** [\[2022\] ZACC 31](#)

**Reasons delivered:** 20 September 2022

**Coram:** Kollapen, Madlanga, Majiedt, Mathopo, Mhlantla JJ, Theron, Tshiqi JJ and Unterhalter AJ

### Catchwords:

Electoral law – Election campaigns – Donations – Disclosure – Where President of Republic of South Africa applied to High Court for relief against Public Protector, in relation to report rendered against President – Where report contained key finding that President had breached duties under *Executive Ethics Code, 2000*, in that, relevantly, President failed to disclose donations made to internal party political campaign that supported President's election as President of African National Congress – Where, during proceedings in High Court, application brought seeking relief that, in event *Code* held not to require disclosure of donations made to campaigns for positions within political parties, it be declared unconstitutional – Where s 96 of *Constitution* requires President to publish code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government – Whether *Code* constitutionally compliant in manner in which it deals with disclosure of donations to campaigns for positions within political parties – Whether there be duty to disclose money donated to election campaigns for positions within political parties.

**Held (8:0):** Order of the High Court of South Africa confirmed.

---

---

## Employment Law

*Numsa obo Aubrey Dhludhlu & 147 Ors v Marley Pipe Systems (SA) (Pty) Ltd*

**Constitutional Court of South Africa:** [\[2022\] ZACC 30](#)

**Reasons delivered:** 2 August 2022

**Coram:** Kollapen, Madlanga, Majiedt, Mathopo, Mhlantla JJ, Mlambo AJ, Theron, Tshiqi JJ and Unterhalter AJ

**Catchwords:**

Employment law – Dismissal of employees – Unprotected strike action – Common purpose – Where employees dismissed following serious assault of manager employed by respondent during unprotected strike action – Where 12 of 148 employees engaged in actual physical assault of manager, another 95 employees placed on scene by evidence, with remaining employees not identified at scene of assault – Where Labour Court found, on count of assault, employees guilty based on common purpose – Where Labour Court of Appeal dismissed appeal, reasoning none of employees intervened to stop assault or dissociated from assault before, during or after – Proper approach to doctrine of common purpose.

**Held (8:0):** Leave to appeal granted; appeal upheld.

---

## Equity

*Guest & Anor v Guest*

**Supreme Court of the United Kingdom:** [\[2022\] UKSC 27](#)

**Judgment delivered:** 19 October 2022

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

**Catchwords:**

Equity – Proprietary estoppel – Equitable remedies – Relief – Equitable compensation – Reliance – Expectation – Where farmer promised son "one day my son, all this will be yours" – Where, relying on promise, son spent years working on father's farm for low wages, accommodated in farm cottage, with expectation of inheriting farm – Where primary judge ruled in son's favour and matter appealed on question of remedy – Where argued before Court of Appeal that primary judge wrong to fashion remedy based on son's expectation of inheritance rather than compensation based on increased value of farm consequent on son's contribution or son's loss of opportunity – Whether expectation-based or reliance-based approach to be adopted – Proper approach to awarding remedy in cases of proprietary estoppel, particularly where expectation of future inheritance rather than immediate benefit.

**Held (5:0):** Appeal allowed.

---

## Expropriation

*Annapolis Group Inc v Halifax Regional Municipality*  
**Supreme Court of Canada:** [\[2022\] SCC 36](#)

**Judgment delivered:** 21 October 2022

**Coram:** Wagner CJ, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

**Catchwords:**

Expropriation – State regulation of land use – Constructive taking of private property by public authority – Where land owner sued municipality and alleged municipality’s regulatory measures have deprived it of all reasonable or economic uses of its land, resulting in constructive taking without compensation – Whether acquisition of beneficial interest in property under constructive taking test requires land to actually be taken from owner and acquired by public authority – Whether intention of public authority relevant to analysis of constructive taking claim.

**Held (5:4):** Appeal allowed; order of motion judge restored.

---

## Income Tax

*Frucor Suntory New Zealand Limited v Commissioner of Inland Revenue*  
**Supreme Court of Canada:** [\[2022\] NZSC 113](#)

**Judgment delivered:** 30 September 2022

**Coram:** Winkelmann CJ, William Young, Glazebrook, O’Regan and Ellen France JJ

**Catchwords:**

Income tax – Tax avoidance – Where Deutsche Bank advanced \$204 million to Danone Holdings NZ Ltd ("DHNZ") in exchange for convertible note redeemable at maturity in five years at Deutsche Bank’s election by issue of 1,025 non-voting shares in DHNZ – Where interest on advance payable semi-annually in arrears at 6.5% per annum – Where, over five-year duration of note, \$66 million paid by DHNZ to Deutsche Bank – Where DHNZ claimed deductions in respect of interest payments – Where transaction part of broader funding arrangement between Deutsche Bank and DHNZ – Where Commissioner of Inland Revenue of position net economic effect of funding arrangement that: (a) Deutsche Bank advanced only \$55 million to DHNZ; and (b) \$66 million paid by DHNZ to Deutsche Bank amounted to repayment of that \$55 million and interest on amortising basis – Where section BG 1(1) of *Income Tax Act 2004* (NZ) provides "tax avoidance" arrangement void as against Commissioner for income tax purposes – Where "tax avoidance" defined to include "directly or indirectly altering incidence of any income tax" – Whether s BG 1(1) engaged – Whether DHNZ's taxable income ought to be adjusted to disallow deductions said to

be claimed illegitimately – Whether tax positions adopted by DHNZ "unacceptable" as not meeting "about as likely as not to be correct" standard stipulated in s 141B(1) of *Tax Administration Act 1994* and, if so whether positions "abusive" on basis DHNZ acted with "dominant purpose" of obtaining tax advantages (s 141D).

**Held (4:1):** Appeal dismissed; cross-appeal allowed.

---

## Property

*Grobler v Phillips & Ors*

**Constitutional Court of South Africa:** [\[2022\] ZACC 32](#)

**Reasons delivered:** 20 September 2022

**Coram:** Kollapen, Madlanga, Majiedt, Mathopo, Mhlantla JJ, Mlambo AJ, Theron, Tshiqi JJ and Unterhalter AJ

### Catchwords:

Property – Residential property – Eviction – Where s 4(7) of *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998* ("PIE") provides if unlawful occupier occupied land for more than six months, court may grant order for eviction where of opinion that just and equitable to do so, after considering all relevant circumstances – Where first respondent 85 years old, resided in residence from age of 11, and resided with son with physical disability – Where applicant purchased property and sought first respondent vacate – Whether just and equitable, as provided in s 4(7) of PIE, to direct first respondent and physically disabled son to vacate residence.

Constitutional law – Residence – Where Court in *Machele v Mailula* [2009] ZACC 7 held eviction from one's home always raises constitutional issue – Where jurisdiction engaged where issues centre around eviction from primary residence.

**Held (9:0):** Leave to appeal granted; appeal upheld.

---

## Taxation

*Commissioner of Inland Revenue v Koo Ming Kown & Anor*

**Hong Kong Court of Final Appeal:** [\[2022\] HKCFA 18](#)

**Judgment delivered:** 5 August 2022

**Coram:** Cheung CJ, Ribeiro, Fok PJJ, Stock and Gleeson NPJJ

**Catchwords:**

Taxation – Corporate tax – Liability – Where s 82A(1)(a) of Inland Revenue Ordinance (Cap 112) ("IRO"), exposes to administrative penalty, described as additional tax, person who makes incorrect tax return – Where s 82A(1)(a) provides, relevantly, any person who without reasonable excuse makes incorrect return by omitting or understating anything, shall be liable under section to additional tax of amount not exceeding treble amount of tax which been undercharged – Where tax returns of Nam Tai Electronic & Electrical Products Limited for years 1996/97, 1997/98 and 1999/2000 were found by Board to have been incorrect – Where first and third returns signed by Mr Koo and second return signed by Mr Murakami – Where Board held Mr Koo and Mr Murakami liable to be assessed to additional tax under s 82A(1)(a) – Whether s 82A of IRO permits Commissioner of Inland Revenue to assess additional tax on secretary, manager, director or liquidator ("signer") who physically signed incorrect of corporate taxpayer – Whether, having regard to all circumstances, including words used in return, legislative context and purposes, signer "making" return in personal capacity on behalf of corporate taxpayer – Whether signer "required" by IRO to make return on behalf of corporate taxpayer.

**Held (5:0):** Appeal dismissed.

---

*Commissioners for His Majesty's Revenue and Customs v NHS Lothian Health Board*

**Supreme Court of the United Kingdom:** [\[2022\] UKSC 28](#)

**Judgment delivered:** 19 October 2022

**Coram:** Lord Reed, Lord Briggs, Lord Sales, Lord Leggatt and Lady Rose

**Catchwords:**

Taxation – Value Added Tax ("VAT") – Input tax – Where respondent submitted late claims to His Majesty's Revenue and Customs Commissioners ("HMRC") seeking to recover VAT input tax paid from 1 April 1974, when VAT first introduced in United Kingdom, to 30 April 1997 – Where respondent submitted claim in March 2009, valuing input tax to which they were entitled as over £7 million – Where, after lengthy correspondence, HMRC rejected claim for reason that: (1) basis for using percentage to calculate recoverable input tax but method used to apportion general expenditure between business and non-business expenditure not explained; (2) respondent not shown input tax claimed not already been recovered previously; and (3) respondent failed to explain why annual input tax claimed for earlier years over four times higher than input tax claimed in then current year – Where First-tier Tribunal dismissed respondent's by then £900,000 claim, concluding respondent failed to establish input tax entitlement – Where Upper Tribunal upheld decision, but First Division of Inner House of Court of Session overturned decisions – Proper approach to

evidence and burden and standard of proof in historical claims for recovery of overpaid VAT.

**Held (5:0):** Appeal allowed.

---

*DCM (Optical Holdings) Ltd v Commissioners for His Majesty's Revenue and Customs*

**Supreme Court of the United Kingdom:** [\[2022\] UKSC 26](#)

**Judgment delivered:** 19 October 2022

**Coram:** Lord Reed, Lord Hodge, Lord Sales, Lord Hamblen and Lord Stephens

**Catchwords:**

Taxation – Value Added Tax ("VAT") – VAT liability – Partially exempt – Output tax – Input tax – Where appellant supplied glasses, but also provided optician services – Where appellant "partially exempt" person for VAT purposes, as it makes both supplies on which VAT chargeable (such as supply of glasses) and supplies exempt from VAT (such as optician services) – Where, as appellant partially exempt, VAT liability and entitlement to recover input tax calculated by reference to partial exemption method in s 19(4) of *Value Added Tax Act 1994* (UK) ("VAT Act") – Where appellant and HMRC in dispute over questions of output and input tax, including: (1) disputed assessment for under-declared output VAT for prescribed accounting periods starting October 2002 and ending April 2005; and (2) disputed decisions between 2008 and 2013 by which HMRC reduced VAT credits which appellant claimed – Where, when faced with an incomplete or incorrect VAT return, s 73 of VAT Act empowers HMRC to make assessment of VAT due not later than whichever later of: (a) two years after end of accounting period; or (b) one year after evidence of facts comes to HMRC's knowledge which is, in HMRC's opinion, sufficient to justify making assessment – Where appellant argued HMRC knew something wrong with apportionment method by January 2004 – Where, when VAT charged on goods and services purchased, it possible for taxable person to reclaim it as input VAT by set off against output VAT – Where s 25(3) of VAT Act provides if no output VAT, or amount of input VAT exceeds output VAT, then amount of excess must be paid to taxable person by HMRC as VAT credit – Whether HMRC subject to statutory time bar under s 73(6) of VAT Act – Whether HMRC possesses power to refuse to accept taxable person's self-assessment claim for payment of VAT credit while HMRC verifies claim and to decide at later date that HMRC are only prepared to pay lower amount than claimed in self-assessment.

**Held (5:0):** Appeal dismissed.

---