



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.

Banking and Finance

Pt Asuransi Tugu Pratama Indonesia TBK v Citibank NA
Hong Kong Court of Final Appeal: [\[2023\] HKCFA 3](#)

Reasons delivered: 6 February 2023

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

Catchwords:

Banking and finance – Authority – "Put on inquiry" – Contributory negligence – Where banker paid money out of customer's account on dishonest instructions of authorised signatory – Where banker owes all ordinary duties of agent, including duty to exercise reasonable skill and care: *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 ("Quincecare duty") – Where s 21 of Law Amendment and Reform (Consolidation) Ordinance (Cap 23) ("Ordinance") provides where person suffers damage as result partly of own fault and partly of fault of any other person, a claim in respect of that damage shall not be defeated, but damages reduced to such extent as court thinks just and equitable – Whether customer's claim to recover balance which ought to be standing in account with banker, which account has been emptied by unauthorised payments, ought properly to sound in debt (to which contributory negligence not a defence) – Whether claim in respect of "damage" for purposes of s 21 of Ordinance.

Limitations – Cause of action – Date of accrual – Whether, in context of contract between banker and customer (debtor/creditor), if banker invalidly

terminates contract, thereby evincing intention no longer to be bound by banker/customer relationship, invalid termination (unless and until accepted by customer as bringing contract to an end) is of any relevance in identifying (for purposes of Limitation Ordinance (Cap 347)) date of accrual of customer's cause of action to recover back amount which ought to be standing in account, or any cause of action for damages for breach of the banker's *Quincecare* duty.

Held (5:0): Appeal allowed.

Bankruptcy

Bartenwerfer v Buckley

Supreme Court of the United States: [Docket No 21-908](#)

Reasons delivered: 22 February 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Bankruptcy – Discharging debt – Fraud – Culpability – Imputation of knowledge – Where petitioner and husband, Mr Bartenwerfer, remodelled house jointly owned, with Mr Bartenwerfer taking charge and petitioner remaining largely uninvolved – Where house sold to respondent and, in conjunction with sale, petitioner and Mr Bartenwerfer attested to having disclosed all material facts related to property – Where, after purchase, respondent discovered several defects that Bartenwerfers had failed to disclose – Where respondent sued in California state court and won, leaving Bartenwerfers jointly responsible for over \$200,000 in damages – Where Bartenwerfers filed for Chapter 7 bankruptcy – Where respondent filed adversary complaint in bankruptcy proceeding, alleging that debt owed on state-court judgment nondischargeable under Bankruptcy Code's exception to discharge of any debt for money to extent obtained by "false pretenses, a false representation, or actual fraud" (11 USC §523(a)(2)(A)) – Where Bankruptcy Court found Mr Bartenwerfer committed fraud and imputed his fraudulent intent to petitioner because two had formed legal partnership to renovate and sell property – Where Bankruptcy Appellate Panel disagreed, holding §523(a)(2)(A) barred petitioner from discharging debt only if she knew or had reason to know of Mr Bartenwerfer's fraud – Where, on remand, Bankruptcy Court determined petitioner lacked such knowledge – Where Bankruptcy Appellate Panel affirmed, but Ninth Circuit reversed in relevant part, invoking *Strang v Bradner*, 114 US 555 – Whether §523(a)(2)(A) precludes petitioner from discharging in bankruptcy a debt obtained by fraud, regardless of culpability.

Held (9:0): Decision of the United States Court of Appeals for the Ninth Circuit affirmed.

Constitutional Law

Agribee Beef Fund (Pty) Ltd v Eastern Cape Development Agency
Constitutional Court of South Africa: [\[2023\] ZACC 6](#)

Reasons delivered: 1 February 2023

Coram: Zondo CJ, Maya DCJ, Baqwa AJ, Kollapen, Madlanga, Majiedt JJ, Mbatha AJ, Rogers, and Tshiqi JJ

Catchwords:

Constitutional law – Procurement – Goods and services – Mootness – Where s 217(1) of *Constitution* provides when organ of state contracts for goods or services, must do so in accordance with system which is fair, equitable, transparent, competitive and cost-effective – Where tripartite agreement between organs of state and private party entered into, requiring private party to provide smallholder farmers with goods and services, paid for with public funds – Whether tripartite agreement between two organs of state and private entity, in furtherance of objects of organs of state, subject to s 217(1) of *Constitution* – Whether matter moot in circumstances where contractual nexus between parties expired in March 2021.

Held (9:0): Appeal upheld.

In the matter of an application by James Hugh Allister and others for Judicial Review; In the matter of an application by Clifford Peeples for Judicial Review

Supreme Court of the United Kingdom: [\[2023\] UKSC 5](#)

Reasons delivered: 8 February 2023

Coram: Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Sales and Lord Stephens

Catchwords:

Constitutional law – Where, post United Kingdom's (UK) decision to leave European Union ("EU"), UK Parliament passed *European Union Withdrawal Agreement Act 2020* providing for formal execution and ratification of Withdrawal Agreement between the UK and the EU, including Northern Ireland Protocol ("Protocol") – Where Protocol came into operation on 1 February 2020 and provides framework for post-withdrawal arrangements in Northern Ireland ("NI") – Where Article 18 of Protocol requires UK to provide opportunity for democratic consent in NI to continued application of Articles 5 to 10 of Protocol – Where Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 ("2020 Regulations") implement in domestic law mechanism for obtaining

democratic consent – Where appellants brought judicial review applications challenging Protocol and 2020 Regulations – Whether Protocol and 2020 Regulations incompatible with *Acts of Union 1800*, and specifically Article VI which provides that subjects of Great Britain and Ireland shall be on same footing with respect to trade, and that any future treaty entered into with foreign power shall preserve that footing – Whether Protocol incompatible with *Northern Ireland Act 1998*, specifically s 1(1) which provides NI in its entirety remains part of United Kingdom and shall not cease to be so without consent of majority of people of NI voting – Whether 2020 Regulations unlawfully eliminated constitutional safeguard enshrined in s 42 of *Northern Ireland Act*, which requires Assembly votes to have cross-community support.

Held (5:0): Appeal dismissed.

R v Hilbach

Supreme Court of Canada: [\[2023\] SCC 3](#)

Reasons delivered: 27 January 2023

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

Catchwords:

Constitutional law – Charter of Rights – Cruel and unusual treatment or punishment – Sentencing – Mandatory minimum sentence – Robbery – Where accused convicted of robbery committed with restricted or prohibited firearm and of robbery committed with ordinary firearm – Where accused challenged constitutionality of mandatory minimum sentence of five years' imprisonment prescribed for robbery committed with restricted or prohibited firearm and of mandatory minimum sentence of four years' imprisonment prescribed for robbery committed with ordinary firearm – Whether mandatory minimum sentences constitute cruel and unusual punishment – *Canadian Charter of Rights and Freedoms*, s 12 – *Criminal Code*, RSC 1985, c C-46, ss 344(1)(a)(i), (a.1).

Held (7:2): Appeal allowed.

R v Hills

Supreme Court of Canada: [\[2023\] SCC 2](#)

Reasons delivered: 27 January 2023

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

Catchwords:

Constitutional law – Charter of Rights – Cruel and unusual treatment or punishment – Sentencing – Mandatory minimum sentence – Discharging firearm – Where accused convicted of discharging firearm into or at place knowing that or being reckless as to whether another person present in place – Where accused challenged constitutionality of mandatory minimum sentence of four years' imprisonment prescribed for offence – Whether mandatory minimum sentence constitutes cruel and unusual punishment – *Canadian Charter of Rights and Freedoms*, s 12 – *Criminal Code*, RSC 1985, c C-46, ss 244.2(1)(a), 244.2(3)(b).

Held (8:1): Appeal allowed.

Tse Henry Edward v Commissioner of Registration
Hong Kong Court of Final Appeal: [\[2023\] HKCFA 4](#)

Reasons delivered: 6 February 2023

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

Catchwords:

Constitutional law – Rights – Right to privacy – Article 14 of Bill of Rights – Judicial review – Where Article 14 provides no one shall be subjected to arbitrary or unlawful interference with privacy and everyone has right to protection of law against such interference or attacks – Where residents required to register for Hong Kong Identity Card ("HKID card") – Where HKID card indicates whether holder male or female ("gender marker") – Where two appellants female to male ("FtM") transgender persons – Where appellants applied to Commissioner of Registration to have gender markers on HKID cards amended to reflect acquired gender – Where Commissioner refused applications on basis appellants had not undergone certain surgical procedures required under published guidelines to qualify for change – Whether Commissioner's refusal violates appellants' constitutional right to privacy under Article 14 – Whether declaration ought to be made that published guidelines unconstitutional.

Held (5:0): Appeal allowed.

Contract

Barton v Morris

Supreme Court of the United Kingdom: [\[2023\] UKSC 3](#)

Reasons delivered: 25 January 2023

Coram: Lord Briggs, Lord Leggatt, Lord Burrows, Lord Stephens and Lady Rose

Catchwords:

Contract – Oral contract – Implied term – Business necessity – Where first respondent performed service for fourth respondent by introducing to fourth respondent buyer who ultimately bought property that fourth respondent owned and wished to sell – Where buyer paid fourth respondent £6 million for property – Where High Court judge sitting at first instance held first respondent not entitled to payment – Where no written agreement on which first respondent or fourth respondent could rely, but judge found that they arrived at binding oral agreement whereby first respondent would be paid £1.2 million for making introduction if buyer bought property for £6.5 million – Where, because contract made no provision as to what would happen if property sold to buyer for less than £6.5 million, no contractual obligation on fourth respondent to pay anything to first respondent – Where Court of Appeal allowed appeal – Where two members of Court of Appeal suggested possible implication of term into contract that reasonable fee would be paid if buyer bought property for less than £6.5 million – Whether first respondent entitled to relief on basis of implied term.

Restitution – Unjust enrichment – Where first respondent argued, in absence of contract, fourth respondent unjustly enriched at first respondent's expense – Where High Court judge relied on principle in *MacDonald Dickens & Macklin v Costello* [2012] QB 244 that applied to preclude any claim for unjust enrichment because such claim would undermine contractual terms agreed between parties – Where Court of Appeal held silence of contract as to what would happen if sale to buyer was for less than £6.5 million meant contract did not rule out claim in unjust enrichment – Where Court of Appeal held fourth respondent would be unjustly enriched if it took benefit of introduction without paying first respondent reasonable fee – Whether fourth respondent unjustly enriched – Whether unjust factor sufficient to entitle first respondent to relief on basis of unjust enrichment.

Held (3:2): Appeal allowed.

Courts and Judges

Minister of Tourism v Afriforum NPC

Constitutional Court of South Africa: [\[2023\] ZACC 7](#)

Reasons delivered: 8 February 2023

Coram: Zondo CJ, Maya DCJ, Baqwa AJ, Madlanga, Majiedt, Mathopo JJ, Mbatha AJ, Rogers, and Tshiqi JJ

Catchwords:

Courts and judges – Leave to appeal – Mootness – Reasonable prospects of success – Where application for leave to appeal brought against Supreme Court of Appeal's judgment and order relating to whether Minister for

Tourism obliged or entitled to include Broad Based Black Economic Empowerment status level criteria among criteria that Department of Tourism used to select businesses that would be given grants out of Covid-19 Tourism Relief Fund – Where Supreme Court of Appeal declared Minister's decision unlawful – Where Minister sought leave to appeal, but application opposed on basis that matter moot and there no reasonable prospects of success – Whether leave to appeal should be granted in circumstances where dispute relates to Fund established under *Disaster Management Act 57 of 2002* ("DM Act") during state of disaster, where state of disaster terminated, where order of Supreme Court of Appeal specific to powers which Minister had purported to exercise under DM Act, where order did not authorise recovery of funds paid from Fund, and Fund been exhausted.

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

R v R

Constitutional Court of South Africa: [\[2023\] ZACC 5](#)

Reasons delivered: 1 February 2023

Coram: Baqwa AJ, Kollapen, Madlanga, Majiedt, Mathopo, Mhlantla, Rogers and Tshiqi JJ

Catchwords:

Courts and judges – Contempt of court – Variation of court orders – Where applicant and respondent parties to divorce proceedings – Where respondent applied to have applicant held in contempt of earlier High Court order – Where applicant sought to challenge contempt orders – Where challenge concerned two paragraphs of order in divorce proceedings: (1) para 2.3, requiring applicant to pay over to respondent share of net rentals concerning property High Court had declared jointly owned; and (2) paras 2.4 and 2.6, requiring transfer of certain property – Where High Court, in contempt proceedings, unilaterally varied orders in both paragraphs 2.4 and 2.6 and made orders that neither party had prayed for – Where High Court relied on rule 42(1)(c) of Uniform Rules of Court, which grants Court, of its own accord, or upon application by affected party, power to vary or rescind earlier order if it granted as result of mistake common to parties – Whether applicant in contempt – Whether, if applicant in contempt, High Court could impose sentence of direct imprisonment, conditional upon payment of amount of money alleged equivalent to arrear rental income – Whether High Court could vary earlier orders – Whether High Court correctly invoked rule 42(1)(c) – Whether order of contempt can flow from order couched in declaratory terms.

Held (8:0): Appeal upheld.

Criminal procedure

Cruz v Arizona

Supreme Court of the United States: [Docket No 21-846](#)

Reasons delivered: 22 February 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Criminal procedure – Post-conviction petition – "Significant change in law" – Where petitioner found guilty of capital murder by Arizona jury and sentenced to death – Where, at trial and on direct appeal, petitioner argued that under *Simmons v South Carolina*, 512 US 154, he should have been allowed to inform jury that life sentence in Arizona would be without parole – Where trial court and Arizona Supreme Court held Arizona's capital sentencing scheme did not trigger application of *Simmons* – Where, after Cruz's conviction became final, Supreme Court held in *Lynch v Arizona*, 578 US 613 at 615, that it was fundamental error to conclude that *Simmons* "did not apply" – Where petitioner sought to raise *Simmons* issue again in state post-conviction petition under Arizona Rule of Criminal Procedure 32.1(g), which permits defendant to bring successive petition if significant change in law that, if applicable to defendant's case, would probably overturn defendant's judgment or sentence – Where Arizona Supreme Court denied relief – Where US Supreme Court does not decide question of federal law in case if state court's judgment rests on state law ground independent of federal question and adequate to support judgment (*Coleman v Thompson*, 501 US 722 at 729) – Whether Arizona Supreme Court's holding that *Lynch* was not significant change in law falls within exception identified in *Coleman*.

Held (5:4): Decision of the Supreme Court of Arizona vacated and remanded.

Discrimination

McCue (as guardian for Andrew McCue) v Glasgow City Council

Supreme Court of the United Kingdom: [\[2023\] UKSC 1](#)

Reasons delivered: 11 January 2023

Coram: Lord Reed, Lord Lloyd-Jones, Lord Sales, Lord Burrows and Lord Stephens

Catchwords:

Discrimination – Disability – *Equality Act 2010* (UK) – Where appellant guardian for her son ("Mr McCue") who has Down's Syndrome and disabled

within meaning of s 6 of *Equality Act* – Where Mr McCue's disability results in him being provided with community care services by respondent pursuant to *Social Work (Scotland) Act 1968* ("1968 Act") – Where s 12(4) of 1968 Act provides assistance may be given unconditionally or subject to conditions as to repayment of assistance as local authority may consider reasonable – Where s 15 of *Equality Act* provides person discriminates against disabled person if they treat person unfavourably because of disability and cannot demonstrate treatment is proportionate means of achieving legitimate aim – Where s 20 of *Equality Act* imposes duty to make adjustments – Where respondent Council's policy document provides that consideration will be given to representations to take into account specific costs in relation to disability related expenditure, with effect that it is left to judgment of relevant Council officials whether any particular item of expenditure claimed to be disability related expenditure is of character and amount so as to affect what is reasonably practicable for individual to pay for service – Where appellant made representations to Council on Mr McCue's behalf that he bears various items of disability related expenditure which ought to be brought into account by Council when assessing amount for which he is charged for provision of services, but representations largely unsuccessful – Whether Council's policy discriminatory.

Held (5:0): Appeal dismissed.

Evidence

Kapa v S

Constitutional Court of South Africa: [\[2023\] ZACC 1](#)

Reasons delivered: 24 January 2023

Coram: Baqwa AJ, Kollapen, Madlanga, Majiedt, Mathopo JJ, Mbatha AJ, Mhlantla, Rogers and Tshiqi JJ

Catchwords:

Evidence – Hearsay – Where applicant convicted of murder – Where s 3(1)(c) of *Law of Evidence Amendment Act 45 of 1988* ("Hearsay Act") provides court may admit hearsay evidence, with regard to certain considerations, where court of opinion evidence should be admitted in interests of justice – Where High Court admitted statement of Ms Dasi who died before applicant's trial – Where applicant sought leave to appeal against conviction and sentence – Whether in interests of justice for condonation for late filing of application to be granted – Whether in interests of justice to admit hearsay evidence in terms of s 3(1)(c) of Hearsay Act – Whether evidence of Ms Dasi had sufficient probative value.

Held (6:3): Condonation granted; leave to appeal granted; appeal dismissed.

Industrial Law

Helix Energy Solutions Group, Inc v Hewitt

Supreme Court of the United States: [Docket No 21-984](#)

Reasons delivered: 22 February 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Industrial law – Overtime – *Fair Labor Standards Act of 1938* ("FLSA") – "Bona fide executive" standard – Salary-basis test – Where respondent filed action against petitioner seeking overtime pay under FLSA – Where FLSA guarantees overtime pay to covered employees when they work more than 40 hours per week – Where respondent worked for petitioner on offshore rig from 2014 to 2017, working 84 hours per week while on vessel – Where respondent paid daily-rate with no overtime compensation and earned over \$200,000 annually – Where petitioner asserted that respondent exempt from FLSA because he qualified as "bona fide executive" (29 USC §213(a)(1)) – Where employee considered bona fide executive excluded from the FLSA's protections if employee meets three distinct tests, including "salary basis" test, requiring employee receive predetermined and fixed salary – Where Secretary of Labor implemented bona fide executive standard through two separate rules, one "general rule" applying to employees making less than \$100,000 in annual compensation, and one addressing "highly compensated employees" ("HCEs") who make at least \$100,000 per year (29 CFR §§541.100, 541.601(a), (b)(1)), but both considering employees to be executives when, relevantly, they are compensated on salary basis ("salary-basis test") – Where District Court held respondent compensated on salary basis – Where Court of Appeals for Fifth Circuit reversed based on examination of regulations giving content to salary-basis test – Where Court concluded daily-rate employees did not fall within §541.602(a) which provided employee will be considered paid on salary-basis if employee regularly receives each pay period on weekly, or less frequent basis, predetermined amount constituting all or part of employee's compensation – Where Court held daily-rate workers can qualify as paid on salary basis only through "special rule" of §541.604(b), which focuses on workers whose compensation is computed on hourly, daily or shift basis, but that respondent's compensation did not satisfy §604(b)'s conditions – Whether respondent an executive exempt from FLSA's overtime pay guarantee – Whether respondent paid on salary basis under §602(a).

Held (6:3): Decision of the United States Court of Appeals for the Fifth Circuit affirmed.

Limitation of Actions

Arellano v McDonough

Supreme Court of the United States: [Docket No 21-432](#)

Reasons delivered: 23 January 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Limitation of actions – Statute of limitations – Equitable tolling – Where 30 years after petitioner's discharge from Navy, he applied for disability compensation – Where petitioner granted service-connected disability benefits from Department of Veterans Affairs ("VA") – Where, applying default rule in 38 USC §5110(a)(1), VA assigned effective date of 3 June 2011, being day agency received petitioner's claim, to disability award – Where petitioner appealed, arguing award's effective date should be governed by exception in §5110(b)(1), which makes effective date of award day following date of veteran's discharge if application received within one year from such date of discharge – Where, alleging that he had been too ill to know of availability of disability benefits, petitioner maintained that exception's one-year grace period should be equitably tolled to make award effective on or about day after discharge from military service in 1981 – Where VA's Board of Veterans' Appeals denied petitioner's request, and Court of Appeals for Veterans Claims and Federal Circuit affirmed – Whether §5110(b)(1) subject to equitable tolling.

Held (9:0): Decision of the United States Court of Appeals for the Federal Circuit affirmed.

Property

Aviva Investors Ground Rent GP Ltd v Williams

Supreme Court of the United Kingdom: [\[2023\] UKSC 6](#)

Reasons delivered: 8 February 2023

Coram: Lord Reed, Lord Briggs, Lord Kitchin, Lord Sales and Lord Richards

Catchwords:

Property – Real property – Leases – First-tier Tribunal (Property Chamber) ("FtT") – Where s 27A of *Landlord and Tenant Act 1985* introduced to regulate levying of service charges by landlords under leases of residential property in respect of expenditure upon repairs and services – Where s 27A(1) provides application may be made to appropriate tribunal for determination whether service charge payable and circumstances as to payment – Where FtT "appropriate tribunal" in England – Where s 27A(6)

provides agreement by tenant void in so far as it purports to provide for determination in particular manner – Proper approach to s 27A(6) where contractual provision in lease provides for tenant to pay fixed proportion of common costs or costs landlord reasonably determine – Whether tenant and landlord able to invoke FtT's jurisdiction under s 27A.

Statutory interpretation – Anti-avoidance provision – Mischief provision designed to combat – Freedom to contract – Proper approach to construction of statutory provision by appellate court.

Held (5:0): Appeal dismissed.

Delaware v Pennsylvania

Supreme Court of the United States: [Docket No 145, Orig](#)

Reasons delivered: 28 January 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Property – Escheatment – Intangible property – Where State may take custody of abandoned property located within its borders through "escheatment" process – Where, when abandoned property intangible, lack of physical location gives rise to multiple States having arguable claims – Where Agent Checks and Teller's Checks ("Disputed Instruments") are prepaid financial instruments used to transfer funds to named payee – Where, when Disputed Instruments not presented for payment within certain period of time, they are deemed abandoned, and, currently, MoneyGram applies common-law escheatment practices outlined in *Texas v New Jersey*, 379 US 674 at 680–682, where Court established rule that proceeds of abandoned financial products should escheat to State of creditor's last known address or, where such records not kept, to State in which company holding funds is incorporated – Where MoneyGram does not keep records of creditor addresses for Disputed Instruments and applies the secondary common law rule and transmits abandoned proceeds to State of incorporation – Where States invoked Court's original jurisdiction to determine whether abandoned proceeds of Disputed Instruments governed *Disposition of Abandoned Money Orders and Traveler's Checks Act* ("FDA") rather than common law – Where FDA provides money order or other similar instrument should generally escheat to State in which such instrument purchased (12 USC §2503) – Where Court consolidated actions and appointed Special Master – Where Special Master, in First Interim Report, concluded Disputed Instruments were covered by FDA – Where Special Master reassessed after oral argument in Supreme Court and issued second report, concluding many of Disputed Instruments were or could be third party bank checks excluded from FDA – Whether Disputed Instruments constitute money orders so as to fall within FDA.

Held (9:0; 5:4 (Thomas, Alito, Gorsuch and Barrett JJ dissenting in part)): exceptions to Special Master's First Interim Report overruled; First Interim Report and order adopted to the extent consistent with opinion; and cases remanded.

Sara & Hossein Asset Holdings Ltd (a company incorporated in the British Virgin Islands) v Blacks Outdoor Retail Ltd

Supreme Court of the United Kingdom: [\[2023\] UKSC 2](#)

Reasons delivered: 18 January 2023

Coram: Lord Hodge, Lord Briggs, Lord Kitchin, Lord Sales and Lord Hamblen

Catchwords:

Property – Real property – Lease – Service charge – Landlord certification of sum payable – Where appellant tenant rented commercial property from respondent – Where respondent claimed service charge arrears from appellant under leases – Where leases provided landlord should provide certificate as to amount of total cost and sum payable by tenant and that this was to be "conclusive" in absence of "manifest or mathematical error or fraud" – Where appellant argued certification conclusive as to amount of costs incurred by landlord but not as to tenant's service charge liability – Where respondent made application for summary judgment in respect of money claim for certified service charges, which was dismissed by Deputy Master in High Court – Where respondent's appeal dismissed by Deputy Judge of High Court, but Court of Appeal allowed respondent's second appeal – Whether respondent's certification of service charge has "conclusive" effect for appellant's liability.

Held (4:1): Appeal allowed in part.

Remedies

Mfoza Service Station (Pty) Ltd v Engen Petroleum Ltd

Constitutional Court of South Africa: [\[2023\] ZACC 3](#)

Reasons delivered: 1 February 2023

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

Catchwords:

Remedies – Damages – Arbitration – Award – Powers of arbitrator – Where s 12B(4)(a) of *Petroleum Products Act 120 of 1977* empowers arbitrator to determine whether petroleum wholesalers or retailers have engaged in unfair or unreasonable contractual practices and, if so, to make such award

as arbitrator deems necessary to correct such practice – Whether damages available remedy under s 12B(4)(a).

Held (6:3): Leave to appeal granted; appeal dismissed.

Rissik Street One Stop CC t/a Rissik Street Engen v Engen Petroleum Ltd
Constitutional Court of South Africa: [\[2023\] ZACC 4](#)

Reasons delivered: 1 February 2023

Coram: Zondo CJ, Baqwa AJ, Kollapen, Madlanga, Majiedt JJ, Mbatha AJ, Mhlantla, Rogers and Tshiqi JJ

Catchwords:

Remedies – Statutory power – Purpose – Where first applicant and respondent parties to operating lease – Where dispute arose between parties regarding right of sale in operating lease and dispute submitted to arbitration pursuant to s 12B of *Petroleum Products Act 120 of 1977* ("PPA") – Where, pursuant to s 12B(4)(a) arbitrator has power to determine whether alleged contractual practices unfair or unreasonable and, if so, to make award deemed necessary to correct such practice – Whether arbitrator has remedial power pursuant to 12B(4)(a) of PPA to allow party to agreement to continue in occupation of leased premises after expiration of operating lease in circumstances where neither renewal nor extension of operating lease sought, but where continued occupation may be necessary to correct unfair or unreasonable contractual practice – Whether party who submits request for referral to arbitration in terms of s 12B of PPA obliged, at time of request, to set out nature of relief sought – Whether court can grant stay of eviction proceedings pending determination of arbitration under section 12B of PPA.

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

Statutory Interpretation

Bittner v United States

Supreme Court of the United States: [Docket No 21-1195](#)

Reasons delivered: 28 February 2023

Coram: Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson JJ

Catchwords:

Statutory interpretation – Where *Bank Secrecy Act* ("BSA") requires persons with certain financial interests in foreign accounts to file annual

report ("FBAR") – Where statute imposes maximum \$10,000 penalty for unwilful violations of law – Where petitioner learned of his BSA reporting obligations and submitted required FBARs covering five years (2007 through 2011) – Where government deemed petitioner's late-filed reports deficient because reports did not address all accounts to which petitioner had either signatory authority or qualifying interest – Where petitioner filed corrected FBARs providing information for each of his accounts – Where government neither contested accuracy of petitioner's new filings nor suggested previous errors were wilful, but took view that unwilful penalties apply to each account not accurately or timely reported – Where, petitioner's five late-filed FBARs involved 272 accounts and government calculated penalty due at \$2.72 million – Where petitioner challenged penalty, arguing BSA authorizes maximum penalty for unwilful violations of \$10,000 per FBAR, not per account – Where Fifth Circuit upheld government's assessment – Whether BSA's \$10,000 maximum penalty for unwilful failure to file compliant FBAR accrues on per-FBAR or per-account basis.

Held (5:4): Decision of the United States Court of Appeals for the Fifth Circuit affirmed.

Taxation

News Corp UK & Ireland Ltd v Commissioners for His Majesty's Revenue and Customs

Supreme Court of the United Kingdom: [\[2023\] UKSC 7](#)

Reasons delivered: 22 February 2023

Coram: Lord Hodge, Lord Kitchen, Lord Hamblen, Lord Leggatt and Lord Burrows

Catchwords:

Taxation – Value Added Tax ("VAT") – Zero-rating – "Always speaking" principle of statutory interpretation – Where appellant publisher of *The Times*, *The Sunday Times*, *The Sun* and *The Sun on Sunday* ("Publications") – Where appellant argues digital editions of Publications subject to zero-rate VAT for period 30 August 2010 to 4 December 2016, as "newspapers" for purposes of *Value Added Tax Act 1994* ("VAT Act") – Where His Majesty's Revenue and Customs found appellant not entitled to zero-rate supply of digital editions of Publications – Where appellant appealed decisions – Where First-tier Tribunal found digital editions of Publications not "newspapers" for purposes of VAT Act, and rejected appellant's claim for recovery of over £35 million – Where Upper Tribunal allowed News Corp's subsequent appeal, but Court of Appeal overturned decision – Where appellant appealed to Supreme Court – Whether supplies of digital editions of Publications not supplies of "newspapers" within meaning of VAT Act such that they could not be zero-rated for VAT.

Held (5:0): Appeal dismissed.

Tort

Fearn v Board of Trustees of the Tate Gallery

Supreme Court of the United Kingdom: [\[2023\] UKSC 4](#)

Reasons delivered: 1 February 2023

Coram: Lord Reed, Lord Lloyd-Jones, Lord Kitchen, Lord Sales and Lord Leggatt

Catchwords:

Tort – Private nuisance – Unreasonable interference – Public interest – Where public viewing gallery on top floor of Blavatnik Building, part of Tate Modern art museum, provides visitors with views into claimants' living areas – Where walls of claimants' flats constructed mainly of glass and viewing gallery provides "uninterrupted view of how claimants seek to conduct their lives" – Where trial judge held intrusive viewing from neighbouring property can give rise to claim for nuisance, but intrusion experienced did not amount to a nuisance as Tate's use of top floor of Blavatnik Building reasonable and claimants responsible for own misfortune – Where Court of Appeal held trial judge's reasoning involved material errors of law and that, correctly applied, facts should support common law nuisance, but dismissed appeal because "overlooking" cannot count as nuisance – Proper approach to private nuisance – Whether visual intrusion can constitute nuisance – Proper approach to considerations of public interest in assessments of nuisance.

Remedies – Injunction – Damages – Where claimants seek injunction requiring Board of Trustees of Tate Gallery to prevent members of public from viewing flats from relevant part of viewing gallery walkway or alternatively, award of damages – Whether appropriate for Supreme Court to determine remedy – Whether injunction or damages appropriate remedy.

Held (3:2): Appeal allowed.
