



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

Malcom Bruce Moncrieff-Spittle v Regional Facilities Auckland Limited
Supreme Court of New Zealand: [\[2022\] NZSC 138](#)

Reasons delivered: 5 December 2022

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

Catchwords:

Administrative law – Judicial review – *New Zealand Bill of Rights Act 1990* (NZ) – Freedom of expression – Where first respondent ("RFAL") cancelled contract for hire of venue, an Auckland Council venue managed by RFAL – Where venue had been hired for presentation by two "alt-right" commentators – Where decision to cancel contract challenged by appellants, ticketholder and Auckland ratepayer – Where appellants sought judicial review of decision to cancel, arguing: (1) RFAL acted irrationally, perversely and arbitrarily; and (2) RFAL failed to act consistently with rights guaranteed under *Bill of Rights*, including freedom of expression – Where High Court dismissed appellants' claim and appellants' appeal to Court of Appeal unsuccessful, but courts adopted different reasoning – Where High Court held RFAL's decision not amenable to judicial review and *Bill of Rights* did not apply – Where Court of Appeal held decision amenable to judicial review, and *Bill of Rights* applied, but claim failed because decision to cancel reasonable both in administrative law terms and under *Bill of Rights* – Whether *Bill of Rights* applies – Whether, if *Bill of Rights* applicable, decision to cancel breach of protected rights – Whether decision by respondent to

cancel contract amenable to judicial review and, if so, what grounds of review available – Whether, if decision reviewable, decision to cancel unreasonable and how freedom of expression to be taken into account in assessment.

Held (5:0): Appeal dismissed.

Walus v Minister of Justice and Correctional Services & Ors
Constitutional Court of South Africa: [\[2022\] ZACC 39](#)

Reasons delivered: 21 November 2022

Coram: Zondo CJ, Madlanga, Majiedt, Mhlantla JJ, Mlambo AJ, Theron, Tshiqi JJ and Unterhalter AJ

Catchwords:

Administrative law – Judicial review – Decision of Minister of Justice and Correctional Services – Rationality – Where applicant charged and convicted of murder, and sentenced to death – Where death sentence commuted to life imprisonment and applicant imprisoned for 28 years – Where applicant applied for parole and application refused several times – Where, on 16 March 2020, Minister again rejected applicant's parole application, identifying "positive factors" favouring applicant being placed on parole, but finding negative factors supporting dismissal of application – Where negative factors included nature of crime, "cold-blooded assassination of prominent political leader", and that applicant convicted with no extenuating circumstances with reference to sentencing remarks – Where High Court dismissed applicant's application to have Minister's decision reviewed and set aside – Whether Minister's decision to deny parole irrational in circumstances where only two factors relied upon would never change.

Criminal law – Parole – Application for – Where s 36 of *Correctional Services Act 111 of 1998* provides objective of implementation of sentence of imprisonment is to enable sentenced prisoner to lead socially responsible crime-free life in future – Whether, when prisoner served many years of life sentence and complied with all requirements for parole, nature and seriousness of crime and sentencing remarks of trial court can be used to deny parole.

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

Arbitration

Lao Holdings NV v Government of the Lao People's Democratic Republic
Singapore Court of Appeal: [\[2022\] SGCA\(I\) 9](#)

Reasons delivered: 24 November 2022

Coram: Menon CJ, Prakash JCA and French IJ

Catchwords:

Arbitration – Award – Setting aside – Conduct of arbitration – Arbitral tribunal – Powers – Where arbitrations suspended pursuant to Deed of Settlement – Where arbitrations could be reinstated under Deed where "material breach" – Where 34 of Deed provided that, if reinstatement occurred, neither appellants nor respondent could add new claims or evidence to arbitrations nor seek additional relief – Where material breach alleged and arbitrations were revived – Where respondent permitted to add new evidence said to go to illegal activities undertaken by appellants – Where awards dismissed appellants' claims with costs – Where Singapore International Commercial Court dismissed appellants' applications to set aside awards – Where Article 34(2)(a)(ii) of UNCITRAL Model Law on International Commercial Arbitration provides arbitral award may be set aside where no proper notice given of appointment of arbitrator or of arbitral proceedings, or otherwise unable to present case – Where Article 34(2)(a)(iv) provides arbitral award may be set aside where composition of arbitral tribunal or procedure not in accordance with agreement of parties – Whether appellants not afforded reasonable opportunity to be heard, contrary to Article 34(2)(a)(ii) – Whether arbitral procedure not in accordance with agreement of parties, contrary to Article 34(2)(a)(iv).

Held (3:0): Appeal dismissed.

Bankruptcy and Insolvency

Peace River Hydro Partners v Petrowest Corp

Supreme Court of Canada: [\[2022\] SCC 41](#)

Reasons delivered: 10 November 2022

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

Catchwords:

Bankruptcy and insolvency – Court-ordered receivership – Enforceability of arbitration agreement – Where receiver commenced civil action for payment of amounts allegedly owed to debtors under agreements that included mandatory arbitration clauses – Where defendants sought stay of proceedings of receiver's action under provincial arbitration legislation on basis that arbitration clauses governed dispute – Where receiver opposed stay and argued that court authorized to assert centralized judicial control over matter under federal bankruptcy and insolvency legislation – Whether

receiver's action should be stayed – *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss 183(1), 243(1) – *Arbitration Act*, RSBC 1996, c 55, s 15.

Held (9:0): Appeal dismissed.

Civil Procedure

Lebea v Menye & Anor

Constitutional Court of South Africa: [\[2022\] ZACC 40](#)

Reasons delivered: 29 November 2022

Coram: Zondo CJ, Madlanga, Majiedt, Mhlantla, Pillay AJ, Rogers, Theron JJ, Tlaletsi AJ, and Tshiqi J

Catchwords:

Civil procedure – Intervention – Where Magistrates Court dismissed application for leave to intervene in civil proceedings in which adverse credibility findings made against applicant, an admitted attorney – Where applicant sought leave to appeal to High Court, which dismissed application on basis applicant failed to show direct and substantial interest in matter – Where Supreme Court dismissed application for special leave to appeal – Whether leave to appeal ought to be granted – Proper approach to application for leave to intervene.

Held (9:0): Leave to appeal refused with costs.

Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH

Constitutional Court of South Africa: [\[2022\] ZACC 42](#)

Reasons delivered: 8 December 2022

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

Catchwords:

Civil procedure – Pleadings – Amendment – Where Court of Commissioner of Patents refused applicant leave to amend plea in patent infringement proceedings instituted by respondent – Where applicant sought to amend particulars of claim to introduce common law defence of unclean hands – Whether refusal of amendment raised constitutional issue – Proper approach to amendment of pleadings.

Held (6:3): Leave to appeal granted; appeal upheld with costs.

Conflict of laws

The Soldiers, Sailors, Airmen and Families Association - Forces Help & Anor v Allgemeines Krankenhaus Viersen GmbH

Supreme Court of the United Kingdom: [\[2022\] UKSC 29](#)

Reasons delivered: 2 November 2022

Coram: Lord Reed, Lord Hodge, Lord Kitchin, Lord Lloyd-Jones and Lord Hughes

Catchwords:

Conflict of laws – Mandatory or overriding effect – Choice of law rules – *Civil Liability (Contribution) Act 1978* (UK) – Where claimant born in German hospital, operated by third party, and claimed to have suffered acute hypoxic brain injury as result of negligence of attending midwife – Where claimant's father stationed with UK armed forces in Germany and hospital provided services to UK armed forces – Where attending midwife employed by first defendant – Where claimant alleged defendants liable for acts or omissions of midwife – Where defendants brought claim for contribution against third party on basis of *Civil Liability (Contribution) Act* – Where common ground that: claimant's claim against defendants governed by German law; any liability of third party governed by German law; applying domestic choice of law rules, German law would apply to contribution claim unless *Civil Liability (Contribution) Act* had overriding effect; and if contribution claim governed by German law, it would extend to question of limitation under s 1(1) of *Foreign Limitation Periods Act 1984* (UK) and under German law limitation period expired – Where defendants claimed *Civil Liability (Contribution) Act* overriding effect with result limitation governed by s 10 of *Limitation Act 1980* (UK) and contribution claim not time-barred – Where Court of Appeal held *Civil Liability (Contribution) Act* has overriding effect and applies irrespective of domestic choice of law rules – Whether *Civil Liability (Contribution) Act* has mandatory or overriding effect such that it applies to all contribution claims brought in England and Wales – Whether, alternatively, *Civil Liability (Contribution) Act* applies only when domestic choice of law rules indicate that contribution claim governed by law of England and Wales.

Held (5:0): Appeal allowed.

Constitutional Law

Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd & Ors

Constitutional Court of South Africa: [\[2022\] ZACC 44](#)

Reasons delivered: 23 December 2022

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

Catchwords:

Constitutional law – Where applicant contracted to supply bulk electricity to municipalities up to Notified Maximum Demand ("NMD") – Where, for extended periods following contract, applicant supplied in excess of NMD – Where applicant then restricted supply to municipalities to NMD – Where municipalities reduced supply to customers – Where customers, through respondent Associations, sought interim orders compelling applicant, as sole supplier of electricity to municipalities, to restore supply of electricity to previous levels pending final adjudication of application for review of applicant's reduction decision under *Promotion of Administrative Justice Act* – Whether Associations established *prima facie* right to secure interim relief – Whether reduction in electricity supply adversely affected rights protected in *Bill of Rights*.

Held (5:4): Leave to appeal granted; appeal dismissed with costs.

R v Sharma

Supreme Court of Canada: [\[2022\] SCC 39](#)

Reasons delivered: 4 November 2022

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

Catchwords:

Constitutional law – Charter of Rights – Right to equality – Discrimination based on race – Right to liberty – Fundamental justice – Sentencing – Aboriginal offenders – Conditional sentences – Where Aboriginal offender pleaded guilty to importing cocaine and sought conditional sentence – Where offender challenged constitutionality of *Criminal Code* provisions making conditional sentences unavailable for certain serious offences and categories of serious offences – Where sentencing judge held conditional sentence unavailable for offender and dismissed *Charter* challenge – Where Court of Appeal struck down impugned provisions on basis that they were overbroad and discriminated against Aboriginal offenders – Whether unavailability of conditional sentence infringes offender's Charter-protected rights – *Canadian Charter of Rights and Freedoms*, ss 7, 15(1) – *Criminal Code*, RSC 1985, c C-46, ss 718.2(e), 742.1(c), 742.1(e)(ii).

Held (5:4): Appeal allowed; sentence imposed at first instance restored.

Contract

Hong Kong Sai Kung Ngong Wo Resort Development Limited v Totalcorp (Nominees) Limited

Hong Kong Court of Final Appeal: [\[2022\] HKCFA 28](#)

Reasons delivered: 19 December 2022

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and Lord Hoffmann NPJ

Catchwords:

Contract – Mortgage – Loan – Excessive rate of interest – Where Court of Appeal, in mortgage action, ordered enforcement of legal charge and payment of loan and other monies secured, reversing judgment under appeal – Where primary judge dismissed action on ground that both charge and recovery of loan unenforceable because parties agreed excessive rate of interest pursuant to s 24 of *Money Lenders Ordinance* (Cap 163) – Whether *BS Lyle Ltd v Chappell* [1932] 1 KB 691 (followed in *New Japan Securities International (HK) Ltd v Lim Yiong Lin* [1987] 3 HKC 153 and *Honip Credit Ltd v Leung Tak Sing Paul* [2020] HKCA 879) lay down rule of law or rule of construction that where extension of loan new loan capitalising accrued interest comes into existence.

Held (5:0): Appeal dismissed.

Courts and Judges

Mineral Sands Resources (Pty) Ltd & Ors v Reddell & Ors

Constitutional Court of South Africa: [\[2022\] ZACC 37](#)

Reasons delivered: 14 November 2022

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

Catchwords:

Courts and judges – Abuse of process – Ulterior motive – Strategic Litigation Against Public Participation ("SLAPP") – Where SLAPP refers to lawsuits initiated against those that speak out on issues of public interest, not as direct tool to vindicate claim, but as indirect tool to limit expression of others – Where applicants initiated defamation suits against respondents, environmental lawyers and activists – Where defendants argued that bringing of defamation actions: (1) abuse of process; (2) amounted to use of court process to achieve improper end; (3) violated right to freedom of expression entrenched in s 16 of *Constitution* – Whether SLAPP suit prohibited under abuse of power doctrine – Whether ulterior motive alone, to exclusion of merits of claim, may be determinative of abuse of process, such that claim can be dismissed solely on that basis.

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

South African Human Rights Commission v Standard Bank of South Africa Ltd & Ors

Constitutional Court of South Africa: [\[2022\] ZACC 43](#)

Reasons delivered: 9 December 2022

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

Catchwords:

Courts and judges – Concurrent jurisdiction – Where application brought by South African Human Rights Commission ("SAHRC"), amicus curiae in High Court proceedings concerning enforcement of payment by respondent banks against debtors, being natural persons – Where debtors either taken up mortgages or purchased motor vehicles on credit and defaulted on repayment – Where banks sought default judgment, with most amounts claimed falling within Magistrates Court's jurisdiction – Where s 169(1) of *Constitution* provides High Court "may" decide matter within jurisdiction – Whether High Court may decline to adjudicate matter over which High Court and Magistrates Courts have concurrent jurisdiction.

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

Sun Min & Ors v Chu Kong

Hong Kong Court of Final Appeal: [\[2022\] HKCFA 24](#)

Reasons delivered: 6 December 2022

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and Lord Neuberger NPJJ

Catchwords:

Courts and judges – Contempt of court – Criminal contempt – Secretary for Justice – Where Order 52 of *Rules of High Court* (Cap 4A) provides judge has power to punish for contempt of court by order of committal and that no application for order of committal can be made unless leave to make application has been granted in accordance with rule (O.52 rule 2(1)) – Where rule 2 provides such application should be made ex parte, and should comply with certain other formalities – Whether person other than Secretary for Justice who wishes to bring proceedings for criminal contempt of court must obtain consent of Secretary before commencing such proceedings.

Held (5:0): Appeals dismissed.

Criminal Law

Berkland v R

Supreme Court of New Zealand: [\[2022\] NZSC 143](#)

Reasons delivered: 7 December 2022

Coram: Winkelmann CJ, William Young, Glazebrook, Ellen France and Williams JJ

Catchwords:

Criminal law – Sentencing – Discretion – *Zhang v R* [2019] 3 NZLR 648 – Where Court of Appeal in *Zhang* broadened sentencing discretion for methamphetamine-related offending in two ways: (1) removed categorical distinction in sentencing between manufacture, importation and supply, rather directing focus to particular role of offender in offending by introducing categories of "leading", "significant" and "lesser" to capture culpability; (2) signalled personal circumstances may be relevant to all methamphetamine-related sentencing – Where Mr Berkland pleaded guilty to charges relating to role in methamphetamine supply operation – Where operation led by Mr Blance – Where High Court described Mr Blance as "mastermind" of operation and Mr Berkland as "right-hand man", sentencing Mr Berkland to 13 years and three months with minimum period of imprisonment ("MPI") of six years and six months – Where Court of Appeal applied new categories in *Zhang*, describing Mr Blance's role as "leading" and Mr Berkland's as at upper end of "significant" – Where Court of Appeal rejected argument for greater discount for personal factors, allowing appeal only in limited respect regarding information not brought to attention of sentencing judge, and reducing appeal by six months – Where Mr Harding pleaded guilty to 11 charges relating to manufacture and distribution of methamphetamine – Where High Court described Mr Harding as "undisputed and unchallenged kingpin" of operation – Where Mr Harding sentenced to 28.5 years imprisonment, having been awarded 18 month discount for late guilty pleas, with MPI of 10 years – Where Mr Berkland and Mr Harding appealed respective Court of Appeal decisions on basis of *Zhang* – Whether Mr Harding's conduct in manufacturing methamphetamine rendered him more culpable than that ordinarily associated with importation or supply and, if so, how increased culpability should be assessed – Whether relevant role criteria applied by Court of Appeal to Mr Berkland to ensure all relevant factors of culpability appropriately considered – Proper approach to consideration of background factors – Whether background relevant to imposition of Mr Berkland's MPI.

Held (5:0): Appeals allowed.

HKSAR v Choy Kin Yue

Hong Kong Court of Final Appeal: [\[2022\] HKCFA 27](#)

Reasons delivered: 16 December 2022

Coram: Cheung CJ, Ribeiro, Fok, Lam PJJ and Lord Hoffmann NPJ

Catchwords:

Criminal law – Unlawful assembly – Riot – Liability – Participatory intent – "Taking part" – Where Court in *HKSAR v Lo Kin Man* (2021) 24 HKCFAR 302 expounded on law relating to offences of unlawful assembly and riot under ss 18 and 19 of *Public Order Ordinance* (Cap 245) – Where Court held "taking part" in assembly required participatory intent – Proper approach to requirement of participatory intent where defendant one of persons who committed prohibited conduct specified in s 18(1) of *Public Order Ordinance*.

Held (5:0): Appeal allowed; conviction and sentence restored.

HKSAR v Milne John

Hong Kong Court of Final Appeal: [\[2022\] HKCFA 22](#)

Reasons delivered: 14 November 2022

Coram: Cheung CJ, Fok, Lam PJJ, Stock and Lord Neuberger NPJJ

Catchwords:

Criminal law – Permanent stay – Bail – Where prosecution related to charge of trafficking dangerous drug – Where respondent applied to permanently stay proceedings on basis that he could not receive fair trial as unable to adduce evidence following *voir dire* ruling – Where permanent stay granted – Where prosecution served notice of intention to appeal – Where respondent released on bail – Whether open to prosecution to challenge correctness of *voir dire* ruling and, if so, whether ruling flawed – Whether exercise of discretion to grant stay of proceedings miscarried – Proper approach to bail application where notice of intention to appeal filed by prosecution.

Held (5:0): Appeal allowed; stay set aside.

Philip v R

Supreme Court of New Zealand: [\[2022\] NZSC 149](#)

Reasons delivered: 16 December 2022

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

Catchwords:

Criminal law – Sentencing – Discretion – *Zhang v R* [2019] 3 NZLR 648 – *Berkland v R* [2022] NZSC 143 – Where *Zhang*, guideline judgment from

Court of Appeal for offending involving methamphetamine, amended by Supreme Court decision in *Berkland* – Where appellant convicted having pleaded guilty to five charges of possession of methamphetamine for supply and two charges of possession of cannabis, and sentenced to one year's home detention – Where Court of Appeal quashed sentence of home detention and substituted term of two years and 11 months' imprisonment, by which time appellant had served seven months of sentence of home detention – Whether Court of Appeal correct to find sentence of one year's home detention manifestly inadequate – Proper approach to appellant's role in terms of *Zhang* and *Berkland* – Proper approach to role in determining culpability – Whether discount should have been allowed to reflect impact of sentencing on appellant's child.

Held (5:0): Appeal allowed.

R v Beaver

Supreme Court of Canada: [\[2022\] SCC 54](#)

Reasons delivered: 9 December 2022

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

Catchwords:

Criminal law – Evidence – Admissibility – Confessions rule – Voluntariness – Where individual unlawfully detained after reporting death of roommate – Where individual given police caution and advised of right to retain and instruct counsel without delay but refused to contact lawyer and confessed to involvement in death – Where individual later charged with manslaughter and sought exclusion of confession as involuntary – Where trial judge admitted confession and entered conviction – Whether confession admissible at trial.

Criminal law – Arrest – Warrantless arrest – Reasonable and probable grounds – Where warrantless arrests by police of two individuals for murder after they reported death of roommate – Whether police had reasonable and probable grounds for arrests.

Constitutional law – Charter of Rights – Remedy – Exclusion of evidence – Where police detained two individuals with respect to death of roommate in breach of several of their Charter rights – Where police attempted to make fresh start by later advising individuals of Charter rights and arresting them for murder – Where police then obtained confessions – Where trial judge admitted confessions at trial and entered convictions for manslaughter – Whether confessions should be excluded – *Canadian Charter of Rights and Freedoms*, s 24(2).

Held (5:4): Appeal dismissed.

R v Ramelson; R v Jaffer; R v Haniffa; R v Dare

Supreme Court of Canada: [\[2022\] SCC 44](#); [\[2022\] SCC 45](#); [\[2022\] SCC 46](#); [\[2022\] SCC 47](#)

Reasons delivered: 24 November 2022

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

Catchwords:

Criminal law – Abuse of process – Entrapment – Bona fide inquiry – Virtual space – Internet – Where accused responded to ad posted by police in escort section of online classified advertising website – Where undercover officer posed as escort disclosing to accused in ensuing text message chat that underage – Where accused arrested when attending at hotel room to meet officer and charged with child luring-related offences – Where accused convicted but sought stay of proceedings on basis of entrapment – Whether accused entrapped.

Held (9:0): Appeals dismissed.

Defamation

Reddell & Ors v Mineral Sands Resources (Pty) Ltd & Ors

Constitutional Court of South Africa: [\[2022\] ZACC 38](#)

Reasons delivered: 14 November 2022

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

Catchwords:

Defamation – Damages – Trading corporations – Claim by – Where respondents instituted defamation suits against applicants – Where applicants contended trading corporations have no remedy available in relation to defamation without proving defamatory statements false, made wilfully and caused company to suffer patrimonial loss – Whether trading corporation able to sue for general damages in defamation suit – Whether, if so, trading corporation ought to be able to do so without alleging or proving falsity of impugned statement, wilfulness of false statement and that trading corporation suffered any patrimonial loss.

Held (7:2): Leave to appeal granted; appeal upheld in part.

Equity

Candey Ltd v Crumpler and another (as Joint Liquidators of Peak Hotels and Resorts Ltd (in liquidation))

Supreme Court of the United Kingdom: [\[2022\] UKSC 35](#)

Reasons delivered: 21 December 2022

Coram: Lord Hodge, Lord Kitchin, Lord Sales, Lord Leggatt and Lady Rose

Catchwords:

Equity – Equitable lien – Security interest – Solicitors – Where Court held in *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21 that solicitor's equitable lien is security interest enforceable against proceeds of litigation up to amount contractually due to solicitor – Where Candey Ltd acted for Peak Hotels and Resorts Limited ("PHRL") – Where PHRL in insolvency proceedings – Where Candey sought payment of outstanding fees in priority to sums payable to other creditors in PHRL's liquidation and asserted equitable lien over sums of money recovered or preserved in course of High Court litigation – Where Candey argued that lien ought to be converted to charge over money under s 73 of *Solicitors Act 1974* (UK) to secure unpaid fees incurred in High Court litigation in priority to liquidators' expenses and all other claims in PHRL's liquidation – Where s 73 provides court in which solicitor been employed in proceedings may declare solicitor entitled to charge on any property recovered or preserved through solicitor's instrumentality in relation to proceedings and make orders for assessment of costs – Where liquidators claimed that: Candey waived or surrendered right to equitable lien in accepting security for fees when retainer renegotiated, namely fixed fee agreement and deed of charge – Whether Candey waived equitable lien by entering into security arrangement.

Held (5:0): Appeal dismissed.

Family Law

F v N

Supreme Court of Canada: [\[2022\] SCC 51](#)

Reasons delivered: 2 December 2022

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

Catchwords:

Family law – Custody – International child abduction – Jurisdiction to make parenting order – Serious harm to child – Best interests of child – Return order – Where parties resided in United Arab Emirates with their two children – Where mother took children on trip to Ontario with father’s consent but refused to return – Where father sought order from Ontario court for children’s return – Where mother requested that Ontario court exercise jurisdiction to make parenting order on merits – Where Ontario court declined jurisdiction on basis that it not satisfied that children would suffer serious harm if removed from Ontario and ordered that children be returned to United Arab Emirates – Whether Ontario court erred in declining jurisdiction and ordering children’s return – *Children’s Law Reform Act*, RSO 1990, c C-12, ss 23, 40.

Held (5:4): Appeal dismissed.

Indigenous Land Rights

Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Limited
Supreme Court of New Zealand: [\[2022\] NZSC 142](#)

Reasons delivered: 21 December 2022

Coram: Winkelmann CJ, William Young, Glazebrook, O’Regan and Williams JJ

Catchwords:

Indigenous land rights – Resumption of land – Waitangi Tribunal – Judicial review – Where, in 2010, Tribunal delivered report into historical claims of Ngāti Kahungunu and Rangitāne of Wairarapa region, and largely upheld claims – Where Ngāti Kahungunu Settlement Trust claimed mandate to represent all of Ngāti Kahungunu ki Wairarapa, engaged in negotiations with Crown, and eventually reached settlement – Where, separately, two Ngāti Kahungunu ki Wairarapa-related entities applied to Tribunal for resumption of certain land – Where Wairarapa Moana ki Pouākani Inc ("Wairarapa Moana") sought resumption of 787 acres in Pouākani No 2 block ("Pouākani land"), being site of Maraetai Power Station, owned and operated by Mercury NZ Ltd ("Mercury") – Where Pouākani land not within rohe of Ngāti Kahungunu ki Wairarapa, but rather in rohe of Raukawa and Ngāti Tūwharetoa – Where, following 1916 agreement with Crown, Wairarapa Moana owned remainder of Pouākani No 2 block on behalf of Ngāti Kahungunu shareholders – Where Wairarapa Moana’s application opposed by Raukawa (supported by Ngāti Tūwharetoa), Mercury and Crown – Where Ms Griggs and Mr Chamberlain, on behalf of Ngāi Tūmapūhia-ā-Rangi, hapū of Ngāti Kahungunu with traditional rights in Ngāumu forest, sought resumption of 10 thousand hectares of Crown forest licence land ("Ngāumu forest") – Where Ngāi Tūmapūhia-ā-Rangi application opposed by Crown – Where Ngāti Kahungunu Settlement Trust filed cross-applications for resumption in response to both Wairarapa Moana and Ngāi Tūmapūhia-ā-Rangi applications – Where Tribunal determined, in response

to Mercury's application to adduce evidence and make submissions on resumption of Pouākani land, that Tribunal precluded from hearing from Mercury by s 8C of *Treaty of Waitangi Act 1975* (NZ) concerning right to be heard on questions in relation to land – Where Tribunal delivered "preliminary determinations" on resumption applications as part of continuing "iterative process" of engagement with claimants, indicating Tribunal minded to grant resumption of Pouākani land and Ngāumu forest – Where Mercury sought judicial review of Tribunal's standing determination and Crown and Raukawa sought judicial review of Tribunal's preliminary determinations – Whether Tribunal's determination, that Wairarapa Moana is not suitable recipient for resumption of Pouākani land, renders appeal moot – Whether fact that Ngāti Kahungunu ki Wairarapa lacks mana whenua in relation to Pouākani land counts decisively against resumption in favour of Ngāti Kahungunu interests – Whether, and to what extent, historical Treaty prejudice is relevant to exercise of Tribunal's resumption jurisdiction – Whether Tribunal took into account all relevant matters when determining that post-1992 delay in resolving Ngāumu forest claim entirely attributable to Crown – Whether Tribunal correctly applied s 8C of *Treaty of Waitangi Act* when refusing to hear from Mercury in Pouākani land application.

Held (5:0; 4:1 (William Young J dissenting in part)): Appeal in SC 93/2021 allowed in part; appeal in SC 127/2021 and cross-appeal in SC 93/2021 dismissed.

Insolvency

Stanford International Bank Ltd (in liquidation) v HSBC Bank PLC
Supreme Court of the United Kingdom: [\[2022\] UKSC 34](#)

Reasons delivered: 21 December 2022

Coram: Lord Hodge, Lord Kitchin, Lord Sales, Lord Leggatt and Lady Rose

Catchwords:

Insolvency – "*Quincecare*" duty – Where Stanford International Bank ("SIB"), through liquidators, claimed damages from HSBC as compensation for payments made from SIB bank accounts held with HSBC ("disputed payments") – Where disputed payments made on SIB's instructions to investors to whom SIB owed sums – Where, as established in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363, bank owes duty of care to customer to refuse customer's payment instructions if bank has reasonable grounds for believing that payments are attempt to defraud customer of money – Where SIB claimed HSBC in breach of "*Quincecare*" duty on basis that, when disputed payments made, HSBC allegedly had reasonable grounds for believing SIB being used as vehicle to perpetrate dishonest Ponzi scheme – Whether SIB suffered loss, as matter of "but for" factual causation, by alleged breach of HSBC of "*Quincecare*" duty where payments were made in discharge of debt owed by SIB.

Held (4:1): Appeal dismissed.

Intellectual Property

Nova Chemicals Corp v Dow Chemical Co
Supreme Court of Canada: [\[2022\] SCC 43](#)

Reasons delivered: 18 November 2022

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

Catchwords:

Intellectual property – Patents – Infringement – Remedies – Accounting of profits – Non-infringing option – Springboard profits – Where patentee permitted to seek accounting of profits following successful infringement claim against infringer – Where reference judge awarded patentee sum equal to infringer’s actual revenue selling patented product minus its actual full costs and also awarded springboard profits – Where Court of Appeal upheld reference judge’s award – Whether lower courts erred in calculating infringer’s profits under accounting of profits – Whether theoretical profits that infringer could have earned by selling unrelated product can be considered as non-infringing option in calculation of profits that infringer must disgorge – Whether patentee entitled to springboard profits.

Held (8:1): Appeal dismissed.

Planning Law

DB Symmetry Ltd & Anor v Swindon Borough Council
Supreme Court of the United Kingdom: [\[2022\] UKSC 33](#)

Reasons delivered: 14 December 2022

Coram: Lord Reed, Lord Hodge, Lord Kitchin, Lord Sales and Lady Rose

Catchwords:

Planning law – Planning condition – Public highway – Where appellant submitted Court of Appeal in *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 erred if Court held local planning authority could not lawfully require landowner by means of planning condition to dedicate land as public highway and thereby avoid payment of compensation – Whether lawful for planning authority, in granting

permission for development, to impose planning condition that developer dedicate land within site to be public highway.

Held (5:0): Appeal dismissed.

Hillside Parks Ltd v Snowdonia National Park Authority
Supreme Court of the United Kingdom: [\[2022\] UKSC 30](#)

Reasons delivered: 2 November 2022

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

Catchwords:

Planning law – Planning permission – Successive grants – Inconsistent planning permissions – Where, in 1967, local planning authority granted full planning permission for development of 401 dwellings on "Balkan Hill" site in accordance with Master Plan ("1967 permission") – Where ownership of Balkan Hill site changed twice after 1967 permission granted and identity of local planning authority changed twice – Where, in 1987, Drake J held that "Master Plan remains in force" – Where, following Drake J's judgment, further development of Balkan Hill site that departed from Master Plan and developer granted series of specific planning permissions for development which departed from Master Plan – Where, in May 2017, authority wrote to developer asserting impossible to implement 1967 permission and required developer to stop works until planning had been regularised – Where developer brought proceedings seeking declarations that authority bound by earlier 1987 Drake J judgment to find 1967 permission remains valid – Whether further development may lawfully be carried out under 1967 permission.

Held (5:0): Appeal dismissed.

Shane Dromgool & Ors v Minister For Land Information
Supreme Court of New Zealand: [\[2022\] NZSC 157](#)

Reasons delivered: 22 December 2022

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

Catchwords:

Planning law – Easement – Compulsory acquisition – Where Top Energy Limited initiated project involving construction of new line in network upgrade – Where proposed new line would cross lands owned by appellants – Where appellants did not agree to grant easement – Where Top Energy made applications to respondent under s 186 of *Resources Management Act 1991* (NZ) to initiate compulsory acquisition of easements over each of appellants' land under Part 2 of *Public Works Act 1981* (NZ) ("PWA") –

Where respondent agreed and PWA process commenced – Where negotiations failed and respondent executed notices of intention to take easements in relation to appellants' land under s 23 of PWA – Where appellants objected in Environment Court under s 23(3) – Where Environment Court's report, issued under s 24 of PWA, largely in favour of respondent's position that taking of easements appropriate – Where appellants appealed against report to High Court – Where appeal successful in part and report set aside, but Court of Appeal reversed High Court decision – Whether Court of Appeal correct in interpretation of role and obligations of respondent in deciding application under s 186(1) of *Resource Management Act* – Whether respondent must be satisfied that proposed taking is fair, sound and reasonably necessary for achieving objectives of network utility operator or whether sufficient that respondent satisfied proposed taking capable of meeting test.

Held (4:1): Appeal dismissed.

Taxation

Des Groseillers v Quebec (Agence du revenu)

Supreme Court of Canada: [\[2022\] SCC 42](#)

Reasons delivered: 17 November 2022

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

Catchwords:

Taxation – Income tax – Assessment – Where taxpayer gave stock options to various registered charities – Where taxpayer claimed tax credits corresponding to amounts of gifts in his tax returns – Where reassessments made against taxpayer to add amounts of gifts to his taxable income – Where reassessments vacated by Court of Québec but restored by Court of Appeal – Court of Appeal's decision affirmed – *Taxation Act*, CQLR, c I-3, ss 50, 422(c)ii.

Held (7:0): Appeal dismissed.

Tort

Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality

Constitutional Court of South Africa: [\[2022\] ZACC 41](#)

Reasons delivered: 30 November 2022

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

Catchwords:

Tort – Damages – Delict – Delictual liability – Loss of profit – Where applicant unsuccessful tenderer for respondent's tender – Where applicant sought to interdict implementation of respondent's decision to award tender on basis award vitiated by bad faith and corruption – Where s 33 of *Constitution* provides right to just administrative action – Where s 217(1) of *Constitution* requires when organ of state contracts for goods or services, that it does so in accordance with system which is "fair, equitable transparent, competitive and cost-effective" – Whether delictual liability attaches to intentional breaches of ss 33 and 217 of *Constitution* – Whether administrative decision tainted by intentional misconduct attracts delictual liability – Whether tenderer, deprived of success in tender by state's intentional misconduct, can claim damages in delict from state for loss of profit.

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

Transportation Law

Des Groseillers v Quebec (Agence du revenu)

Supreme Court of Canada: [\[2022\] SCC 48](#)

Reasons delivered: 25 November 2022

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

Catchwords:

Transportation law – Statutory privilege for on-board recording – Power of court to order production and discovery of on-board recording – Where aircraft struck ground when attempting to land in snowstorm – Where passengers brought class action for damages for negligence against airline, manufacturer and others – Where Manufacturer brought motion for disclosure of audio and transcript of cockpit voice recorder held by federal agency who investigated crash – Where agency opposed disclosure and requested to make submissions to motion judge in absence of public and other parties – Where motion judge refused permission to make such submissions and ordered disclosure of cockpit voice recorder – Whether agency entitled to make submissions before motion judge in absence of public and other parties – Whether motion judge committed reviewable error in ordering disclosure of cockpit voice recorder based on weighing of public interest in proper administration of justice and importance of statutory privilege – *Canadian Transportation Accident Investigation and Safety Board Act*, SC 1989, c 3, s 28(6)(b), (c).

Held (7:0): Appeal dismissed.

Voting Rights

Make it 16 Inc v AG

Supreme Court of New Zealand: [\[2022\] NZSC 134](#)

Reasons delivered: 21 November 2022

Coram: Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Kós JJ

Catchwords:

Voting rights – Voting age – *New Zealand Bill of Rights Act 1990*, ss 5, 19 – Age discrimination – Where 18 years minimum voting age in New Zealand – Where appellant sought to have voting age lowered to 16 years – Where appellant sought declarations in High Court that provisions setting minimum voting age in *Electoral Act 1993* and *Local Electoral Act 2001* inconsistent with right to freedom from discrimination on basis of age, protected by s 19 of *Bill of Rights* – Where High Court declined to make declarations sought on basis that limit on freedom from discrimination on grounds of age justified limit under s 5 of *Bill of Rights* – Where Court of Appeal declined to make declarations, referring to political nature of issues – Whether appropriate for courts to engage in inquiry for which appellant advocates – Proper approach to s 19, being right to freedom from discrimination on grounds of age, in light of s 12, which protects voting rights in general elections for those aged 18 years and older – Whether, if s 12 does not override or qualify s 19, inconsistency with s 19 justified under s 5 – Whether, if inconsistency not justified, declarations should be made.

Held (5:0; 4:1 (Kós J dissenting in part)): Appeal allowed; declaration made.
