OVERSEAS DECISIONS BULLETIN

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Decisions from 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 and the Supreme Court of New Zealand.

Administrative Law

See also **Civil Procedure**: *McGraddie v McGraddie & Anor*

See also **Constitutional Law**: *Siemer v The Solicitor-General*

Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another

Constitutional Court of South Africa: [2013] ZACC 25.

Judgment delivered: 10 July 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Jafta, Froneman, Khampepe, Nkabinde, Skweyiya, Van der Westhuizen and Zondo JJ.

Catchwords:

> Administrative law – Powers of Head of a Provincial Department of Education (HOD) – In 2008 and 2009 2009 the governing bodies of Welkom High School and Harmony High School respectively adopted pregnancy policies that provide for the exclusion of pregnant learners from school for certain time periods – The HOD issued instructions to the principals of the schools to readmit two learners who had been excluded from school in terms of the pregnancy policies – Whether powers of HOD extended to the power to interfere with implementation of schools' policies.

Constitutional law – Bill of Rights – Right to education – Whether school policies infringed right of pregnant learners to receive a basic education, human dignity and freedom from unfair discrimination.

Held: Appeal dismissed (Mogoeng CJ, Jafta, Nkabinde and Zondo JJ). As a matter of legality, supervisory authority must be exercised lawfully in accordance with the *Schools Act*. Because the HOD had purported to override school policies without following the relevant procedures set out in the Schools Act, he acted unlawfully. The interdict was therefore correctly granted. However, school's also ordered to review policy in light of Constitutional requirements.

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R (on the application of Modaresi) (FC) v Secretary of State for Health

Supreme Court of the United Kingdom: [2013] UKSC 53.

Judgment delivered: 24 July 2013

Coram: Lord Neuberger PSC, Lady Hale, Lord Wilson, Lord Sumption and Lord Carnwath JJSC.

Catchwords:

Administrative law – Judicial review – Mental health review tribunal – Patient applied for review of admission to hospital for assessment – Time limit for application expired on public holiday – Application form faxed to hospital trust in time but not received by tribunal until first working day after public holiday – Tribunal wrongly treated application as out of time – Secretary of State refused to refer patient's case to tribunal because patient had fresh opportunity for application under different statutory regime as then detained for treatment – Whether refusal to refer breached patient's Convention right to liberty – Whether lawful – Mental Health Act 1983 (as amended by Transfer of Tribunal Functions Order 2008, art 6, Sch 3, para 47), ss 66, 67 – Human Rights Act 1998, Sch 1, Pt I, art 5.4.

Held: Appeal unanimously dismissed. The Secretary of State for Health had not acted unlawfully in refusing to exercise his statutory discretion to refer the case of a detained patient to a mental health review tribunal for review in circumstances where the patient had a right to make an application to the tribunal herself.

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South Lanarkshire Council v Scottish Information Commissioner

Supreme Court of the United Kingdom: [2013] UKSC 55.

Judgment delivered: 29 July 2013

Coram: Lady Hale DPSC, Lord Kerr, Lord Wilson, Lord Reed and Lord Carnwath JJSC.

Catchwords:

> Administrative law – Freedom of information – Data protection – Personal data – Requests to local authority for information as to number but not identity of employees placed on specified points of pay grading system – Requests refused on ground information related to personal data – Commissioner required disclosure – Whether processing of data necessary for purposes of applicant's legitimate interests – Whether processing unwarranted as prejudicial to rights and freedoms or legitimate interests of data subjects – Data Protection Act 1998, Sch 2, cond 6 – Freedom of Information (Scotland) Act 2002 , s 1 – Council Directive 95/46/EC, art 7(f)
>
> Administrative law – Natural justice – Duty to be fair – Local authority's refused applicant's request for information — Investigation by commissioner – Commissioner communicated applicant's case to local authority but not subsequent supporting material – Whether obliged to disclose all communications concerning application – Whether denial of natural justice.

Held: Appeal unanimously dismissed. Whether processing personal data was "necessary" within the meaning of condition 6 in Schedule 2 to the Data Protection Act 1998 was to be determined as part of the proportionality test established in European Union law so that a measure which interfered with a right protected by such law had to be the least restrictive for the achievement of a legitimate aim. The Information Commissioner had not acted in breach of the rules of natural justice where, having notified a public authority and sent it a copy of an application requesting his decision in respect of its refusal to process personal data information, he had not supplied to the authority copies of subsequent material in support of the application which did not advance the applicant's case.

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Citizenship and Migration Law

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

Supreme Court of the United Kingdom: [2013] UKSC 49.

Judgment delivered: 10 July 2013

Coram: Lord Neuberger PSC, Lord Clarke, Lord Wilson, Lord Carnwath and Lord Toulson JJSC.

Catchwords:

> Citizenship and migration – Illegal entrant – Detention of child pending removal – Secretary of State mistakenly but reasonably believed 17-year-old claimant seeking asylum aged over 18 – Asylum refused and claimant detained pending removal from United Kingdom – Whether detention breached Secretary of State's statutory duty regarding welfare of children – Whether lawful – Immigration Act 1971, Sch 2, para 16(2) (as substituted by Immigration and Asylum Act 1999, s 140(1) and amended by Nationality, Immigration and Asylum Act 2002, s 73(5)) – Borders, Citizenship and Immigration Act 2009, s 55.

Held: Appeal unanimously dismissed. The Home Secretary did not act unlawfully when she detained a 17-year-old illegal immigrant in the mistaken but reasonable belief that he was aged over 18.

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R (on the application of New London College Limited); R (on the application of West London Vocational Training College) v Secretary of State for the Home Department

Supreme Court of the United Kingdom: [2013] UKSC 51.

Judgment delivered: 17 July 2013

Coram: Lord Hope DPSC, Lord Clarke, Lord Sumption, Lord Reed and Lord Carnwath JJSC.

Catchwords:

> Citizenship and migration – Immigration rules – Effect – Home Secretary introduced guidance for educational sponsors of overseas students – Guidance laid down new qualification criteria for educational sponsors – Applicant sponsors failed to meet qualification criteria – Whether guidance constituted an immigration rule which had to be laid before Parliament – Whether failure to lay guidance before Parliament renders guidance unlawful – Immigration Act 1971, s 3(2).

Held: Appeal unanimously dismissed. The requirement, laid down under s 3(2) of the Immigration Act 1971, that rules affecting immigrants be laid before Parliament before they became lawful applied to rules which a migrant had to fulfil as a condition of his obtaining leave to enter or remain in the United Kingdom but did not apply to rules which an

educational establishment had to fulfil before it was entitled to sponsor students from outside the European Economic Area

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Ezokola v Canada
Supreme Court of Canada: [2013] SCC 40.

Judgment delivered: 19 July 2013.

Coram: McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Catchwords:

> Citizenship and migration — Convention refugees — Complicity in crimes against humanity — Former representative of the Democratic Republic of Congo sought refugee protection in Canada — Immigration and Refugee Board rejected claim for refugee protection on grounds that representative was complicit in crimes against humanity committed by the government of the Democratic Republic of Congo — Whether mere association or passive acquiescence are sufficient to establish complicity — Whether a contribution-based test for complicity should be adopted — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 98 — United Nations Convention Relating to the Status of Refugees, Can. T.S. 1969 No. 6, art. 1F(a).

Held: Appeal allowed and matter remitted to a new panel of the Refugee Protection Division for redetermination in accordance with these reasons. To exclude a claimant from the definition of "refugee" by virtue of Art 1F(a), there must be serious reasons for considering that the claimant has voluntarily made a significant and knowing contribution to the organization's crime or criminal purpose. Decision makers should not overextend the concept of complicity to capture individuals based on mere association or passive acquiescence. Test requires a voluntary, knowing, and significant contribution to the crime or criminal purpose of a group.

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Civil Procedure

Abela and others v Baadarani
Supreme Court of the United Kingdom: [2013] UKSC 44.

Judgment delivered: 26 June 2013

Coram: Lord Neuberger PSC, Lord Clarke, Lord Sumption, Lord Reed and Lord Carnwath JJSC.

Catchwords:

> Civil procedure – Claim form – Service out of jurisdiction – Claimants given permission to serve claim form at address in Lebanon but unable to locate defendant at that address – Claimants instead delivered claim form to office of defendant's attorney in Beirut – Judge ordered that delivery of documents to attorney amounted to good service – Whether power to make retrospective declaration of good service extends to service out of jurisdiction – CPR rr 6.15(2), 6.37(5)(b), 6.40(3)(4)

Held: Appeal unanimously allowed. The court has the power to make a retrospective declaration of good service, even where service is made out of jurisdiction in a state in respect of which no relevant bilateral convention on service of judicial documents exists.

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Daniel v President of the Republic of South Africa and Another

Constitutional Court of South Africa: [2013] ZACC 24.

Judgment delivered: 27 June 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Froneman, Khampepe, Nkabinde, Skweyiya, Van der Westhuizen, Zondo JJ and Mhlantla AJ.

Catchwords:

> Civil procedure – Courts – Rules of court – Rescission of order – *Functus officio* – Applicant sought recession of order of the Constitutional Court that his first application be dismissed – First application was dismissed because court considered it not in interests of justice to grant direct access (i.e. original jurisdiction) to applicant – Whether first application was a claim that fell within the exclusive jurisdiction of the court such that order dismissing claim must be rescinded.
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> Rules of court – Exclusive jurisdiction – Rescission of order – Whether Constitutional Court decision should be rescinded as only avenue to launch claim.

Held: Appeal dismissed. The failure to appoint the Commission of Inquiry in this case does not constitute an issue that falls within the exclusive jurisdiction of this Court. This finding inevitably leads to the conclusion that the impugned order was not granted erroneously. Accordingly the application for rescission must fail

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Mukaddam v Pioneer Foods (Pty) Ltd and Others

Constitutional Court of South Africa: [2013] ZACC 23.

Judgment delivered: 27 June 2013.

Coram: Moseneke DCJ, Jafta, Froneman, Khampepe, Nkabinde, Skweyiya, Zondo JJ, Mhlantla and Bosielo AJJ.

Catchwords:

> Civil procedure – Class actions – Respondents found guilty of engaging in anti-competitive conduct – Applicant instituted class action proceedings against respondents – The High Court refused to allow applicant to bring class action – Held that the claims applicant intended to pursue were bad in law and that applicant had failed to establish exception circumstances for instituting a class action – Whether this is the correct test for class actions.

Held: Appeal allowed. The correct standard was to determine if the institution of a class action would be in the interests of justice.

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Conseil scolaire francophone de la Colombie-Britannique v. British Columbia

Supreme Court of Canada: [2013] SCC 42.

Judgment delivered: 26 July 2013.

Coram: McLachlin CJ, LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

Catchwords:

> Civil procedure – Courts — Rules of court — Affidavits — Language of exhibits — 1731 English Act received into B.C. law provides English as language of court "proceedings" — B.C. Supreme Court Civil Rules also require documents "prepared for use in the court" be in English unless impracticable — French language school board sought to file affidavits attaching exhibits prepared in French prior to litigation — Whether 1731 Act or B.C. rules preclude admission of exhibits prepared in French without English translation — Whether admitting exhibits in French within inherent jurisdiction of superior courts to control own processes — Whether B.C. Civil Rules limit exercise of inherent jurisdiction — Supreme Court Civil Rules, B.C. Reg.168/2009, R. 22-3(2).

Rules of court – Whether admitting exhibits in French within inherent jurisdiction of superior courts to control own processes — Whether B.C. Civil Rules limit exercise of inherent jurisdiction — Supreme Court Civil Rules, B.C. Reg.168/2009, R. 22-3(2).

Held: Appeal dismissed (LeBel, Abella and Karakatsanis JJ dissenting). The B.C. legislature has exercised its power to regulate the language to be used in court proceedings in that province by adopting legislative provisions which require civil "proceedings", which includes exhibits to affidavits filed as part of those proceedings, to be in English. In doing so, the legislature has ousted the inherent jurisdiction of the courts and, therefore, no residual discretion exists to admit documents in other languages without an English translation.

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McGraddie v McGraddie & Anor

Supreme Court of the United Kingdom: [2013] UKSC 58.

Judgment delivered: 31 July 2013

Coram: Lord Neuberger PSC, Lady Hale DPSC, Lord Wilson, Lord Reed and Lord Hughes.

Catchwords:

Civil Procedure – Appeal – Witness action tried by judge alone – Findings of fact – Review by appellate court – Principles applicable – Appellant and first respondent are father and son respectively – Case concerned dispute over title to property – Trial judge decided in favour of appellant on basis that he found no evidence materially undermined the appellant's account – Appellate court overturned and substituted their own decision – Whether to interfere only if satisfied that judge's conclusions on primary facts plainly wrong.

Administrative law – Appellate review – Appellate court substituted decision of trial court – Whether appellate court may interfere only if satisfied that judge's conclusions on primary facts plainly wrong.

Held: Appeal unanimously allowed. In cases such as this where the trial judge is faced with a stark choice between irreconcilable accounts the credibility of the parties' testimony is of primary importance. It was incorrect for the Inner House to rely on *Hamilton v Allied Domecq Ltd* [2007] UKHL 33, in which a critical finding of fact had been made that was unsupported by the evidence. This was not the position in the present case. The Inner House had no proper basis for concluding that the Lord Ordinary had gone plainly wrong, let alone that on a re-

consideration of the whole evidence the opposite conclusion should be reached.

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Conflict of Laws

The Government of the Republic of Zimbabwe v Fick and Others

Constitutional Court of South Africa: [2013] ZACC 22.

Judgment delivered: 27 June 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Froneman, Khampepe, Nkabinde, Skweyiya, Van der Westhuizen, Zondo JJ and Mhlantla AJ.

Catchwords:

> Conflict of laws – Enforcement of foreign judgments and orders – Government of Zimbabwe expropriated respondent farmer's land pursuant to its constitutionally-authorised land-reform policy – Farmers approached the Southern African Development Community Tribunal (Tribunal) for relief – Tribunal decided in their favour – Zimbabwe failed to comply with its decision – Farmer's again approached Tribunal for relief – Tribunal granted a costs order against Zimbabwe – Zimbabwe again failed to comply – Subsequently the North Gauteng High Court ordered the registration and execution of the costs order against property of Zimbabwe – Zimbabwe applied to the High Court for the rescission of the order, which was dismissed – Zimbabwe appealed unsuccessfully to the Supreme Court of Appeal – Aggrieved by that outcome, Zimbabwe sought leave to appeal to the Constitutional Court – Whether leave should be granted – Whether Tribunal's order can be enforced in South Africa.
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> Constitutional law – Bill of Rights – Compensation for expropriation.

Held: Leave granted and appeal dismissed (by majority).

> The High Court correctly ordered that the costs order be enforced in South Africa. The Court held that that development was provided for by the SADC legal instruments on the enforcement of the decisions of the Tribunal in the region. The majority also held that the Constitution enjoins our courts to develop the common law in order to facilitate the enjoyment of the rights provided for in the Bill of Rights such as the right of access to courts, compensation for expropriation and the rule of law, which in terms of the amendment to the Constitution of Zimbabwe would

have been denied to the farmers had the costs order of the Tribunal not been enforced

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Constitutional Law

See also **Administrative Law**: *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another*

See also **Conflict of Laws**: *The Government of the Republic of Zimbabwe v Fick and Others*

Hollingsworth v Perry

Supreme Court of the United States: Docket No 12-144.

Judgment delivered: 26 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

Constitutional law – Justiciability – Case or controversy – Standing – Proposition 8 provided that only marriage between a man and a woman was valid or recognised in California – Couples, who wished to marry, named state and local officials as defendants but official refused to defend Proposition 8 and did not appeal the district court's order – Whether official proponents of an initiative authorised under California law to appeal a judgment invalidating the initiate when public officials declined to do so – Whether proponents had a direct stake in the outcome of their appeal –

Held (5-4): The proponents lacked standing. Their only interest was to vindicate the constitutional validity of a generally applicable California law, which was insufficient to confer standing.

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United States v Windsor

Supreme Court of the United States: Docket No 12-307.

Judgment delivered: 26 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Constitutional law – Fifth Amendment – Defense of Marriage Act – The state in which the decedent and the spouse resided recognized their same-sex marriage – Estate contended that the refusal of the federal government to recognize the marriage for purposes of the estate tax exemption constituted a denial of constitutional rights – Whether Defense of Marriage Act is constitutional

Held (5-4): The judgment holding the Defense of Marriage Act unconstitutional was affirmed.

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Kapri (AP) v The Lord Advocate representing The Government of the Republic of Albania (Scotland)

Supreme Court of the United Kingdom: [2013] UKSC 48.

Judgment delivered: 10 July 2013

Coram: Lord Hope DPSC, Lady Hale, Lord Kerr, Lord Sumption and Lord Toulson JJSC.

Catchwords:

> Constitutional law – Devolution – Scotland – "Devolution issue" – High Court of Justiciary determined extradition compatible with appellant's Convention right to fair trial – Appellant appealed to Supreme Court – Whether devolution or compatibility issue – Criminal Procedure (Scotland) Act 1995, s 288ZA(2) (as inserted by Scotland Act 2012, s 34(3)) – Scotland Act 1998 (as amended by Scotland Act 2012, s 36(4)), s 57(2), Sch 6, para 1(d) – Extradition Act 2003, s 101(2)
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> Extradition – Compatibility with Convention rights – Fair trial – Albania sought appellant's extradition – Appellant alleged systemic corruption in Albanian judicial system – Whether necessary to show likely effect of corruption on appellant's particular circumstances – Whether appellant liable to suffer flagrant denial of justice if extradited – Human Rights Act 1998, Sch 1, Pt I, art 6 – Extradition Act 2003, s 87.

Held: Appeal unanimously allowed. The case is returned to the Appeal Court for consideration of the question whether Mr Kapri would suffer a flagrant denial of justice if he were to be extradited to Albania.

An arrested person who resisted extradition on the basis that there was systemic corruption in the judicial system in the requesting country did not necessarily have to point to particular facts or circumstances affecting his case since such corruption affected everyone who was subjected to it and it was impossible to say that any individual who was returned to such a system would receive the right to a fair trial within article 6 of the Convention.

Extradition proceedings were not "criminal proceedings" and, therefore, the question whether the exercise of a function by a member of the Scottish Government in ordering a person's extradition was compatible with his Convention rights was a devolution issue, rather than a compatibility issue, for the purposes of an appeal from the High Court of Justiciary to the Supreme Court.

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National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others

Constitutional Court of South Africa: [2013] ZACC 26.

Judgment delivered: 11 July 2013.

Coram: Mogoeng CJ, Moseneke DCJ, Froneman, Jafta, Khampepe, Nkabinde, Skweyiya JJ and Mhlantla AJ.

Catchwords:

Constitutional law – Separation of powers – Functions of the judiciary – Sections 2 and 3 of the Performing Animals Protection Act assign the function of issuing licences for the training, exhibition or use of animals to Magistrates – Whether this is an administrative function – Whether offends the separation of powers – Whether Magistrates have the expertise required to perform this function – The High Court declared the sections unconstitutional and the NSPCA applied to the Constitutional Court for confirmation of this order.

Held: Order of constitutional invalidity upheld but and suspended for a period of 18 months to afford Parliament the opportunity to cure the defect in the Act.

There may be cases where the performance of administrative functions by a Magistrate may be justified and in such a case there would be no breach of the principle of the separation of powers. However, the Court held that the performance by a Magistrate of administrative duties which were unrelated to his or her judicial functions in circumstances where there is no

justification for the performance of such a function by a member of the Judiciary does offend the separation of powers. The Court unanimously held that there was no justification for assigning the function of issuing animal training and exhibition licences to Magistrates.

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Siemer v The Solicitor-General
Supreme Court of New Zealand: [2013] NZSC 68.

Judgment delivered: 12 July 2013.

Coram: Elias CJ, McGrath, William Young and Glazebrook JJ.

Catchwords:

Constitutional law – Powers of court – Suppression orders – Whether New Zealand courts have inherent power or jurisdiction to suppress judgments in criminal cases – Whether a suppression order can be made consistently with the Bill of Rights Act.

Administrative law – Judicial review – Whether a person who wishes to act in a manner contrary to a suppression order may seek to have it varied or rescinded.

Criminal law – Contempt of court – Whether defendant may raise as a defence that the order should not have been made or made in the terms it was – Whether defendant should instead apply to the court seeking to have the order varied or set aside.

Held: Appeal dismissed (Elias CJ dissenting). New Zealand courts have inherent jurisdiction to suppress judgments in criminal cases; A person may seek to have a suppression order varied or rescinded, but not contend as a defence that it should not have been made.

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Corporations Law

In re Nortel GmbH (in administration) and related companies; In re Lehman Brothers International (Europe) (in administration) and related companies (Nos 1 and 2)
Supreme Court of the United Kingdom: [2013] UKSC 52.

Judgment delivered: 24 July 2013

Coram: Lord Neuberger PSC, Lord Mance, Lord Clarke, Lord Sumption and Lord Toulson JJSC.

Catchwords:

> Corporations law – Insolvency – Administration – Expenses of administration – Effect of financial support direction or contribution notice issued by Pensions Regulator to company undergoing insolvency process – Whether cost of compliance with direction or notice after company going into administration ranks as expense of administration or as provable debt or expense or neither – Insolvency Rules 1986 (as amended by Insolvency (Amendment) Rules 2003, r 5, Sch 1, para 9 and Insolvency (Amendment) Rules 2006 , r 4), rr 2.67(1)(f), 13.12(1)(b).

Held: Appeal unanimously allowed to the extent of declaring that a target's liability under the Financial Support Directions (FSD) regime, arising pursuant to an FSD issued after the company has gone into administration, ranks as a provable debt of the company, and does not rank as an expense of the administration

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Criminal Law

See also **Constitutional Law**: *Siemer v The Solicitor-General*

Sekhar v United States

Supreme Court of the United States: Docket No 12-357.

Judgment delivered: 26 June 2013.

Coram: Roberts CJ, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Kagan JJ.

Catchwords:

> Criminal law – Racketeering – Hobbs Act – Defendant was managing partner of a firm – State Comptroller's Office was considering whether to invest in a fund managed by that firm – The office's general counsel made a written recommendation to the Comptroller not to invest in the fund – General counsel received anonymous e-mails threatening to disclose information about his alleged affair if he did not recommend moving forward with the investment – Whether attempting to compel a person to recommend that his employer approve an investment constituted

"the obtaining of property from another" under 18 U.S.C.S. § 1951(b)(2) – Whether conviction should be reversed

Held (9-0): Conviction reversed. Whether one considered the personal right at issue to be "property" in a broad sense or not, it certainly was not obtainable property under the Hobbs Act. Defendant's goal was to force the general counsel to offer advice that accorded with defendant's wishes, but that was coercion, not extortion.

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R v Brown (Northern Ireland)

Supreme Court of the United Kingdom: [2013] UKSC 43.

Judgment delivered: 26 June 2013

Coram: Lord Neuberger PSC, Lady Hale, Lord Kerr, Lord Wilson and Lord Reed JJSC.

Catchwords:

Criminal law – Defendant pleaded guilty to having had unlawful carnal knowledge of a girl under the age of 14 years contrary to section 4 of the Criminal Law Amendment Acts (Northern Ireland) 1885-1923 – Under that provision reasonable belief that the girl was over the age of 14 was not available as a defence – Sentenced to three years detention – Sentence suspended for two years – Defendant later received different legal advice and sought leave to appeal – Whether section 4 of the 1885 Act created an offence in which proof that the defendant did not honestly believe that the girl was over the age of 14 was not required.

Held: Appeal unanimously dismissed. The policy approach of protecting younger females by ensuring that a defence of reasonable belief should not be available has been unswerving. Further, there is nothing in the contemporary social context which militates against the denial of the defence of belief as to age for section 4 offences.

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R v Vuradin

Supreme Court of Canada: [2013] SCC 38.

Judgment delivered: 27 June 2013.

Coram: Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Catchwords:

Criminal law – Judgments and orders — Sufficiency of reasons — Burden of proof — Accused convicted of sexual assault and unlawful touching for sexual purpose involving four complainants — Whether trial judge's reasons for judgment sufficient — Whether trial judge properly applied burden of proof.

Held: Appeal unanimously dismissed. The core question in determining whether the trial judge's reasons are sufficient is whether the reasons, read in context, show why the judge decided as he did. The trial judge's reasons satisfy this threshold. The reasons allow for meaningful appellate review because they tell the accused why the trial judge decided as he did. The trial judge also properly applied the burden of proof.

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R (on the application of Sturnham) v The Parole Board of England and Wales and another No 2

Supreme Court of the United Kingdom: [2013] UKSC 47.

Judgment delivered: 3 July 2013

Coram: Lord Neuberger PSC, Lord Mance, Lord Sumption, Lord Reed and Lord Carnwath JJSC.

Catchwords:

Criminal law – Prisons – Prisoners' rights – Release on licence – Claimant serving indeterminate sentence of imprisonment for public protection – Claimant's case referred to Parole Board – Parole Board refused to direct release on licence – Whether test for directing release different from test for imposing sentence – Whether Parole Board applying correct test – Crime (Sentences) Act 1997, s 28(6)(b) – Criminal Justice Act 2003, s 225.

Held: Appeal unanimously dismissed. The statutory provisions relating to sentences of imprisonment for public protection involve a higher threshold for the imposition of such sentences than for continued detention after the expiry of a prisoner's minimum term.

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Hughes v R

Supreme Court of the United Kingdom: [2013] UKSC 56.

Judgment delivered: 31 July 2013

Coram: Lord Neuberger PSC, Lord Mance, Lord Kerr, Lord Hughes and Lord Toulson.

Catchwords:

> Criminal law – Driving while unlicensed, disqualified or uninsured – Causing death by – The unlicensed and uninsured appellant was involved in a fatal collision with another vehicle – Collision caused entirely due to the fault of the other driver – Prosecution accepted that the appellant was in no way at fault for the accident – Appellant charged with causing death of another person by driving without insurance and licence – Whether prosecution must prove an act or omission on behalf of the appellant, amounting to fault in his part, which had contributed to the fatality – Road Traffic Act 1988, s 3ZB (as insert by Road Safety Act 2006, s 21).

Held: Appeal unanimously allowed. If the Court of Appeal were correct, then the appellant would be criminally responsible for the other driver's death despite not being at fault at all for the collision. In addition, if any of the appellant's family had died he would also be criminally responsible for their deaths despite the fact that if the other driver had survived he would have been guilty of causing death by, at the very least, careless driving when unfit to drive through drugs. The wording of s 3ZB imported the concept of causation. The appellant's driving was not, in law, a cause

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Discrimination Law

North and others v Dumfries and Galloway Council (Scotland)

Supreme Court of the United Kingdom: [2013] UKSC 45.

Judgment delivered: 26 June 2013

Coram: Lord Hope DPSC, Lady Hale, Lord Wilson, Lord Reed and Lord Hughes JJSC.

Catchwords:

> Discrimination law – Sex – Equal pay – Same employment – Claimants employed at council schools – Male comparators employed at council depots under different collective agreement – Whether comparison permissible where no possibility of man doing comparators' jobs at schools – Whether comparators in "same employment" – Equal Pay Act 1970 (c 41), s 1(6) (as amended by Sex Discrimination Act 1975 (c 65), Sch 1, para 1(1)).

Held: Appeal unanimously allowed. The requirement that claimants and their chosen comparators were "in the same employment" did not simply mean that they must be employed by the same employer, but that whether in the event of the transfer of the comparators to do their present job in a different location (however unlikely), the comparators would remain employed on the same or broadly similar terms and conditions to those applicable in their current place of work.

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Equity

See also **Intellectual Property**: *Zodiac Seats UK Limited (formerly known as Contour Aerospace Limited) v Virgin Atlantic Airways Limited*

Benedetti v Sawiris and others

Supreme Court of the United Kingdom: [2013] UKSC 50.

Judgment delivered: 17 July 2013

Coram: Lord Neuberger PSC, Lord Kerr, Lord Clarke, Lord Wilson and Lord Reed JJSC.

Catchwords:

> Equity – Restitution – Unjust enrichment – Quantum meruit – Claimant provided services for defendants' acquisition of company – Acquisition agreement provided for acquisition scheme and for claimant's services to be remunerated – Acquisition of company achieved through different route without provision for claimant's remuneration – Claimant obtained separate payment under brokerage agreement – Defendants made offer of remuneration in excess of sums received under brokerage agreement – Whether benefit to defendant of claimant's services to be assessed by reference to their objective market value – Whether defendants unjustly enriched.

Held: Appeal unanimously dismissed. A restitutionary award made on the basis of unjust enrichment where the benefit was in the form of services was normally to be assessed by reference to the objective market value of the services, tested by the price which a reasonable person in the defendant's position would have had to pay for the services, and taking into account conditions which increased or decreased the objective value of the benefit to any reasonable person in that position.

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Evidence

R v Youvarajah
Supreme Court of Canada: [2013] SCC 41.

Judgment delivered: 25 July 2013.

Coram: McLachlin CJ, Fish, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

Catchwords:

> Evidence — Admissibility — Hearsay — Murder trial — Co-accused witness recanted previous statement implicating accused in murder — Trial judge found prior inconsistent statement did not meet threshold reliability test — Whether prior inconsistent statement was sufficiently reliable to be considered by jury for truth of its contents.

Held: Appeal allowed and acquittal restored (Rothstein and Wagner JJ dissenting).

A prior inconsistent statement of a non-accused witness may be admitted for the truth of its contents if the following reliability indicia are met: (1) the statement is made under oath or solemn affirmation after a warning as to possible sanctions if the person is untruthful; (2) the statement is videotaped or recorded in its entirety; and (3) the opposing party has a full opportunity to cross-examine the witness on the statement. The prior inconsistent statement's threshold reliability may also be established by: (1) the presence of adequate substitutes for testing truth and accuracy (procedural reliability); and (2) sufficient circumstantial guarantees of reliability or an inherent trustworthiness (substantive reliability). A trial judge is well-placed to assess the hearsay dangers in a particular case and the effectiveness of any safeguards to assist in overcoming them. Thus, absent an error in principle, the trial judge's determination of threshold reliability is entitled to deference. In this case, the trial judge did not err in finding that there were insufficient safeguards to establish threshold reliability to admit the ASF as evidence for the truth of its content.

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Extradition

See also **Constitutional Law**: *Kapri (AP) v The Lord Advocate representing The Government of the Republic of Albania (Scotland)*

Insurance Law

Teal Assurance Company Ltd v W R Berkley Insurance (Europe) Ltd & Anor

Supreme Court of the United Kingdom: [2013] UKSC 57.

Judgment delivered: 31 July 2013

Coram: Lord Neuberger PSC, Lord Mance, Lord Clarke, Lord Sumption and Lord Toulson.

Catchwords:

> Insurance law – Professional liability insurance – Priority in which claims made by an insured exhaust layers of insurance cover – Whether the chronological order in which liability for claims is irrelevant as a matter of general law.

Held: Appeal unanimously dismissed. The insured must present their losses in a chronological order for the purposes of determining the exhaustion of primary and excess layers

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Intellectual Property

Zodiac Seats UK Limited (formerly known as Contour Aerospace Limited) v Virgin Atlantic Airways Limited

Supreme Court of the United Kingdom: [2013] UKSC 46.

Judgment delivered: 3 July 2013

Coram: Lord Neuberger PSC, Lady Hale, Lord Clarke, Lord Sumption and Lord Carnwath JJSC.

Catchwords:

> Intellectual property – Patent – Practice – Estoppel – European Patent (UK) – English appellate court found patent valid and infringed and ordered inquiry as to damages – Subsequent opposition proceedings before technical appeal board in European Patent Office amended patent to remove claims held by appellate court to have been infringed – Effect of later amendment of

patent by EPO – Patents Act 1977, s 77 (as amended by Copyright, Designs and Patents Act 1988, s 295, Sch 5, paras 8(b), 21) – Convention on the Grant of European Patents (1978) (Cmnd 7090) (as amended by Act revising the Convention on the Grant of European Patents 2002, Munich 2002) (Cm 5615), art 1(24)), arts 64, 68.

Equity – Estoppel – Whether appellate court's decision res judicata – Whether estoppel prevents any challenge to damages inquiry.

Held: Appeal allowed unanimously. Zodiac is entitled to rely on the amendment of patent in answer to Virgin's claim for damages on the enquiry. Where judgment was given in an English court that a patent, whether English or European, was valid and infringed, and the patent was subsequently retrospectively revoked or amended, whether in England or at the European Patent Office, the defendant was entitled to rely on the fact of the revocation or amendment on an inquiry as to damages in respect of the unamended patent.

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Judgments and Orders

Daejan Investments Limited (Appellant) v Benson and others (Respondents) (No. 2)

Supreme Court of the United Kingdom: [2013] UKSC 54.

Judgment delivered: 24 July 2013

Coram: Lord Neuberger PSC, Lord Hope DPSC, Lord Clarke, Lord Wilson and Lord Sumption JJSC.

Catchwords:

Judgments and orders – Supplementary judgment – Consequential matters – Costs – Landlord had succeeded in the Supreme Court in obtaining a dispensation enabling it to recover certain service charges from tenants – Whether tenants entitled to a declaration under Landlord & Tenant Act 1985 section 20C that the costs of the litigation should not be recovered as a service charge.

Held: Unanimously allowed.

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Legal Practitioners

Canadian National Railway Co. v McLercher LLP
Supreme Court of Canada: [2013] SCC 39.

Judgment delivered: 5 July 2013.

Coram: McLachlin CJ, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Catchwords:

> Legal practitioners — Barristers and solicitors — Duty of loyalty — Conflict of interest — Breach of confidence — Whether a law firm can accept a retainer to act against a current client on a matter unrelated to the client's existing files — Whether a law firm can bring a lawsuit against a current client on behalf of another client and if not, what remedies are available to the client.

Held: Appeal allowed and the matter remitted to the Court of Queen's Bench for redetermination of a remedy. McKercher's conduct fell squarely within the scope of the bright line rule. CN and the class suing CN are adverse in legal interest; CN did not tactically abuse the bright line rule; and it was reasonable in the circumstances for CN to have expected that McKercher would not concurrently represent a party suing it for $1.75 billion. McKercher's failure to obtain CN's consent before accepting the class action retainer breached the bright line rule. McKercher's termination of its retainers with CN breached its duty of commitment. Its failure to advise CN of its intention to represent the class breached its duty of candour. However, McKercher possessed no relevant confidential information that could be used to prejudice CN in the class action.

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Public Health Law

See also **Statutes**: *Torfaen County Borough Council v Douglas Willis Ltd*

Rules of Court

See also **Civil Procedure**: *Daniel v President of the Republic of South Africa and Another*

See also **Civil Procedure**: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*

Statutes

Torfaen County Borough Council v Douglas Willis Ltd

Supreme Court of the United Kingdom: [2013] UKSC 59.

Judgment delivered: 31 July 2013

Coram: Lady Hale DPSC, Lord Kerr, Lord Wilson, Lord Carnwath and Lord Toulson JJSC.

Catchwords:

> Statutes – Statutory construction – Food Labelling Regulations 1996, reg 44(1)(d) – Inspectors for the appellants visited the premises of the respondent company and found packages of frozen meat labelled with "use by" dates that had passed – Respondents charged with selling food after its use by date contrary to the reg 44(1)(d) – Respondent submitted it had no case to answer as the food was not highly perishable and not likely to constitute an immediate danger to human health – Whether prosecution had to prove that the food was in a highly perishable state at the time of the alleged offences – Whether "use by" date "relating to" food if not in fact required – Whether food ceasing to require "use by" date if subsequently frozen and so ceasing to be highly perishable.
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> Public health law – Food safety standards - Food Labelling Regulations 1996, reg 44(1)(d) – Proper construction of the regulations.

Held: Appeal unanimously allowed. On the wording of reg 44(1)(d) all the prosecution had to prove was that the food was in the defendant's possession for sale at the date of the alleged offence; that the food had a use by mark or label "relating" to it; and that the date shown had passed. To read into that an additional requirement that the food was in a highly perishable state would seriously weaken the regulatory scheme and the protection provided to consumers.

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