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

R (on the application of Pathan) v Secretary of State for the Home Department

United Kingdom Supreme Court: [2020] UKSC 41

Judgment delivered: 23 October 2020

Coram: Lords Kerr and Wilson, Lady Black, Lord Briggs, Lady Arden

Catchwords:

Administrative law – Procedural fairness – Where appellant applied for leave to remain in UK as Tier 2 (General) Migrant – Where at time of application, appellant's employer supplied valid certificate of sponsorship – Where Home Office revoked employer's sponsor licence while application outstanding – Where Home Office did not inform appellant, and three months after revoking employer's licence, rejected application on basis he no longer had valid certificate of sponsorship – Where appellant sought administrative review of rejection decision and 60-day period to enable him to obtain new certificate – Where rejection decision was maintained – Where appellant unsuccessfully sought judicial review in Upper Tribunal – Where Court of Appeal dismissed appeal – Whether Home Secretary's failure to promptly notify appellant of revocation of employer' licence constituted breach of duty to afford appellant procedural fairness – Whether, having notified appellant of revocation of sponsor's licence, Home Secretary under duty to provide period of time following notification to allow appellant to respond.

Held (4:1): Appeal allowed.

Chan Ka Lam v The Country and Marine Parks Authority
Hong Kong Court of Final Appeal: [2020] HKCFA 33

Judgment delivered: 12 October 2020

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

Catchwords:

> Administrative law – Planning and environment – Statutory interpretation – Where in May 2011, respondent prepared working paper for Country and Marine Parks Board – Where working paper provided plan to assess suitability of including 54 enclaves into surrounding parks or to protect enclaves by other means – Where six of enclaves assessed deemed inappropriate for inclusion into surrounding parks – Where appellant sought judicial review of respondent's decision not to consult Board when determining those six enclaves should not be incorporated into surrounding country parks – Where s 5(1)(b) of *Country Parks Ordinance* (Cap 208) provides that Board "shall … consider and … advise the [respondent] on, the policy and programmes prepared by the [respondent] in respect of country parks and special areas, including proposed country parks and special areas" – Where Court of First Instance dismissed application for judicial review – Where Court of Appeal dismissed appeal – Whether respondent had duty to consult Board with respect to assessments in working paper – If it did, what is extent of that duty.

Held (5:0): Appeal allowed.

Arbitration

BRS v BRQ & Anor
Singapore Court of Appeal: [2020] SGCA 108

Judgment delivered: 29 October 2020

Coram: Prakash and Chong JJA, Woo J

Catchwords:

> Arbitration – Setting aside awards – Time limits – Natural justice – Where appellant using special purpose vehicle company (second respondent) to build hydroelectric power plant – Where project ran out of funds before completion – Where first respondent entered sale and purchase agreement with appellant, agreeing to buy all shares in second

respondent – Where agreement envisaged project would be completed by 31 March 2013 and that cost of project would be approximately S$170m – Where project in fact completed on 31 October 2015 and where costs exceeded estimate – Where first and second respondents commenced arbitral proceedings against appellant claiming payment of costs incurred beyond estimate and damages for delay – Where arbitral tribunal issued award in substance favouring first and second respondents, though appellant's liability was limited in certain respects to 30 June 2014 on basis that project could have been completed by that date had first and second respondents pursued project in more prudent and cost-effective manner – Where both appellant and first and second respondents commenced proceedings in High Court to set aside portions of award – Where first and second respondents claimed tribunal's findings as to 30 June 2014 cut-off date arrived at in breach of rules of natural justice – Where appellant challenged other aspects of award relating to liability on basis that tribunal had breached rules of natural justice and/or had gone beyond jurisdiction – Where first and second respondents contended that appellant's application to set aside award time-barred – Where High Court rejected all grounds on which parties sought to have award set aside – Where High Court held appellant's application to set aside filed within time because three-month time limit only began to run on 23 March 2018, when tribunal dismissed appellant's request for correction of award – Where both appellant and first and second respondents appealed – Whether appellant's application to set-aside award lodged within time – If so, whether tribunal breached rules of natural justice and/or acted in excess of jurisdiction in respect of issues raised by appellant – Whether tribunal breached rules of natural justice by failing to consider first and second respondents' submissions and evidence in relation to 30 June 2014 cut-off date.

Held (3:0): Appellant's appeal dismissed; first and second respondents' appeal allowed in part.

BTN & Anor v BTP & Anor

Singapore Court of Appeal: [2020] SGCA 105

Judgment delivered: 23 October 2020

Coram: Menon CJ, Prakash JA, Loh J

Catchwords:

Arbitration – Setting aside awards – Public policy – Where first appellant company incorporated in Mauritius and second appellant company incorporated in Malaysia – Where first and second respondents natural persons – Where in September 2012 respondents entered into share purchase agreement with first appellant pursuant to which first appellant would acquire respondents' substantial shareholdings in second appellant – Where agreement governed by Mauritian law and contained arbitration clause requiring arbitration under rules of Singapore International

Arbitration Centre as well as exclusive jurisdiction clause ("subject to" arbitration clause) in favour of Mauritian courts – Where under agreement, respondents to be employed by second appellant under contracts described as Promoter Employment Agreements ("PEAs") – Where part of consideration for first appellant's acquisition of shares was "Earn Out Consideration", being payments to be made to respondents over three years indexed to financial performance of certain group of companies – Where share purchase agreement and PEAs contained provisions governing termination of employment which provided that where termination was "With Cause", entitlement to Earn Out Consideration lost – Where parties entered PEAs – Where PEAs governed by Malaysian law – Where PEAs contained arbitration clauses and exclusive jurisdiction clauses mirroring those in share purchase agreement – Where in January 2014, second appellant gave notice to respondents of termination of employment citing grounds for "With Cause" termination – Where respondents commenced proceedings in Malaysian Industrial Court and obtained awards to effect that dismissals without just cause or excuse – Where those awards required second appellant to pay compensation based on respondents' monthly salaries, but did not cover Earn Out Consideration – Where respondents commenced arbitral proceedings against appellants pursuant to arbitration clause in share purchase agreement – Where before arbitral tribunal appellants contended respondents were dismissed "With Cause" and so had lost entitlement to Earn Out Consideration – Where respondents contended that Malaysian Industrial Court's awards rendered issues of cause of termination *res judicata* and on proper construction of share purchase agreement and PEAs, Court's determination that dismissals without cause binding – Where tribunal issued Partial Award on questions of law and concluded appellants could not adduce evidence before it in support of submission that respondents terminated "With Cause" – Where appellants commenced proceedings in Singapore High Court seeking declaration that tribunal had jurisdiction to determine whether respondents' employment terminated "Without Cause" or alternatively, seeking to have Partial Award set aside – Where High Court dismissed appellants' application – Whether Partial Award should be set aside because tribunal breached rules of natural justice in making it, because contrary to Singapore public policy, or because tribunal's decision on *res judicata* issue meant tribunal failed to decide matters coming within scope of submission to arbitration.

Held (3:0): Appeal dismissed.

Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb

United Kingdom Supreme Court: [2020] UKSC 38

Judgment delivered: 9 October 2020

Coram: Lords Kerr, Sales, Hamblen, Leggatt and Burrows

Catchwords:

Arbitration – Governing law – Where appellant Russian company insured owner of power plant against fire damage – Where owner of power plant contracted with head contractor in relation to construction work – Where head contractor in turn engaged respondent Turkish engineering company as sub-contractor – Where contract between head contractor and respondent included agreement that disputes would be resolved by way of arbitration in London – Where head contractor transferred its rights and obligations under that contract to owner – Where power plant subsequently damaged by fire – Where appellant paid out insurance claim to owner and assumed rights of owner to claim compensation from third parties, including respondent, for fire damage – Where appellant commenced proceedings in Russia against respondent – Where respondent commenced proceedings in High Court of England and Wales seeking anti-suit injunction restraining appellant from pursuing Russian claim – Where High Court dismissed respondent's application for injunctive relief on ground that Russian court was appropriate forum to determine scope of arbitration agreement – Where Court of Appeal allowed appeal – Whether contract contained any choice of law as to governing law of contract as whole or arbitration agreement specifically – If not, whether law of seat of arbitration governed validity and scope of arbitration agreement.

Held (3:2): Appeal dismissed.

Bankruptcy

Chandos Constructions Ltd v Deloitte Restructuring Inc
Supreme Court of Canada: 2020 SCC 25

Judgment delivered: 2 October 2020

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

Catchwords:

Bankruptcy – Anti-deprivation rule – Priority of claims – Where clause in subcontract awarded fee to general contractor in the event of subcontractor's bankruptcy – Where subcontractor filed assignment in bankruptcy prior to completing subcontract – Whether general contractor entitled to set fee off against amount owing to subcontractor – Whether anti-deprivation rule exists at common law – If so, whether clause invalid by virtue of anti-deprivation rule.

Held (8:1): Appeal dismissed.

Civil Procedure

Desjardins Financial Services Firm Inc v Asselin
Supreme Court of Canada: 2020 SCC 30

Judgment delivered: 30 October 2020

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

Catchwords:

> Civil procedure – Class action – Authorization to institute class action – Conditions for authorizing action – Where motion filed for authorization to institute class action in contractual liability for breach of duty to inform and in extracontractual liability for breach of duties of competence and management against financial institutions with respect to term savings investments – Where Superior Court dismissed motion – Where Court of Appeal set aside judgment and authorized class action – Whether Court of Appeal was justified in intervening in Superior Court's decision – *Code of Civil Procedure*, CQLR, c. C-25, art. 1003.

Held (9:0; 6:3 (Moldaver, Côté and Rowe JJ dissenting in part)): Appeal allowed in part.

Bent v Platnick
Supreme Court of Canada: 2020 SCC 23

Judgment delivered: 10 September 2020

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

Catchwords:

> Civil procedure – Courts – Dismissal of proceeding that limits debate – Freedom of expression – Matters of public interest – Application of Ontario's framework for dismissal of strategic lawsuits against public participation (SLAPPs) to defamation claim – Whether defamation claim against lawyer for statements made in email alleging that physician inappropriately altered medical reports should be dismissed under anti-SLAPP legislation – Whether fresh evidence should be admitted in proceedings before Supreme Court of Canada – *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 137.1.

Held (5:4): Appeals dismissed.

1704604 Ontario Ltd v Pointes Protection Association & Ors
Supreme Court of Canada: 2020 SCC 22

Judgment delivered: 10 September 2020

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

Catchwords:

> Civil procedure – Courts – Dismissal of proceeding that limits debate – Freedom of expression – Matters of public interest – Proper interpretation and application of Ontario's framework for dismissal of strategic lawsuits against public participation (SLAPPs) – *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 137.1.

Held (9:0): Appeal dismissed.

Contracts

Bryce Brougham v Christine Anna Elizabeth Regan and Mark Jefferey Tuffin & Anor
Supreme Court of New Zealand: [2020] NZSC 118

Judgment delivered: 30 October 2020

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

Catchwords:

> Contracts – Guarantees – Writing requirements – Where second respondent one of two trustees of trust – Where appellant and second respondent in de facto relationship and established company together to enable them to purchase business – Where trustees entered loan agreement with company – Where appellant and first respondent were to each guarantee $25,000 of loan – Where appellant signed loan agreement as both director of company and as guarantor – Where first respondent signed only as director – Where loan agreement provided that before money advanced, any person named in agreement as guarantor had to sign separate written guarantee – Where appellant never signed guarantee – Where $50,000 advanced to company on same day agreement signed – Where relationship between appellant and second respondent ended and company liquated – Where trustees commenced proceedings in District Court attempting to enforce guarantee against appellant – Where District Court and High Court found against trustees, but Court of Appeal allowed appeal and held appellant liable as guarantor for $50,000 plus interest – Whether loan agreement satisfied requirement in s 27(2) of *Property Law Act 2007* that contracts of guarantee be in writing and signed by guarantor.

Held (5:0): Appeal allowed.

Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp.
Supreme Court of Canada: 2020 SCC 29

Judgment delivered: 23 October 2020

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

Catchwords:

> Contracts – Post-incorporation contracts – Formation – Strata corporations – Where air space parcel agreement provided for payment obligations in relation to parking rights entered into and registered on title by developer prior to incorporation of strata corporation – Where dispute later arose between strata corporation and owner of parking facility – Whether strata corporation bound by air space parcel agreement – *Strata Property Act*, S.B.C. 1998, c. 43.

Held (9:0; 8:1 (Rowe J dissenting in part)): Appeal dismissed.

Savvy Vineyard 4334 Ltd & Anor v Weta Estate Ltd & Anor
Supreme Court of New Zealand: [2020] NZSC 115

Judgment delivered: 22 October 2020

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

Catchwords:

> Contracts – Interpretation – Repudiation – Where appellants and respondents entered into agreements for supply of grapes to appellants from respondents' vineyards – Where agreements contained option for purchase of grapes by appellants – Where cl 2.2 provided that option to purchase deemed effective on 1 May 2009 and to be repeated on each third anniversary of that date, with proviso that if appellants did not exercise option for two consecutive 3-year periods, option lapsed – Where appellants purported to exercise option on 17 November 2014 – Where respondents refused to supply grapes on basis that notice to exercise option not given in time – Where in December 2010, respondents gave notice to appellants that grape supply agreements at end – Where in other proceedings, Supreme Court held that December 2010 notice invalid and of no effect – Where appellants subsequently commenced proceedings in High Court seeking inquiry into damages based on respondents' wrongful repudiation and seeking declarations relating to November 2014 notices – Where High Court dismissed cause of action based on December 2010 notice but found for appellants on option issue – Where Court of Appeal allowed respondent's appeal – Whether, on proper construction of cl 2.2, November 2014 notice to exercise option given in

time – Whether respondents liable to appellants in damages for wrongful repudiation of grape supply agreements in December 2010.

Held (5:0): Appeal allowed.

Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd & Ors

Hong Kong Court of Final Appeal: [2020] HKCFA 32

Judgment delivered: 9 October 2020

Coram: Ribeiro, Fok and Cheung PJJ, Bokhary and Sumption NPJJ

Catchwords:

Contracts – Enforcement of arbitral awards – Inducing breach of contract – Constructive trusts – Where first and second appellants wholly and indirectly owned company incorporated in People's Republic of China which owned piece of land in Xiamen – Where in July 2003 first and second appellants entered into agreement with respondent – Where under agreement, respondent would acquire right to develop land by first and second appellants transferring their shares in company which owned land to respondent's nominee upon payment of transfer price – Where first and second appellants terminated agreement – Where respondent commenced arbitral proceedings against first and second appellants at China International Economic and Trade Arbitration Commission ("CIETAC") in August 2005 – Where between November 2005 and March 2006, corporate restructures led to all shares in company which owned disputed land being held by another party, such that it was impossible for first and second appellants to transfer shares to respondent's nominee as agreed – Where in October 2006, CIETAC issued award requiring first and second appellants to perform agreement – Where respondent unsuccessfully attempted to have award enforced by Xiamen Municipal Intermediate Court – Where respondent then successfully applied to Hong Kong Court of First Instance to enforce award – Where Hong Kong Court of Appeal dismissed first and second appellants' appeal against that decision – Where in May 2008, respondent commenced common law action against first and second appellants to enforce first award – Where respondent also commenced proceedings in Court of First Instance against entities related to first and second appellants asserting proprietary rights over shares – Where shares said to be subject of constructive trust in favour of first and second appellants because shares transferred to third party, beyond reach of respondent, in breach of fiduciary duty by first and second appellants – Where respondent later amended claim adding further defendants and seeking damages for failure to honour award, damages for tort of inducing breach of contract and for unlawful means conspiracy, and equitable compensation for breach of fiduciary duty – Where Court of First Instance dismissed respondent's claims – Where on appeal, Court of Appeal awarded respondent damages for first and second appellant's failure to perform award, on respondent's election set aside enforcement order granted in earlier proceedings, and otherwise dismissed respondent's

appeal – Where respondent appealed against dismissal of balance of claims – Where first and second appellants appealed against that part of Court of Appeal's decision which concerned damages – Whether open for Hong Kong court, enforcing Mainland award at common law, to go beyond terms of award and award damages in circumstances where award only contemplated ongoing performance of agreement – If Hong Kong courts enforcing such awards may fashion appropriate remedy, whether award of damages inconsistent with arbitral award requiring continuing performance – Whether on facts elements of tort of inducing breach of contract made out – Whether constructive trust arose in circumstances where agreement, made subject to PRC law, lacked characteristics of contract which, if governed by Hong Kong law, would have been enforceable by way of specific performance.

Held (5:0): Appeals dismissed.

Constitutional Law

Fraser & Ors v Canada (Attorney General)
Supreme Court of Canada: 2020 SCC 28

Judgment delivered: 16 October 2020

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

Catchwords:

Constitutional law – Charter of Rights – Right to equality – Discrimination based on sex – Adverse impact discrimination – Systemic discrimination – Where Royal Canadian Mounted Police allowed members to job-share – Where job-sharing members not allowed under pension plan to buy back pension credits – Where job-sharers are mostly women – Where retired members claimed that pension consequences of job-sharing have discriminatory impact on women and violate their constitutional right to equality – Whether limitation on job-sharers' ability to buy back pension credits discriminates on basis of sex – If so, whether infringement justified – *Canadian Charter of Rights and Freedoms*, ss. 1, 15(1) – *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11 – *Royal Canadian Mounted Police Superannuation Regulations*, C.R.C., c. 1393.

Held (6:3): Appeal allowed.

Corporations

Vivien Judith Madsen-Ries and Henry David Levin as Liquidators of Debut Homes Limited (in liq) & Anor v Leonard Wayne Cooper & Ors
Supreme Court of New Zealand: [2020] NZSC 100

Judgment delivered: 24 September 2020

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

Catchwords:

> Corporations – Directors' duties – Where Debut Homes Ltd ("Debut") residential property developer – Where first respondent was Debut's sole director – Where first respondent decided to wind down Debut's operations, finishing existing developments, but not taking on any more – Where at time decision was made, predicted that following wind-down, GST deficit would exceed $300,000 – Where Debut placed into liquidation on application of Inland Revenue – Where first appellants are Debut's liquidators – Where first appellants commenced proceedings in High Court, suing first respondent for breaches of *Companies Act 1993*, including claim that first respondent incurred debts without reasonable belief that Debut would be able to meet them when they fell due contrary to s 136 of Act – Where High Court found for first appellants – Where Court of Appeal allowed appeal – Whether first respondent breached directors' duties under Act – If yes, whether first respondent could invoke defence under s 138 of reliance on professional advice – Whether general security arrangement securing advances by second respondents should be partially set aside – If directors' duties were breached, what relief should be ordered.

Held (5:0): Appeal allowed.

Criminal Law

Brooke Christie Rolleston v The Queen; Brandon James Roche v The Queen
Supreme Court of New Zealand: [2020] NZSC 113

Date of orders: 26 June 2019; 19 November 2019

Publication of reasons: 19 October 2020

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

Catchwords:

> Criminal law – Jurors – Apprehended bias – Where following jury trial, appellants convicted of sexual offending against teenage complainant – Where appellants appealed against convictions, arguing one juror was biased, as brother of one of appellants bullied juror in high school – Where

appellants sought direction that independent person be appointed to interview all jurors – Where Court of Appeal declined application and dismissed conviction appeals – Where Supreme Court ordered independent practitioner to interview juror in question – Where after interview, juror provided written statement – Where after interview and statement, appellants applied to cross-examine juror – Whether application to cross-examine should be allowed – Whether convictions affected by juror bias.

Held (5:0): Application to cross-examine juror dismissed; appeals dismissed.

R (on the application of Highbury Poultry Farm Produce Ltd) v Crown Prosecution Service

United Kingdom Supreme Court: [2020] UKSC 39

Judgment delivered: 16 October 2020

Coram: Lords Reed, Lloyd-Jones, Kitchin, Hamblen and Burrows

Catchwords:

Criminal law – Animal welfare – Mens rea – Where Highbury Poultry Farm Produce Ltd ("HPFPL") operates poultry slaughterhouse – Where on three occasions, chickens entered scalding tank while still alive – Where HPFPL charged with two offences in relation to each incident, namely, failure to comply with arts 3 and 15(1) of Regulation (EC) No 1099/2009 which respectively provided that animals should be spared avoidable suffering during their killing, and that prior to scalding, carotid arteries must be severed and animal must present no signs of life – Where failure to comply with arts 3 and 15(1) offences in domestic law by operation of *Welfare of Animals at the Time of Killing (England) Regulations 2015* – Where HPHPL argued 2015 Regulations required proof of mens rea or culpability on part of defendant – Where trial judge rejected argument – Where in judicial review proceedings, Divisional Court held that while there was presumption 2015 Regulations required proof of mens rea, presumption displaced – Whether offences in question strict liability offences – Whether necessary for prosecution to prove negligence on part of business operator.

Held (5:0): Appeal dismissed.

HKSAR v Yuong Ho Cheung & Ors

Hong Kong Court of Final Appeal: [2020] HKCFA 29

Date of orders: 1 September 2020

Publication of reasons: 23 September 2020

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

Catchwords:

> Criminal law – Appeals against conviction – Statutory interpretation – Where appellants Uber drivers and did not hold hire car permits within meaning of Road Traffic Ordinance (Cap 374) – Where appellants convicted of offence of driving motor vehicle "for the carriage of passengers for hire or reward" without permit, contrary to s 52(3) of Ordinance – Where appeals to Court of First Instance dismissed – Whether phrase "for the carriage of passengers for hire or reward" required proof that driver was driving for sole purpose of fulfilling direct carriage contract for reward between driver and passenger.

Held (5:0): Appeal dismissed.

Rambele v The State; Msimango & Ors v The State & Anor

Constitutional Court of South Africa: [2020] ZACC 22

Judgment delivered: 16 September 2020

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

Catchwords:

> Criminal law – Appeals against conviction – Fair trial – Legal representation – Where applicants tried in High Court for various offences including racketeering, theft, and acquisition, possession or disposal of unwrought gold – Where in course of long trial, applicants sought various postponements in order to obtain funds to engage preferred legal representatives – Where High Court enabled access to free legal assistance, but applicants refused such assistance, preferring to try to engage preferred representatives – Where following considerable delays, High Court made orders deeming accused cases closed, as unreasonable delays constituted exceptional circumstances within meaning of s 342A of *Criminal Procedure Act 1977* – Where applicants convicted on various counts – Where applicants refused leave to appeal to Full Court of High Court and to Supreme Court of Appeal – Where applicants sought leave to appeal to Constitutional Court – Whether application raised constitutional question – Whether applicants' rights to fair trial in art 35(3) of Constitution infringed on basis that High Court failed to properly evaluate evidence, that trial judge biased in not granting certain postponement, or that effects of s 342A not sufficiently explained.

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

Shay O'Carroll v The Queen

Supreme Court of New Zealand: [2020] NZSC 92

Judgment delivered: 14 September 2020

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

Catchwords:

> Criminal law – Sentencing – Where pursuant to s 155 of *Cook Islands Act 1995* (NZ), New Zealand High Court convicted appellant of offence committed in Cook Islands – Where High Court considered sentence of home detention appropriate but held it had to sentence appellant to term of imprisonment on basis that Cook Islands law does not provide for home detention – Where Court of Appeal held it had no jurisdiction to hear appeal and agreed with High Court as to availability of home detention – Where Supreme Court granted leave to appeal – Whether Court of Appeal had jurisdiction to hear appeal – Whether High Court had power to impose home detention.

Held (5:0): Appeal allowed; sentence quashed and substituted with sentence of 10 months' home detention.

Defences

Ecila Henderson (A Protected Party, by her litigation friend, The Official Solicitor) v Dorset Healthcare University NHS Foundation Trust

United Kingdom Supreme Court: [2020] UKSC 43

Judgment delivered: 30 October 2020

Coram: Lords Reed and Hodge, Lady Black, Lord Lloyd-Jones, Lady Arden, Lords Kitchin and Hamblen

Catchwords:

> Defences – Illegality – Where appellant suffers from paranoid schizophrenia or schizoaffective disorder – Where in August 2010 she was under care of community mental health team managed and operated by respondent – Where in late August 2010, she killed her mother while experiencing serious psychotic episode – Where appellant convicted of manslaughter by reason of diminished responsibility – Where appellant sentenced to hospital order and unlimited restriction order under *Mental Health Act 1983*, and has been in hospital since – Where appellant commenced negligence proceedings against respondent, seeking damages – Where respondent admitted liability for negligent failure to return appellant to hospital upon deterioration of psychiatric condition in mid-August 2010 and accepted if it had done so, appellant's mother would not have been killed – Where respondent contended appellant's claim barred for illegality because damages she claimed resulted from sentence imposed on her in criminal proceedings and/or her own criminal act – Where recoverability of damages claimed tried as preliminary issue –

Where High Court upheld respondent's defence, and Court of Appeal dismissed appeal, both applying House of Lords' decision in *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] AC 1339 – Whether *Gray* could be distinguished – Whether *Gray* should be departed from in light of Supreme Court's more recent decision on illegality in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 – Whether appellant could recover damages for any heads of loss she claimed.

Held (7:0): Appeal dismissed.

Stoffel & Co v Grondona
United Kingdom Supreme Court: [2020] UKSC 42

Judgment delivered: 30 October 2020

Coram: Lords Reed and Hodge, Lady Black, Lord Lloyd-Jones, Lady Arden

Catchwords:

Defences – Illegality – Where respondent and Mr M had business relationship – Where Mr M purchased 125-year lease of property – Where he subsequently borrowed £45,000 from BM Samuels Finance Group Plc – Where loan was secured by charge over property – Where respondent bought property from Mr M with assistance of mortgage advance of £76,475 from Birmingham Midshires – Where mortgage advance to be secured by charge over property entered into by respondent – Where appellant solicitors acted for respondent, Mr M, and Birmingham Midshires in relation to transaction – Where mortgage advance procured by fraud – Where appellant negligently failed to register transfer form, form releasing BM Samuels charge, and Birmingham Midshires charge with Land Registry – Where in 2006 respondent defaulted on payments under Birmingham Midshires charge, and Birmingham Midshires commenced proceedings against her – Where respondent sought damages from appellant – Where appellant admitted failure to register forms with Land Registry constituted negligence or breach of retainer, but sought to raise illegality defence, contending that respondent had instructed them in order to pursue illegal mortgage fraud – Where trial judge held defence failed – Where Court of Appeal dismissed appeal – Whether, applying policy-based approach to illegality defence articulated in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467, respondent's claim against appellant was barred on grounds of illegality.

Held (5:0): Appeal dismissed.

Discrimination

R (on the application of Z & Anor) v Hackney London Borough Council & Anor
United Kingdom Supreme Court: [2020] UKSC 40

Judgment delivered: 16 October 2020

Coram: Lords Reed and Kerr, Lady Arden, Lords Kitchin and Sales

Catchwords:

Discrimination – Charities – Social Housing – Where charitable objective of second respondent is to make social housing available primarily for members of Orthodox Jewish community in Hackney – Where second respondent makes properties available via online portal operated by first respondent, Hackney London Borough Council – Where portal available to applicants for social housing identified by Council as having priority need – Where Council cannot compel second respondent to take tenants falling outside charitable objective and selection criteria – Where there is significant need for social housing in Orthodox Jewish community, so in practice, Council only nominates and second respondent only accepts members of that community for second respondent's properties – Where appellant single mother with four small children, two of whom have autism – Where appellant identified as having priority need for social housing in larger property – Where appellant now housed in such property, but had to wait longer than she otherwise would have because not member of Orthodox Jewish community, and so appropriately sized properties which became available earlier not available to her – Where appellant commenced proceedings against first and second respondents alleging she suffered unlawful direct discrimination on grounds of race and religion contrary to *Equality Act 2010* – Where Divisional Court dismissed claim and Court of Appeal dismissed her appeal – Where on appeal to Supreme Court, appellant permitted to add additional claim that second respondent's allocation policy contravened Council Directive 2000/43/EC of 29 June 2000 by unlawfully discriminating against her on grounds of race or ethnic origin – Whether second respondent acted unlawfully in restricting access to its social housing properties.

Held (5:0): Appeal dismissed.

Employment Law

National Union of Metal Workers of South Africa & Ors v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) & Anor
Constitutional Court of South Africa: [2020] ZACC 23

Judgment delivered: 27 October 2020

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

Catchwords:

Employment law – Unfair dismissal – Automatic unfair dismissal – *Labour Relations Act 1995*, s 187 – Where first respondent steel manufacturer and supplier of steel products – Where in April 2014, first respondent's business affected by adverse economic conditions, requiring restructure of workforce to remain financially sustainable – Where first respondent initiated consultation process with employees, offered voluntary severance packages, and proposed redesigning certain positions – Where first applicant, union acting for employees, proposed alternative restructure model – Where consultations continued and first applicant and first respondent reached interim agreement pursuant to which union members agreed to work according to first respondent's redesigned job descriptions until agreement reached on first applicant's alternative plan – Where interim agreement continued for six months until first applicant informed first respondent that its members would no longer perform redesigned jobs on basis that first respondent had not yet negotiated acceptable form of first respondent's alternative plan – Where first respondent reached view that negotiations on alternative plan unlikely to progress further and informed first applicant that consultation process had concluded, first respondent's redesigned job structure would be implemented, and that union members who had been performing redesigned jobs under interim agreement could remain in those jobs if they chose to but would be retrenched if they rejected the redesigned structure – Where some employees accepted first respondent's offer – Where others rejected it and retrenched for what first respondent considered to be operational reasons – Where approximately one year later first respondent transferred its fleet, transport business and 110 employees to second respondent – Where first applicant commenced proceedings in Labour Court contending that dismissal of member employees automatically unfair within meaning of s 187 – Where Labour Court rejected first applicant's argument, holding dismissal for operational reasons not automatically unfair – Where Labour Appeal Court dismissed appeal – Where first applicant sought leave to appeal to Constitutional Court – Whether dismissal of applicants was automatically unfair within meaning of s 187.

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

Matthews v Ocean Nutrition Canada Ltd

Supreme Court of Canada: 2020 SCC 26

Judgment delivered: 9 October 2020

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

Catchwords:

Employment law – Constructive dismissal – Duty to provide reasonable notice – Damages – Where employee worked for employer for

approximately 14 years – Where employer provided long term incentive plan according to which employee would receive bonus payment if company sold – Where company sold soon after employee constructively dismissed – Whether damages for breach of duty to provide reasonable notice include incentive bonus.

Held (7:0): Appeal allowed.

Evidence

David Noel Roigard v The Queen
Supreme Court of New Zealand: [2020] NZSC 94

Judgment delivered: 14 September 2020

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

Catchwords:

Evidence – Evidence of prison informants – Where appellant convicted for murder of his son and theft in special relationship, and sentenced to life imprisonment – Where appeal to Court of Appeal against conviction and sentence dismissed – Where two Crown witnesses at trial had been in prison with appellant and gave evidence concerning admissions they claimed appellant had made in prison – Where both witnesses had histories of dishonesty and received sentencing discounts for providing assistance – Whether evidence of witnesses should have been excluded – Whether reliability of evidence of prison informants could be considered in determining whether probative value of evidence outweighed by risk of unfair prejudice under *Evidence Act* s 8(1).

Held (3:2): Appeal dismissed.

Family Law

Michel v Graydon
Supreme Court of Canada: 2020 SCC 24

Date of orders: 14 November 2019

Publication of reasons: 18 September 2020

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

Catchwords:

Family law – Support – Child support – Retroactive support – Where mother sought retroactive variation of child support order under British Columbia's *Family Law Act* – Where variation sought after child had become adult – Whether court has jurisdiction to vary child support order after order has expired and after child support beneficiary has ceased to be child – *Family Law Act*, S.B.C. 2011, c. 25, s. 152.

Held (9:0): Appeal allowed.

Intellectual Property

International Consolidated Business Pty Ltd v SC Johnson & Son Inc

Supreme Court of New Zealand: [2020] NZSC 110

Judgment delivered: 15 October 2020

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

Catchwords:

Intellectual property – Trade marks – Where appellant held registered trade mark "ZIPLOC" from 8 June 2006 with deemed registration date of 22 November 2001 – Where respondent filed revocation application against appellant's trade mark on 22 April 2013 – Where trade mark revoked for non-use on 26 June 2014, effective from 22 April 2013 – Where on 19 April 2013, respondent applied to register its own "ZIPLOC" trade mark – Where Assistant Commissioner of Trade Marks held respondent's application for registration should not proceed because at date of application appellant still registered owner of ZIPLOC mark – Where High Court partially overturned Assistant Commissioner's decision, backdating revocation of appellant's registered trade mark to 19 April 2013, and remitting matter to Assistant Commissioner – Where Court of Appeal held respondent's application could proceed to registration on basis register assessed for competing marks only at date of actual entry of new mark – Where Court of Appeal held s 68(2) of *Trade Marks Act 2002*, which provides for backdating of revocation of trade marks, did not alter result in this case – Whether date on which register assessed to ascertain whether there are competing marks is date of entry onto register – Whether Court of Appeal erred in interpretation of effect of s 68(2) – Whether appellant was owner of "ZIPLOC" mark as at 19 April 2013 – Whether s 26, which in special circumstances provides for overriding of prohibition of registration of identical marks, applicable in circumstances.

Held (5:0): Appeal dismissed.
