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

Rangitira Developments Ltd v Royal Forest and Bird Protection Society of New Zealand Inc

Supreme Court of New Zealand: [2020] NZSC 66

Judgment delivered: 15 July 2020

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

Catchwords:

Administrative law – Special and general legislation – Where appellant sought to develop and operate coal mine – Where proposed mine largely within reserve owned and administered by Buller District Council – Where appellant held mining permit under *Crown Minerals Act 1991* – Where access arrangement between appellant and Council necessary for appellant to access mine site and undertake mining on reserve – Where s 60(2) of *Crown Minerals Act* provided Council may have regard to any matter it considered relevant in deciding whether to enter such arrangement – Where *Reserves Act 1977* required Council to administer reserve for purpose for which it is held (here, water conservation) and no other purpose and, to extent compatible with that purpose, protect biological and natural features of reserve and maintain ecological value – Where respondent society opposed mine – Where appellant sought declarations that while Council must have regard to *Reserves Act*, it could also consider economic and other benefits to local community when

making decisions as to access arrangements – Where High Court made declarations sought – Where Court of Appeal allowed respondent's appeal, holding that Council must give effect to requirements of *Reserves Act* – Where appellant granted leave to appeal to Supreme Court – Whether *Crown Minerals Act* special legislation which prevailed over, or limited operation of, general legislation like *Reserves Act*.

Held (5:0): Appeal dismissed.

Little Sisters of the Poor Saints Peter and Paul Home v Pennsylvania & Ors

United States Supreme Court: Docket No. 19-431

Judgment delivered: 8 July 2020

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

Catchwords:

Administrative law – Subordinate legislation – Where *Patient Protection and Affordable Care Act 2010* ("ACA") required certain employers to provide women with "preventive care and screenings" – Where "preventive care and screenings" given content by Preventive Care Guidelines issued by agency of Department of Health and Human Services called Health Resources and Services Administration ("HRSA") – Where Guidelines require health plans to provide coverage for contraceptive methods approved by Food and Drug Administration ("contraceptive mandate") – Where HRSA has discretion to exempt religious employers from providing contraceptive coverage – Where later additional rule allowed certain religious organisations to opt out of providing contraceptive coverage by self-certifying to their health insurance issuer – Where in earlier cases, religious entities challenged rules under *Religious Freedom Restoration Act 1993* ("RFRA") – Where Supreme Court held in earlier case that contraceptive mandate substantially burdened free exercise of employers' religious beliefs – Where Supreme Court remanded without deciding RFRA question in relation to self-certification rule – Where in response to these decisions, two interim final rules ("IFRs") promulgated – Where first IFR significantly expanded exemption to contraceptive mandate for religious organisations – Where second rule created similar exemption for employers with sincerely held moral objections to providing some or all forms of contraceptive coverage – Where, after comments received, final rules issued, substantially preserving IFRs – Where Pennsylvania and New Jersey challenged final rules as substantively unlawful on basis that neither ACA nor RFRA conferred statutory authority to promulgate exemptions, and as procedurally defective because issuing authorities failed to comply with notice and comment procedures in *Administrative Procedure Act* – Where District Court issued preliminary nationwide injunction preventing implementation of final rules – Where Court of Appeals for Third Circuit

affirmed District Court's decision – Whether issuing authorities had statutory authority to promulgate religious and moral exemptions to contraceptive mandate – Whether rules containing exemptions procedurally defective.

Held (7:2): Judgment of Court of Appeals for Third Circuit reversed; case remanded with instructions to dissolve nationwide preliminary injunction.

Appeals

H v Director of Immigration
Hong Kong Court of Final Appeal: [2020] HKCFA 22

Judgment delivered: 14 July 2020

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

Catchwords:

Appeals – Jurisdiction of Court of Appeal – Finality of leave decisions – Where appellants (H and AH) separately applied to respondent for dependent visas – Where respondent refused applications – Where, out of time, appellants separately sought leave to apply for judicial review of respondent's decision, together with extensions of time – Where in both cases, primary judge refused to grant extension of time and dismissed application for leave to apply for judicial review – Where H filed Notice of Appeal against primary judge's decision, and was directed by Registrar to apply for leave to appeal pursuant to s 14AA of *High Court Ordinance* and seek extension of time for that purpose – Where s 14AA provided leave required to appeal to Court of Appeal from interlocutory judgments or orders of Court of First Instance – Where H accordingly sought leave and extension of time – Where Court of Appeal refused to grant leave and struck out H's appeal – Where H then applied to Court of Appeal for leave to appeal to Court of Final Appeal – Where Court of Appeal held that since it had refused leave to appeal pursuant to s 14AA, s 14AB ("No appeal lies from a decision of the Court of Appeal as to whether or not leave to appeal to it should be granted") precluded any further appeal to Court of Final Appeal – Where H then applied to Court of Final Appeal for leave to appeal – Where AH sought extension of time to seek leave to appeal from primary judge's decision – Where Court of Appeal dismissed application – Where AH applied to Court of Appeal for leave to appeal from that decision to Court of Final Appeal – Where Court of Appeal refused leave, applying its decision in H's case – Where AH then applied to Court of Final Appeal for leave to appeal from Court of Appeal's decision – Whether s 14AA applies to decision of Court of First Instance to refuse extension of time to apply for leave to apply for judicial review – If yes (such that leave is required to appeal against such refusal), whether finality provision in s 14AB, in its application to judicial review proceedings, inconsistent

with Court of Final Appeal's power of final adjudication in art 82 of Basic Law.

Held (5:0): Appeals allowed on leave issue; constitutional issue not reached.

Uhrle v R
Supreme Court of New Zealand: [2020] NZSC 62

Judgment delivered: 9 July 2020

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

Catchwords:

Appeals – Leave to appeal – Finality – Recall of decisions – Where applicant convicted of murder – Where Court of Appeal dismissed appeal against conviction – Where Supreme Court dismissed application for leave to appeal from that decision – Where applicant sought to commence second appeal against conviction in Court of Appeal on basis of fresh evidence – Where Court of Appeal characterised application as one for recall of its earlier decision – Where Court of Appeal declined to recall earlier decision – Where applicant approached Supreme Court second time seeking leave to appeal against conviction – Whether refusal of leave to appeal final – Whether test for recall of decisions in criminal jurisdiction same as test in civil jurisdiction.

Held (5:0): Leave to appeal refused.

Citizenship

Chisuse & Ors v Director-General, Department of Home Affairs & Anor
Constitutional Court of South Africa: [2020] ZACC 20

Judgment delivered: 22 July 2020

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

Catchwords:

Citizenship – *South African Citizenship Act 1995* as amended by *South African Citizenship Amendment Act 2010* – Where applicants born outside of South Africa to South African parent before 1 January 2013 (date that 2010 amending Act commenced) – Where under pre-amendment law applicants would have been eligible for citizenship by registration of birth – Where under prevailing interpretation of amended law, applicants ineligible for citizenship – Where s 20 of Constitution provides that citizens

may not be deprived of citizenship – Where applicants commenced proceedings in High Court seeking declaration that relevant provisions of amended law unconstitutional and invalid for depriving them of their citizenship, and seeking to have words read-in to amended law to cure defect – Where High Court granted relief sought, declaring provisions invalid, reading-in required words, declaring four of applicants were citizens, and directing first respondent to take appropriate steps to formalise citizenship of those applicants – Where order of invalidity brought to Constitutional Court for confirmation – Whether impugned provisions capable of being read consistently with Constitution.

Held (9:0): High Court's orders of constitutional invalidity not confirmed; High Court's orders that four applicants were citizens and consequential orders upheld.

Civil Procedure

Atlantic Lottery Corp Inc v Babstock
Supreme Court of Canada: 2020 SCC 19

Judgment delivered: 24 July 2020

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

Catchwords:

Civil procedure – Class actions – Certification – Pleadings – Causes of action – Where plaintiffs alleged defendants profited from dangerous and deceptive video lottery terminals – Where plaintiffs relied on waiver of tort, breach of contract and unjust enrichment as causes of action and seeking gain-based reward – Where plaintiffs' action certified as class proceeding – Whether plaintiffs' claims disclose reasonable cause of action.

Held (9:0; 5:4 (Wagner CJ and Karakatsanis, Martin and Kasirer JJ dissenting in part)): Appeals allowed.

Company Law

Lehtimäki & Ors v Cooper
United Kingdom Supreme Court: [2020] UKSC 33

Judgment delivered: 29 July 2020

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

Catchwords:

Company law – Charitable companies limited by guarantee – Where in 2002, appellant and fourth respondent, then married, established The Children's Investment Fund Foundation (UK) ("CIFF") as charitable company limited by guarantee with purpose of helping children in developing countries – Where CIFF has board of trustees and members – Where marriage broke down and governance issues in relation to CIFF arose – Where agreed that appellant would resign as member and trustee of CIFF, and CIFF would make grant of US$360m to appellant's new charity, Big Win Philanthropy ("BWP") – Where s 217 of *Companies Act 2006* and s 201 of *Charities Act 2011* required payments by company in connection with loss of office of directors to be approved by members of company and Charity Commission – Where Charity Commission authorised trustees of CIFF to obtain court approval – Where trustees commenced proceedings in name of CIFF and surrendered discretion on transaction to court – Where members of CIFF were appellant, fourth respondent, and first respondent – Where first respondent only non-conflicted member and so only he would vote on resolution to approve grant – Where first respondent was party to trustees' proceeding and did not surrender his discretion to court, nor make voting intentions clear – Where Chancellor of High Court determined it would be in CIFF's best interests for him to exercise trustees' discretion and approve grant – Where Chancellor accepted reasonable fiduciaries could disagree with his decision – Where first respondent did not consider himself bound to vote in favour of resolution to approve grant – Where Chancellor held first respondent, as member of CIFF, was also fiduciary and that once Court had approved grant, it would be in breach of fiduciary duty to vote against resolution – Where, accordingly, Court ordered first respondent to vote in favour of resolution – Where Court of Appeal discharged order against first respondent, agreeing he was a fiduciary, but holding he had not threatened to act contrary to duty, since he had expressed intention to act to further CIFF's charitable purposes, as he understood them – Where, before Supreme Court, appellant sought order requiring first respondent to vote in favour of resolution approving grant – Whether such order can be made – Whether members were fiduciaries – If first respondent was fiduciary, whether there exists principle of trust and charity law that courts do not generally intervene in exercise of fiduciary's discretions unless fiduciary acting improperly or unreasonably – Whether s 217 of *Companies Act* precluded court from directing first respondent to vote in favour of resolution.

Held (5:0): Appeal allowed.

Sevilleja v Marex Financial Ltd
United Kingdom Supreme Court: [2020] UKSC 31

Judgment delivered: 15 July 2020

Coram: Lady Hale, Lords Reed and Hodge, Lady Black, Lords Lloyd-Jones, Kitchin and Sales

Catchwords:

Company law – Reflective loss – Where respondent owned and controlled two companies incorporated in British Virgin Islands – Where appellant company commenced proceedings against respondent's companies for monies due under contract – Where appellant obtained judgment in Commercial Court for over US$5.5m plus costs of £1.65m – Where Commercial Court judge gave parties confidential draft judgment on 19 July 2013, to be handed down six days later – Where from 19 July 2013, respondent allegedly procured transfer of over US$9.5m from his companies' London accounts to offshore accounts under his personal control – Where by end of August 2013, respondent's companies assets were US$4,329.48 – Where in December 2013, respondent placed his companies into liquidation, with alleged debts exceeding US$30m – Where appellant only creditor not connected to respondent – Where appellant sought damages from respondent in tort for inducing or procuring violation of appellant's rights under Commercial Court's judgment and orders and for intentionally causing appellant to suffer loss by unlawful means – Where appellant claimed judgment debt, interest and costs, less amount appellant recovered in proceedings in United States – Where respondent contended appellant's claim for these amounts barred by "reflective loss" principle – Where Court of Appeal accepted respondent's contention – Whether appellant's claim barred on basis that "reflective loss" cannot be recovered.

Held (7:0): Appeal allowed.

Constitutional Law

British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia

Supreme Court of Canada: 2020 SCC 20

Judgment delivered: 31 July 2020

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

Catchwords:

Constitutional law – Judicial independence – Judicial remuneration – Where judicial compensation commission made recommendations to provincial Attorney General about remuneration, allowances and benefits of provincial judges – Where Attorney General made submission to Cabinet concerning commission's recommendations and government's response – Where Legislative Assembly passed resolution rejecting

commission's recommended increase in salary – Where judges petitioned for judicial review of Legislative Assembly's resolution – Whether Cabinet submission should form part of record on judicial review.

Held (9:0): Appeal allowed.

Nova Scotia (Attorney General) v Judges of the Provincial Court and Family Court of Nova Scotia

Supreme Court of Canada: 2020 SCC 21

Judgment delivered: 31 July 2020

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

Catchwords:

Constitutional law – Judicial independence – Judicial remuneration – Where judicial compensation commission made recommendations to provincial government concerning salaries, benefits and pensions of provincial judges – Where Attorney General provided report to Cabinet concerning commission's recommendations – Where order in council varied commission's recommendation concerning judge's salaries – Where judges applied for judicial review of order in council – Whether Attorney General's report should form part of record on judicial review – Whether production of report precluded on grounds of public interest immunity.

Held (9:0): Appeal allowed in part.

R v Thanabalasingham

Supreme Court of Canada: 2020 SCC 18

Judgment delivered: 17 July 2020

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

Catchwords:

Constitutional law – *Charter of Rights* – Right to be tried within reasonable time – Where accused charged with second degree murder in death of spouse – Where delay of almost five years between charge and anticipated end of trial – Whether accused's right to be tried within reasonable time under s 11(b) of *Canadian Charter of Rights and Freedoms* infringed – Framework for determining s 11(b) infringement set out in *Jordan* applied.

Held (9:0): Appeal dismissed.

Reference re Genetic Non-Discrimination Act
Supreme Court of Canada: 2020 SCC 17

Judgment delivered: 10 July 2020

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

Catchwords:

> Constitutional law – Division of powers – Criminal law – Genetic tests – Where Parliament enacted legislation criminalising compulsory genetic testing and non-voluntary use or disclosure of genetic test results in context of wide range of actitivies – Whether ss 1 to 7 of *Genetic Non-Discrimination Act*, SC 2017 c 3, are ultra vires Parliament's jurisdiction over criminal law under s 91(27) of *Constitution Act 1867*.

Held (5:4): Appeal allowed; reference question answered in negative.

Trump v Vance, District Attorney of the County of New York & Ors
United States Supreme Court: Docket No. 19-635

Judgment delivered: 9 July 2020

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

Catchwords:

> Constitutional law – Article II and Supremacy Clause – Immunity of sitting President – Where New York County District Attorney's Office served subpoena *duces tecum* on President Trump's personal accounting firm, seeking production of financial records relating to President and his businesses – Where President Trump, in personal capacity, commenced proceedings in Federal District Court against district attorney and accounting firm seeking to prevent enforcement of subpoena on basis that Art II and Supremacy Clause afford sitting President absolute immunity from state criminal process – Where District Court dismissed case on basis of abstention doctrine in *Younger v Harris* 401 US 37 (1971) and, alternatively, held President not entitled to injunctive relief – Where Court of Appeals for Second Circuit disagreed with District Court as to abstention doctrine but agreed on injunctive relief – Where Second Circuit rejected argument put by United States as *amicus curiae* that state grand jury subpoena seeking President's document must satisfy heightened showing of need – Whether Art II and Supremacy Clause categorically preclude issue of state criminal subpoena to sitting President – If not, whether art II and Supremacy Clause require heightened standard for issue of subpoena to sitting President.

Held (7:2): Judgments of Court of Appeals for Second Circuit affirmed; case remanded for further proceedings.

Trump & Ors v Mazars USA, LLP & Ors

United States Supreme Court: Docket No. 19-715

Judgment delivered: 9 July 2020

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

Catchwords:

> Constitutional law – Legislative power – Separation of powers – Where House Committee on Financial Services issued subpoena to Deutsche Bank, seeking documents relating to finances of President Trump, his children, and affiliated businesses – Where same Committee issued similar subpoena to Capital One – Where Permanent Select Committee on Intelligence issued similar subpoena to Deutsche Bank as that issued by Financial Services Committee – Where House Committee on Oversight and Reform issued subpoena to President's personal accounting firm, Mazars USA, LLP – Where each Committee provided different justifications for requests, claiming information sought would help guide law reform in various domains – Where petitioners (President in personal capacity, his children, and affiliated businesses) brought proceedings in District Court for District of Columbia ("DC") resisting Oversight Committee's subpoena – Where petitioners brought proceedings in Southern District of New York resisting other committees' subpoenas – Where in both cases, petitioners contended subpoenas lacked legitimate legislative purpose and violated separation of powers – Where District Court for DC dismissed petitioners' challenge – Where Court of Appeals for DC Circuit affirmed that decision, holding that Oversight Committee's subpoena served valid legislative purpose – Where District Court in Southern District of New York denied preliminary injunction – Where Court of Appeals for Second Circuit substantially affirmed that decision, holding Intelligence Committee's subpoena properly issued as part of investigation into alleged foreign influence in US political process, and holding Financial Services Committee's subpoenas sufficiently connected to potential legislation – Whether subpoenas issued to President in respect of financial information exceeded authority of House of Representatives under Constitution.

Held (7:2): Judgments of Court of Appeals for DC Circuit and Court of Appeals for Second Circuit vacated; cases remanded.

Our Lady of Guadalupe School v Morrissey-Berru

United States Supreme Court: Docket No. 19-267

Judgment delivered: 8 July 2020

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

Catchwords:

> Constitutional law – First Amendment – Employment discrimination – Where two teachers worked at Roman Catholic schools in Archdiocese of Los Angeles – Where each of their employment agreements set out school's mission, imposed commitments regarding religious instruction, worship and personal modelling of faith, and provided for performance review on those bases – Where both teachers' employment was terminated – Where one claimed she was demoted and her contract not renewed in order to replace her with younger teacher, in violation of *Age Discrimination in Employment Act 1967* – Where other claimed she was discharged for having requested leave of absence to obtain breast cancer treatment – Where Supreme Court held in earlier case that First Amendment, in order to preserve independence of religious institutions in matters of faith and doctrine, prevented courts from determining employment discrimination claims where employee falls within "ministerial exception" to employment laws – Where in age discrimination case, school invoked "ministerial exception" and obtained summary dismissal of proceedings at first instance – Where Court of Appeals for Ninth Circuit reversed, holding that employee did not fall within exception, not having title "minister", having limited formal religious training, and not holding herself out as religious leader – Where in medical treatment case, at first instance, school obtained summary judgment under "ministerial exception", but Ninth Circuit reversed on similar grounds as in age discrimination case – Whether First Amendment prevents courts from hearing and determining teachers' employment discrimination claims.

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

Barr, Attorney General & Ors v American Association of Political Consultants Inc & Ors

United States Supreme Court: Docket No. 19-631

Judgment delivered: 6 July 2020

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

Catchwords:

> Constitutional law – First Amendment – Robocalls – Where *Telephone Consumer Protection Act 1991* prohibited almost all robocalls to mobile phones – Where in 2015 Congress amended prohibition, creating exception for robocalls made to collect debt owed to or guaranteed by United States – Where respondent political organisations commenced proceedings seeking declarations that law as amended violated First

Amendment – Where District Court held that while law as amended was content-based, it survived strict scrutiny because of Government's compelling interest in collecting debt – Where Court of Appeals for Fourth Circuit vacated District Court's judgment, holding that amended law did not pass strict scrutiny – Where Fourth Circuit held government-debt exception invalid and severed it from robocall prohibition – Whether government-debt exception violated First Amendment – Whether government-debt exception severable.

Held (6:3 on validity: 7:2 on severability): Judgment of Court of Appeals for Fourth Circuit affirmed.

Contracts

ANZ Bank New Zealand Ltd v Bushline Trustees Ltd
Supreme Court of New Zealand: [2020] NZSC 71

Judgment delivered: 24 July 2020

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

Catchwords:

Contracts – Entire agreement clauses – Where appellant entered loan agreement with first respondents (trustees of two trusts) – Where appellant advanced $19.47m to first respondents for term of 12 months – Where interest rate was floating rate plus margin of 0.7 per cent – Where interest rate clause in agreement stated margin "reviewable at any time" – Where agreement contained entire agreement clause – Where, in response to global financial crisis, appellant exercised right to increase margin – Where first respondents contended increase was contrary to representation or undertaking by appellant prior to signing agreement that margin would be fixed for five years – Where High Court rejected first respondents' claim, finding appellant did not make alleged representation and no oral agreement made – Where Court of Appeal allowed first respondents' appeal, finding parties had made oral agreement that margin would remain fixed for five years – Where Court of Appeal held entire agreement clause did not prevent oral agreement entered into prior to written loan agreement being given effect – Where appellant granted leave to appeal to Supreme Court – Whether appellant made representation or gave undertaking alleged – If it did, whether entire agreement clause operated to give effect to such representation or undertaking – Whether first respondents' claim made out of time.

Held (5:0): Appeal allowed.

Criminal Law

Dermot Gregory Nottingham v R
Supreme Court of New Zealand: [2020] NZSC 74

Judgment delivered: 31 July 2020

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

Catchwords:

> Criminal law – Sentencing – Home detention – *Sentencing Act 2002*, s 80A(3) – Where appellant convicted of publishing information in breach of suppression orders and criminal harassment – Where District Court sentenced appellant to term of 12 months' home detention – Where appellant appealed against conviction and sentence and where Solicitor-General appealed against sentence – Where appellant had served three and a half months of sentence by time appeal heard – Where Court of Appeal dismissed appellant's appeal against conviction and sentence – Where Court of Appeal allowed Solicitor-General's appeal, quashed original sentence, and imposed new sentence of 12 months' home detention – Where Supreme Court granted appellant leave to appeal against sentence – Whether Court of Appeal had jurisdiction to impose sentence which would, in effect, mean appellant served serve 15 and a half months of home detention in circumstances where statutory maximum term for home detention was 12 months.

Held (5:0): Appeal allowed; appellant's sentence varied to come within statutory maximum.

Van der Walt v S
Constitutional Court of South Africa: [2020] ZACC 19

Judgment delivered: 21 July 2020

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

Catchwords:

> Criminal law – Right to fair trial – Where, after trial in Regional Court, applicant doctor convicted of culpable homicide in relation to care of patient – Where High Court dismissed appeal against conviction and sentence – Where Supreme Court of Appeal refused special leave to appeal – Where applicant sought leave to appeal to Constitutional Court against conviction and sentence – Whether trial judge's approach of first deciding on admissibility of some evidence in judgment on conviction had effect that when applicant chose not to testify, he did not know full ambit of case against him – Whether trial judge's reliance on medical textbooks not referred to in testimony produced unfairness – Whether prosecution put to proof on causation – Whether doctors, as providers of health care,

should be sentenced differently in culpable homicide matters than other offenders

Held (11:0): Leave to appeal granted; appeal allowed; conviction and sentence set aside; matter referred to Director of Public Prosecutions to consider whether applicant should be recharged, and if so, retrial to be conducted by different Regional Magistrate.

HKSAR v Kwan Ka Hei

Hong Kong Court of Final Appeal: [2020] HKCFA 21

Judgment delivered: 9 July 2020

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

Catchwords:

Criminal law – Meaning of "explosive" in s 2 of *Dangerous Goods Ordinance* – Offence of possession of explosive substance in s 55(1) of *Crimes Ordinance* – Where appellant searched by police and found carrying 16 smoke cakes (pyrotechnic substances that emit large volume of smoke when ignited but do not produce explosion) – Where appellant charged and convicted of offence under s 55 of *Crimes Ordinance* – Where *Crimes Ordinance* does not define "explosive substance", but where deputy magistrate satisfied that definition of "explosive" in *Dangerous Goods Ordinance* applicable to s 55 offence – Where *Dangerous Goods Ordinance* defines "explosive" as including "any substance used or manufactured with a view to producing a practical effect by explosion or a pyrotechnic effect" – Where appellant's appeal to Court of First Instance dismissed – Where Court of First Instance certified question of law on construction of s 55 and where Appeal Committee granted leave to appeal to Court of Final Appeal – Whether, on proper interpretation of s 55, "explosive substance" includes substance used or manufactured with view to producing pyrotechnic effect.

Held (5:0): Appeal dismissed.

McGirt v Oklahoma

United States Supreme Court: Docket No. 18-9526

Judgment delivered: 9 July 2020

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

Catchwords:

Criminal law – Jurisdiction – Indian country – Where *Major Crimes Act* provided that within "Indian country", "[a]ny Indian who commits" certain

offences "shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States" – Where "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government" – Where petitioner convicted by Oklahoma state court of three offences specified in *Major Crimes Act* – Where petitioner argued, following conviction, that Oklahoma lacked jurisdiction to prosecute because he was enrolled member of Seminole Nation and crimes occurred on Creek Reservation – Where petitioner sought retrial in federal court – Where Court of Criminal Appeals of Oklahoma rejected petitioner's argument – Whether Creek Reservation remained Indian country for purposes of *Major Crimes Act*, or whether Reservation diminished or disestablished.

Held (5:4): Judgment of Court of Criminal Appeals of Oklahoma reversed.

R v Hilton
United Kingdom Supreme Court: [2020] UKSC 29

Judgment delivered: 1 July 2020

Coram: Lords Kerr, Wilson, Lloyd-Jones and Briggs, Lady Arden

Catchwords:

Criminal law – Proceeds of crime – *Proceeds of Crime Act 2002* – Where respondent convicted of offences relating to social security – Where confiscation order under Act sought against respondent in Crown Court – Where at time of hearing respondent's only property was house jointly owned with former partner – Where that property subject to mortgage and where building society was mortgagee – Where primary judge accepted value of respondent's share in property £10,263.50 but did not make formal determination as to extent of respondent's interest – Where primary judge made confiscation order in that amount – Where respondent appealed – Where s 160A of Act conferred power on Crown Court to determine extent of respondent's interest in shared property but provided that the court "must not exercise the power … unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it" – Where Court of Appeal held Crown Court's failure to give respondent's former partner or mortgagee building society reasonable opportunity to make representations invalidated confiscation order – Where Director of Public Prosecutions appealed – Where Court of Appeal certified two points of law of general public importance – Circumstances in which court making confiscation order that affects property held by defendant and another person required by s 160A to give the other person reasonable opportunity to make representations – Whether failure to give opportunity to make representations invalidates confiscation order.

Held (5:0): Appeal allowed.

Electoral Law

Chiafalo & Ors v Washington
United States Supreme Court: Docket No. 19-465

Judgment delivered: 6 July 2020

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

Catchwords:

> Electoral law – Presidential elections – Electoral College – Where all States, with two partial exceptions, appoint electors to Electoral College selected by political party whose candidate wins popular vote in State – Where most States compel electors to pledge to support that party's nominee – Where 15 States impose sanctions on "faithless electors", removing them if they fail to vote according to pledge, and substituting alternate elector whose vote State then reports – Where some States, including Washington, impose monetary fines on "faithless electors" – Where three Washington electors reneged on pledges to support Hillary Clinton in 2016 election – Where Washington fined each of them $1,000 for failing to support same candidate as voters – Where electors challenged fines, contending that Constitution gives members of Electoral College right to vote as they wish – Where Washington Superior Court rejected electors' argument – Where Supreme Court of Washington affirmed Superior Court's decision – Whether Constitution permits States to enforce pledge requirements through legal sanctions.

Held (9:0): Judgment of Supreme Court of Washington affirmed.

Employment Law

Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation
Constitutional Court of South Africa: [2020] ZACC 21

Judgment delivered: 4 August 2020

Coram: Mogoeng CJ**,** Cameron, Froneman, Jafta, Khampepe, Madlanga and Mhlantla JJ, Mathopo AJ, Theron J, Victor AJ

Catchwords:

> Employment law – Transfer of contract or employment – *Labour Relations Act 1995*, s 197 – Where Department of Transport entered turnkey

agreement with Tasima (Pty) Ltd ("Tasima") for development of electronic National Traffic Information System ("eNaTis") – Where Road Traffic Management Corporation ("RTMC") was state organ with mandate to establish and run effective traffic management system – Where in prior decision, Constitutional Court ordered that eNaTis be transferred from Tasima to RTMC within 30 days of order – Where s 197 of *Labour Relations Act 1995* provided for transfer of employment relationships with transfer for business in absence of agreement otherwise – Where Labour Court and Labour Appeal Court both held s 197 applicable to transfer of eNaTis from Tasima to RTMC and made declarations to effect that Tasima's employees automatically transferred to RTMC upon transfer of business – Where, in "main proceedings", Labour Court held effective date of transfer was actual date of transfer, while Labour Appeal Court held that effective date was date on which High Court had, in earlier proceedings, declared extension agreement unlawful – Where, in "supplementary proceedings", Labour Court had granted interim relief, ordering RTMC to take on Tasima's employees within specified period, but Labour Appeal Court allowed appeal from that order on jurisdictional grounds – Whether s 197 applicable to transfer of eNaTis from Tasima to RTMC – If so, whether effective date of transfer was actual date, date of High Court's earlier order, or another date – Whether interim relief moot.

Held (6:4 in main proceedings; 10:0 in supplementary proceedings): In main proceedings: RTMC granted leave to appeal and appeal dismissed; Tasima granted leave to cross-appeal and cross-appeal allowed. In supplementary proceedings: Tasima's application for leave to appeal dismissed.

Evidence

Shagang Shipping Company Ltd (in liq) v HNA Group Company Ltd

United Kingdom Supreme Court: [2020] UKSC 34

Judgment delivered: 5 August 2020

Coram: Lords Hodge, Briggs, Hamblen, Leggatt and Burrows

Catchwords:

Evidence – Admissibility of evidence allegedly obtained by torture – Where appellant and respondent's subsidiary entered contract for charter of ship in August 2008 – Where respondent entered into guarantee with appellant, securing performance of respondent subsidiary's obligations under contract – Where guarantee governed by English law and conferred jurisdiction on English courts – Where vessel delivered in April 2010 but subsidiary defaulted on payments from September 2010 – Where appellant commenced arbitration proceedings and eventually terminated contract for subsidiary's repudiatory breach – Where appellant pursued arbitration claim for damages for subsidiary's breach, and obtained partial final award in November 2012 – Where in September 2012 appellant

commenced proceedings in Commercial Court against respondent in relation to guarantee – Where respondent alleged contract procured by bribes paid by or on behalf of appellant to employees of subsidiary – Where respondent relied on confessions made in course of investigation by Chinese Public Safety Bureau – Where appellant alleged confessions obtained by torture and consequently inadmissible – Where trial judge gave judgment for appellant, finding no bribery occurred and ruling out torture, though expressing "lingering doubt" as to latter – Where Court of Appeal allowed appeal and remitted matter for reconsideration – Whether trial judge failed to follow steps necessary to reach proper evaluation of admissible evidence – Whether trial judge asked wrong question as to weight to be accorded to confession evidence – Whether trial judge failed to take into account all relevant considerations in deciding bribery issues – Whether trial judge failed to exclude irrelevant matters (including his "lingering doubt") in assessing whether alleged bribe paid.

Held (5:0): Appeal allowed.

Family Law

Villiers v Villiers
United Kingdom Supreme Court: [2020] UKSC 30

Judgment delivered: 1 July 2020

Coram: Lady Hale, Lords Kerr and Wilson, Lady Black, Lord Sales

Catchwords:

Family law – Maintenance – Jurisdiction – *Matrimonial Causes Act 1973* – Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("Maintenance Regulation") – Where sch 6 of *Civil Jurisdiction and Judgments (Maintenance) Regulations 2011* (SI 2011/1484) adopted Maintenance Regulation into English domestic law – Where parties married in England in 1994 and lived together in Scotland between 1995 and 2012 – Where parties separated in 2012 and where wife sought divorce in England in July 2013 and husband sought divorce in Scotland in October 2014 – Where divorce application assigned to Scottish courts on basis that parties had last lived together in Scotland – Where wife consented to orders dismissing her petition in England and sought in English courts maintenance orders under s 27 of Act – Where husband applied for stay or dismissal of maintenance application on basis that English courts did not or should not have jurisdiction to hear it – Where English High Court rejected husband's application for stay or dismissal and ordered him to pay maintenance – Where Court of Appeal dismissed husband's appeal – Whether, under s 27, English courts have jurisdiction to make maintenance orders in cases with no international dimension – If yes, whether English courts have discretion to stay

maintenance proceedings on ground of forum non conveniens following promulgation of sch 6 – If forum non conveniens not available, whether sch 6's purported removal of forum non conveniens as ground on which English courts might stay maintenance proceedings beyond Secretary of State's regulation-making powers in s 2(2) of *European Communities Act 1972* – If sch 6 within power, with result that jurisdiction governed by Maintenance Regulation as adopted into domestic law, whether husband's divorce proceeding in Scotland "related action" for purposes of art 13 of Maintenance Regulation and whether High Court should decline to hear wife's maintenance claim on basis of art 13.

Held (3:2): Appeal dismissed.

Human Rights

Sutherland v Her Majesty's Advocate

United Kingdom Supreme Court: [2020] UKSC 32

Judgment delivered: 15 July 2020

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

Catchwords:

Human rights – Right to respect for private life and correspondence under art 8 of European Convention on Human Rights – Evidence obtained by so-called "paedophile hunters" – Where member of paedophile hunter group created fake profile on dating application – Where appellant communicated with decoy profile – Where decoy user said he was 13 years old – Where appellant sent decoy sexual image and arranged to meet – Where appellant confronted at meeting place by members of paedophile hunter group who remained with him until police arrived – Where copies of appellant's communications with decoy profile provided to police – Where appellant charged with offences under *Sexual Offences (Scotland) Act 2009* and *Protection of Children and the Prevention of Sexual Offences (Scotland) Act 2005* – Where appellant objected to admissibility of evidence of communications on basis it was obtained covertly without authorisation under relevant statute and without authorisation or reasonable suspicion of criminality in violation of rights under art 8 – Where trial judge dismissed objection and appellant convicted – Where appeal to High Court of Justiciary dismissed – Whether use of communications as evidence in public prosecution interfered with appellant's art 8 rights – Whether, and to what extent, obligation on state to provide adequate protection of art 8 rights incompatible with use by prosecutor of material supplied by paedophile hunter groups in investigating and prosecuting crime.

Held (5:0): Appeal dismissed.

Intellectual Property

Unwired Planet International Ltd & Anor v Huawei Technologies (UK) Co Ltd & Anor; Huawei Technologies Co Ltd & Anor v Conversant Wireless Licensing SÀRL; ZTE Corporation & Anor v Conversant Wireless Licensing SÀRL

United Kingdom Supreme Court: [2020] UKSC 37

Judgment delivered: 26 August 2020

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

Catchwords:

Intellectual property – Patents – Where European Telecommunications Standards Institute ("ETSI") sets international standards for mobile telephones – Where for mobile phones and other equipment to comply with ETSI standards, intellectual property covered by certain patents essential – Where such patents are called Standard Essential Patents ("SEPs") – Where ETSI requires members to declare patents which might be used in telecommunications standards – Where ETSI then requires SEP owner to give irrevocable undertaking to licence patented technology on fair, reasonable and non-discriminatory terms – Where Unwired Planet International Ltd ("Unwired") acquired five UK patents (among others) from another company – Where Unwired commenced proceedings against Huawei Technologies Co Ltd ("Huawei"), alleging patent infringement and claiming that its five UK patents were SEPs – Where technical trials found two of five patents to be SEPs – Where in subsequent non-technical trial, judge held Unwired's undertaking to licence its SEPs on fair, reasonable and non-discriminatory terms justiciable and enforceable in English courts – Where judge also held implementer (like Huawei) that refused to take licence on terms held by court to be fair, reasonable and non-discriminatory could be subject to injunction for infringing UK patent – Where judge determined royalty rates and licence terms he considered fair, reasonable and non-discriminatory – Where in separate proceedings, Conversant Wireless Licensing SÀRL ("Conversant") alleged Huawei and ZTE Corporation ("ZTE") infringed four of its UK patents which formed part of global patent portfolio acquired by Conversant in 2011 – Where Huawei and ZTE sought dismissal of Conversant's claims on basis that English courts lacked jurisdiction to determine validity of foreign patents or alternatively sought stay of proceedings on ground that English courts not appropriate forum – Where trial judge dismissed both applications, holding that English courts had jurisdiction to enforce Conversant's undertaking under ETSI policy and to determine what fair, reasonable and non-discriminatory licence terms would be (such terms being adjustable to reflect rulings of foreign courts if necessary) – Where Court of Appeal dismissed appeals in both proceedings – Whether English courts have jurisdiction, and may exercise power, to grant injunctive relief restraining infringement of UK patent that is SEP unless implementer of patented

invention enters global licence of multi-national patent portfolio – Whether English courts have jurisdiction, and may exercise power, to determine royalty rates and other terms of such licence – Whether, in Conversant proceedings, High Court should have set aside service out of jurisdiction and permanently stayed proceedings on basis China was more suitable forum – Whether Unwired breached non-discrimination limb of its ETSI undertaking in dealings with Huawei – Whether Unwired's claim for injunctive relief abuse of its dominant position contrary to art 102 of Treaty on Functioning of European Union – Whether, in both appeals, even if Huawei is infringing SEPs, damages would have been more appropriate and proportionate remedy than injunctive relief.

Held (5:0): Appeals dismissed.

Legal Profession

New Zealand Law Society v John Llewellyn Stanley
Supreme Court of New Zealand: [2020] NZSC 83

Judgment delivered: 17 August 2020

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

Catchwords:

Legal profession – Admission – Character – *Lawyers and Conveyancers Act 2006*, s 55 – Where respondent completed academic and professional qualifications for admission – Where appellant society refused to issue certificate of character to respondent because of concerns relating to respondent's history of criminal offending (including drink driving convictions) and respondent's attitude towards that offending – Where respondent unable to be admitted without certificate – Where matter contested in High Court – Where High Court held respondent not fit and proper person to be admitted – Where Court of Appeal allowed appeal and refused to issue stay of its judgment pending further appeal – Where respondent admitted and granted practising certificate – Where appellant granted leave to appeal to Supreme Court – Approach to fit and proper person standard in s 55 where applicant for admission has previous convictions – Whether, on correct approach to s 55, respondent was fit and proper person – Whether respondent's name could be removed from roll if appeal allowed.

Held (3:2): Appeal dismissed.

Real Property

Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd
United Kingdom Supreme Court: [2020] UKSC 36

Judgment delivered: 19 August 2020

Coram: Lords Wilson, Carnwath and Lloyd-Jones, Lady Arden, Lord Kitchin

Catchwords:

Real property – Restrictive covenants – Unreasonable restraints of trade – Where developer of shopping centre granted lease to appellant containing restrictive covenant requiring that any development on site would not contain unit of 3,000 sq ft or more whose purposes was sale of food or textiles – Where appellant retailer built its store and centre opened – Where developer assigned freehold interest in land and burden of covenant to respondent – Where respondent was property holding company managed by developer and owned by him and his wife – Where shopping centre became less successful over time – Where respondent commenced proceedings in High Court of Northern Ireland seeking declaration covenant unenforceable at common law – Where primary judge dismissed claim, holding that under *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, covenant engaged restraint of trade doctrine only if one of original covenantor and covenantee had surrendered pre-existing freedom to use the land upon entry into covenant – Where primary judge held developer surrendered such freedom, but respondent had not and that covenant only engaged restraint of trade doctrine until assignment to respondent occurred – Where Court of Appeal allowed appeal, holding doctrine engaged before and after assignment – Whether *Esso* remains good law – Whether covenant engaged restraint of trade doctrine at any relevant time.

Held (5:0): Appeal allowed.

Taxation

Commissioners of Her Majesty's Revenue & Customs v Parry & Ors
United Kingdom Supreme Court: [2020] UKSC 35

Judgment delivered: 19 August 2020

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

Catchwords:

Taxation – Inheritance tax – Where Mrs Staveley had pension fund with pension scheme – Where shortly before her death, she transferred funds from pension scheme into personal pension plan ("PPP") – Where she did not take any pension benefits during her life and so death benefit was payable under PPP – Where Mrs Staveley had nominated her two sons as

beneficiaries of death benefit, subject to discretion of pension scheme administrator – Where, after her death, death benefit paid to two sons – Where tax authorities determined inheritance tax payable on death benefit on basis that both (i) transfer of funds from pension scheme to PPP and (ii) Mrs Staveley's omission to draw any benefits from plan prior to death, were lifetime transfers of value under *Inheritance Tax Act 1984* – Where First-tier Tribunal (Tax Chamber) held inheritance tax payable on (ii) but not (i) – Where Upper Tribunal (Tax and Chancery Chamber) held no inheritance tax payable on either transaction – Where Court of Appeal held inheritance tax payable on both – Whether either or both transactions were lifetime transfers of value with consequence that they gave rise to charge to inheritance tax.

Held (5:0; 3:2 (Lords Hodge and Sales dissenting in part)): Appeal allowed in part.

Big G Restaurants (Pty) Limited v Commissioner for the South African Revenue Service

Constitutional Court of South Africa: [2020] ZACC 16

Judgment delivered: 21 July 2020

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

Catchwords:

Taxation – Income tax – *Income Tax Act 1962*, s 24C – Where s 24C allows taxpayer to claim tax allowance in respect of future expenditure to be incurred under contract – Where for taxpayer to claim allowance, taxpayer's income in given assessment year must include amount received or accrued under contract and Commissioner of South African Revenue Service must be satisfied such amount will be used in whole or in part to finance future expenditure to be incurred by taxpayer in performance of contractual obligations – Where applicant was franchisee operating restaurants in terms of written franchise agreement with Spur Group (Pty) Limited – Where applicant claimed allowance under s 24C for 2011-2014 in respect of future costs of renovating restaurant premises on basis that franchise agreement required periodic renovation – Where Commissioner disallowed allowance – Where applicant objected and Commissioner disallowed objection – Where applicant successfully appealed to Tax Court – Where Supreme Court of Appeal allowed appeal, holding that applicant's income from restaurant business accrued under contracts of sale with customers, not under franchise agreement, latter being agreement imposing renovation obligation – Where applicant sought leave to appeal to Constitutional Court – Whether, to claim s 24C allowance, relevant income must be received or accrued under same contract under which future expenditure incurred.

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