



OVERSEAS DECISIONS BULLETIN

Produced by the Legal Research Officer,
High Court of Australia Library

Volume 14 Number 5 (1 September 2017 – 31 October 2017)

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

Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Limited (Scotland)

United Kingdom Supreme Court: [\[2017\] UKSC 66](#)

Judgment delivered: 25 October 2017

Coram: Lord Neuberger, Lady Hale, Lord Mance, Lord Reed, Lord Hodge

Catchwords:

Administrative law – Planning conditions – *Town and Country Planning (Scotland) Act 1997* – Where s 22 of Act empowers planning authorities to adopt supplementary planning guidance – Where appellant adopted supplementary planning guidance requiring developers to enter into planning obligations to make contributions to Strategic Transport Fund – Where Inner House of Court of Session quashed supplementary planning guidance on basis obligation to contribute to Fund breached Scottish Government guidance and planning obligations must fairly and reasonably relate to permitted development – Whether policy tests in Scottish Government guidance are legal tests for validity of planning obligations – Whether planning obligations under Act must relate to permitted development.

Held (5:0): Appeal dismissed.

In the matter of an application by Jason Loughlin for Judicial Review (Northern Ireland)

United Kingdom Supreme Court: [\[2017\] UKSC 63](#)

Judgment delivered: 18 October 2017

Coram: Lady Hale, Lord Kerr, Lord Wilson, Lord Carnwath, Lord Hughes

Catchwords:

Administrative law – Judicial review – *Serious Organised Crime and Police Act 2005 (UK) s 74* – Prosecutorial decision – Where two former members of paramilitary organisation (“informants”) supplied information to police about involvement in offences including murder – Where informants agreed to assist with investigation and give evidence at trial – Where tariff for life sentences reduced by 75% in recognition of assistance – Where only one person convicted at trial and not because of evidence given by informants – Where respondent applied for judicial review of prosecutor’s decision not to refer informants back to sentencing court under s 74 – Where application succeeded before Divisional Court – Whether Divisional Court erred in concluding prosecutor bound to refer case if change in circumstances and no countervailing circumstances.

Held (5:0): Appeal allowed.

Admiralty Law

Mitsui & Co Ltd & Ors v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG & Anor

United Kingdom Supreme Court: [\[2017\] UKSC 68](#)

Judgment delivered: 25 October 2017

Coram: Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

Catchwords:

Admiralty law – York-Antwerp Rules 1974 – Law of “general average” – Where pirates boarded vessel owned by appellants and ordered course be altered to Somalia – Where pirates demanded ransom of US \$6m – Where appellants agreed to ransom of US \$1.85m after seven weeks of negotiations – Where bill of lading stated “general average” to be calculated “in accordance with the York-Antwerp Rules 1974” – Where appellants contended vessel operating expenses incurred during negotiation period were “expense incurred in place of another expense which would have been allowable as general average” for purposes of Rule F because \$4.15m saved as result of negotiations – Where adjudicator found operating expenses fell within Rule F – Where Commercial Court

upheld adjudicator's decision – Where Court of Appeal allowed appeal – Whether Court of Appeal erred in finding negotiation period operating expenses not allowable under Rule F.

Held (4:1): Appeal allowed.

Arbitration

Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq

United Kingdom Supreme Court: [\[2017\] UKSC 64](#)

Judgment delivered: 25 October 2017

Coram: Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

Catchwords:

Arbitration – Enforcement of award – *Arbitration Act 1966* – Where High Court made order permitting appellant to enforce arbitral award against respondent as judgment under s 66(1) of Act – Where High Court also made interim receivership order against respondent and interim third party debt order with respect to letters of credit issued by Crédit Agricole S.A. addressed to Central Bank of Iraq instructing it to advise each credit to respondent – Where respondent challenged interim orders on basis High Court lacked jurisdiction to make orders and debts immune from execution under *State Immunity Act 1978* – Where High Court set aside interim orders – Where Court of Appeal dismissed appeal – Whether no jurisdiction to make third party debt order because respondent not sole creditor under letters of credit – Whether no jurisdiction to make third party debt order because debts situated outside England and Wales – Whether no jurisdiction to make third party debt order due to obligations of Crédit Agricole S.A. to Central Bank of Iraq – Whether receivership order appropriate in circumstances.

Held (3:2): Appeal allowed.

Prometheus Marine Pte Ltd v King & Anor

Court of Appeal of Singapore: [\[2017\] SGCA 61](#)

Judgment delivered: 24 October 2017

Coram: Sundaresh Menon CJ, Andrew Phang Boon Leong and Steven Chong JJA

Catchwords:

Arbitration – Application to set aside award – *Arbitration Act 2001* – *International Arbitration Act 1994* – Where respondent contracted to

purchase yacht from appellant – Where yacht damaged prior to delivery – Where appellant agreed to carry out repairs – Where respondent dissatisfied with repairs – Where respondent commenced proceedings against appellant by notice of arbitration – Where arbitrator made award in respondent's favour – Where appellant sought to set aside award – Where primary judge upheld award – Whether primary judge biased against appellant – Whether primary judge erred in failing to find arbitrator's failure to determine *lex arbitri* contrary to public policy – Whether primary judge erred in finding no evidence award induced by fraud or corruption – Whether primary judge erred in finding arbitrator did not exceed jurisdiction or breach rules of natural justice – Whether primary judge erred in finding appellant was seller under contract and therefore party to arbitration agreement.

Held (3:0): Appeals dismissed.

Constitutional Law

HKSAR v Fong Kwok Shan Christine

Hong Kong Court of Final Appeal: [\[2017\] HKCFA 59](#)

Judgment delivered: 4 October 2017

Coram: Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Chan NPJ and Lord Neuberger NPJ

Catchwords:

Constitutional law – Freedom of speech – Proportionality – *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* art 27 – *Hong Kong Bill of Rights Ordinance* art 16 – Where appellant participated in demonstrations in public gallery during sittings of subcommittee of Legislative Council – Where appellant convicted of contravening ss 11 and 12(1) of *Administrative Instructions for Regulating Admittance and Conduct of Persons* – Where s 11 requires persons to “behave in an orderly manner and comply with any direction given by any officer of the Council” – Where s 12(1) provides that “[n]o person shall, in a press or public gallery, display any sign, message or banner” – Whether right to freedom of expression engaged – Whether principle that courts should not intervene with internal processes of Legislative Council applies to regulation of admittance of persons – Whether s 11 invalid because uncertain – Whether s 12(1) unconstitutional because restriction on right to freedom of expression disproportionate to risk of disorder in public galleries.

Held (5:0): Appeal dismissed.

India v Badesha & Anor

Supreme Court of Canada: [\[2017\] SCC 44](#)

Judgment delivered: 8 September 2017

Coram: McLachlin CJ, Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ

Catchwords:

Constitutional law – Canadian Charter of Rights and Freedoms s 7 – *Extradition Act*, S.C. 1999, c. 18 s 44(1)(a) – Where Canadian citizens residing in Canada charged with offences in India – Where India sought extradition – Where Minister of Justice ordered surrender after receiving assurances from India regarding treatment if incarcerated – Where majority of Court of Appeal concluded Minister’s orders unreasonable – Whether Court of Appeal erred in finding Minister could not reasonably conclude no substantial risk of torture or mistreatment or that surrenders would not otherwise be unjust or oppressive.

Held (9:0): Appeal allowed.

Contracts

Ivey v Genting Casinos (UK) Ltd t/a Crockfords

United Kingdom Supreme Court: [\[2017\] UKSC 67](#)

Judgment delivered: 25 October 2017

Coram: Lord Neuberger, Lady Hale, Lord Kerr, Lord Hughes, Lord Thomas

Catchwords:

Contracts – Implied terms – Where appellant won £7.7m at casino over two days – Where appellant’s associate asked croupier to turn cards in particular manner – Where appellant admitted to use of “edge sorting” to identify cards – Where casino refused to pay winnings because it believed appellant cheated – Where parties agree contract for betting contained implied term neither party would cheat – Where High Court held appellant’s use of edge sorting was cheating – Where Court of Appeal upheld finding – Whether “cheating” in gambling requires dishonesty.

Held (5:0): Appeal dismissed.

Kawarau Village Holdings Ltd & Anor v Ho Kok Sun and Others & Ors

New Zealand Supreme Court: [\[2017\] NZSC 150](#)

Judgment delivered: 6 October 2017

Coram: Elias CJ, William Young, Arnold, O'Regan and Ellen France JJ

Catchwords:

Contracts – Construction – Contracts for sale and purchase – Repudiation – *Contract and Commercial Law Act 2017 s 37(2)(a)* – Where Kwarau Falls Station Development planned as three-stage development – Where purchasers refused to settle because stages two and three would not be completed – Where vendor purported to cancel contracts and forfeit deposits – Where purchasers claimed settlement notices and notices of cancellation issued by vendor amounted to repudiation and purported to accept repudiation – Where High Court concluded no contractual obligation to complete stages two and three – Where Court of Appeal held vendor obliged to complete all stages and obligation was essential term of contracts – Whether vendor obliged to complete all stages of development – If yes, whether essential term such as to allow purchasers to cancel pursuant to s 37(2)(a) of Act.

Held (3:2): Appeal dismissed.

Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited

Constitutional Court of South Africa: [\[2017\] ZACC 32](#)

Judgment delivered: 5 September 2017

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron, Froneman, Jafta, Khampepe, Madlanga, Mhlantla JJ, Mojapelo, Pretorius AJJ and Zondo J

Catchwords:

Contracts – Interpretation – *Prescription Act 1969 s 12* – Where parties entered into written loan agreement in 2007 – Where appellant advanced capital to respondent in February 2008 – Where loan agreement provided capital repayable within 30 days from date of written demand – Where appellant requested repayment in September 2013 – Where appellant applied to High Court in July 2014 for respondent to be placed into provisional liquidation under *Companies Act 2008 s 345* – Where respondent contended debt prescribed in 2011 – Where High Court dismissed application on basis liquidation inappropriate where genuine dispute about debt – Where majority of Supreme Court of Appeal dismissed appeal – Whether defence of prescription available – Whether contract points to intention to defer when debt became due – Whether appellant's claim prescribed.

Held (6:5): Appeal dismissed.

Costs

Harrielall v University of KwaZulu-Natal

Constitutional Court of South Africa: [\[2017\] ZACC 38](#)

Judgment delivered: 31 October 2017

Coram: Nkabinde ADCJ, Cameron, Froneman, Jafta, Khampepe, Madlanga, Mhlantla JJ, Mojabelo, Pretorius AJJ and Zondo J

Catchwords:

Costs – Constitutional matters – Proceedings against State – Where appellant applied to High Court for review of decision of university – Where application dismissed with costs – Where appeal to Supreme Court of appeal dismissed with costs – Whether courts below erred in failing to follow *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14.

Held (10:0): Appeal allowed in part.

Criminal Law

Glenn Roderick Holland v The Chief Executive of the Department of Corrections

New Zealand Supreme Court: [\[2017\] NZSC 161](#)

Judgment delivered: 27 October 2017

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

Catchwords:

Criminal law – Parole – *Parole Act* 2002 – Where appellant sentenced to total of three years imprisonment in 2012 for doing indecent act on child under 12 outside New Zealand and knowingly possessing objectionable material in terms of *Films, Videos and Publications Classification Act* 1993 – Where appellant had history of sexual offending and possession of child pornography – Where District Court imposed “extended supervision order” in 2016 for period of ten years under Pt 1A of *Parole Act* – Where Court of Appeal dismissed appeal against order – Whether Court of Appeal erred in failing to find District Court erred in taking into account offences under *Films, Videos and Publications Classification Act* when assessing whether pervasive pattern of serious sexual offending for purposes of s 1071(2) of *Parole Act*.

Held (5:0): Appeal dismissed.

Makhubela v The State; Matjeke v The State
Constitutional Court of South Africa: [\[2017\] ZACC 36](#)

Judgment delivered: 29 September 2017

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron, Froneman, Jafta, Khampepe, Madlanga, Mhlantla JJ, Mojapelo, Pretorius AJJ and Zondo J

Catchwords:

Criminal law – Common purpose – Evidence – Admissions – *Law of Evidence Amendment Act 1988* – Where appellants charged with offences based on doctrine of common purpose – Where High Court held statements by co-accused admissible as evidence against appellants – Where Full Court of High Court and Supreme Court of Appeal dismissed appeals – Whether Act altered common law position that admissions inadmissible against co-accused – Whether insufficient evidence to sustain appellants’ convictions – Requirements for common purpose liability.

Held (11:0): Appeals allowed in part.

Matjhabeng Local Municipality v Eskom Holdings Limited & Ors; Shadrack Shivumba Homu Mkhonto & Ors v Compensation Solutions (Pty) Limited

Constitutional Court of South Africa: [\[2017\] ZACC 35](#)

Judgment delivered: 26 September 2017

Coram: Nkabinde ADCJ, Cameron, Froneman, Jafta, Khampepe, Madlanga, Mhlantla JJ, Mojapelo, Pretorius AJJ and Zondo J

Catchwords:

Criminal law – Contempt of court – Standard of proof – Where appellants failed to comply with obligations under consent orders and rule nisi order – Where appellants convicted of contempt of court – Whether non-compliance with orders “wilful and mala fide” – Whether, where public officials accused of contempt, officials themselves rather than institutional structures for which officials are responsible must have wilfully or maliciously failed to comply with order – Whether consent order constitutes court order susceptible to contempt proceedings – Whether public officials can be found guilty of contempt in absence of joinder to proceedings.

Held (10:0): Appeals allowed.

HKSAR v Tam Ho Nam

Hong Kong Court of Final Appeal: [\[2017\] HKCFA 58](#)

Judgment delivered: 22 September 2017

Coram: Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Bokhary NPJ and Lord Neuberger NPJ

Catchwords:

Criminal law – Retrial – Provocation – *Homicide Ordinance* s 4 – Where appellant convicted of murdering girlfriend after re-trial – Where prosecution conceded on appeal that trial judge misdirected jury in respect of defence of provocation – Whether in interests of justice for further re-trial to be ordered.

Held (5:0): Appeal allowed.

Employment Law

P v Commissioner of Police of the Metropolis

United Kingdom Supreme Court: [\[2017\] UKSC 65](#)

Judgment delivered: 25 October 2017

Coram: Lady Hale, Lord Kerr, Lord Wilson, Lord Reed, Lord Hughes

Catchwords:

Employment law – Equal treatment – Effective remedy – EU Council Directive 2000/78/EC – Charter of Fundamental Rights of the European Union art 47 – *Equality Act* 2010 s 42(1) – Where appellant suffered post-traumatic stress disorder (“PTSD”) after being assaulted whilst serving as police officer – Where appellant subsequently involved in incident which led to her arrest – Where appellant asserted behaviour related to PTSD – Where police misconduct panel concluded appellant should be dismissed – Where appellant appealed to Employment Tribunal and Police Appeals Tribunal on basis dismissal constituted disability discrimination – Where Employment Tribunal struck out claim on basis panel was judicial body so claim barred by judicial immunity – Where Employment Appeal Tribunal and Court of Appeal upheld decision – Whether Court of Appeal erred in applying common law rule of judicial immunity – Whether judicial immunity inconsistent with right to effective and equivalent remedy under EU law – Whether *Equality Act* 2010 s 42 applies to exercise of disciplinary functions by misconduct panels.

Held (5:0): Appeal allowed.

David Brown & Anor v New Zealand Basing Ltd

New Zealand Supreme Court: [\[2017\] NZSC 139](#)

Judgment delivered: 13 September 2017

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

Catchwords:

Employment law – *Employment Relations Act 2000* – Age discrimination – Where appellants employed by respondent as Cathay Pacific pilots based in Auckland – Where employment agreements require appellants to retire at age of 55 – Where Employment Court held provisions of Act apply such that appellants cannot be required to retire by reason of attaining age of 55 – Where Court of Appeal allowed appeal on basis agreements governed by law of Hong Kong – Whether Court of Appeal erred in concluding age discrimination provisions of Act do not apply to employment agreements.

Held (5:0): Appeal allowed.

Affco New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Incorporated & Ors

New Zealand Supreme Court: [\[2017\] NZSC 135](#)

Judgment delivered: 7 September 2017

Coram: William Young, Glazebrook, O'Regan, McGrath and Arnold JJ

Catchwords:

Employment law – *Employment Relations Act 2000* s 82 – Where appellant and first respondent entered into collective agreement – Where collective agreement ceased to apply at end of December 2014 – Where appellant required workers who presented for work at beginning of 2015/2016 season to agree to new employment agreements containing terms substantially less favourable than terms of expired collective agreement – Where first respondent and workers brought claim alleging appellant unlawfully locked out workers – Where Employment Court upheld claim – Where Court of Appeal dismissed appeal – Whether Court of Appeal erred in finding appellant locked workers out within meaning of s 82 of Act – Whether workers who presented for work at beginning of 2015/2016 season were “employees” within meaning of s 6 – Whether term “employees” in s 82(1)(b) has same meaning as in s 6.

Held (5:0): Appeal dismissed.

Human Rights

Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah

United Kingdom Supreme Court: [\[2017\] UKSC 62](#)

Judgment delivered: 18 October 2017

Coram: Lord Neuberger, Lady Hale, Lord Clarke, Lord Wilson, Lord Sumption

Catchwords:

Human rights – Charter of Fundamental Rights of the European Union art 47 – European Convention on Human Rights art 6 – *State Immunity Act* 1978 – Where Moroccan nationals recruited to work for Libyan and Sudanese governments at London embassies dismissed from employment – Where Employment Tribunal dismissed claims on basis Libya and Sudan entitled to immunity under *State Immunity Act* – Where Employment Appeal Tribunal allowed appeals and held sections of Act incompatible with art 47 of Charter – Where Court of Appeal affirmed decision and declared sections of Act incompatible with right to access court under art 6 of Convention – Whether Court of Appeal erred in concluding provisions incompatible with art 47 of Charter and art 6 of Convention.

Held (5:0): Appeal dismissed.

Migration

Tran v Canada (Public Safety and Emergency Preparedness)

Supreme Court of Canada: [\[2017\] SCC 50](#)

Judgment delivered: 19 October 2017

Coram: McLachlin CJ, Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ

Catchwords:

Migration – Inadmissibility – Serious criminality – *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 – Where appellant convicted of offence and sentenced to one year conditional sentence of imprisonment to be served in community – Where maximum penalty for offence increased from 7 years to 14 years imprisonment after appellant committed offence but before conviction – Where delegate of Minister decided appellant inadmissible to Canada under s 36 due to serious criminality – Where primary judge held delegate's decision unreasonable – Where Court of Appeal allowed Minister's appeal – Whether conditional sentence is "term of imprisonment" for purposes of s 36 – Whether "maximum term of imprisonment" in s 36(1) refers to maximum sentence that could have been imposed at time of commission of offence or at time of admissibility determination.

Held (9:0): Appeal allowed.

Procedure

Reyes v Al-Malki & Anor

United Kingdom Supreme Court: [\[2017\] UKSC 61](#)

Judgment delivered: 18 October 2017

Coram: Lord Neuberger, Lady Hale, Lord Clarke, Lord Wilson, Lord Sumption

Catchwords:

Procedure – Jurisdiction – Diplomatic immunity – Vienna Convention on Diplomatic Relations 1961 arts 31, 37 – *Diplomatic Privileges Act* 1964 s 2 – Where respondents employed appellant as domestic servant – Where one of respondents was member of diplomatic staff of Saudi Arabian embassy – Where appellant brought proceedings in Employment Tribunal alleging mistreatment in course of employment and victim of trafficking – Where Court of Appeal held Employment Tribunal lacked jurisdiction because respondents entitled to diplomatic immunity under arts 31 and 37 as incorporated into law of United Kingdom by s 2 of Act – Whether claims fall within exception contained in art 31(1)(c) – Whether respondents validly served with claim.

Held (5:0): Appeal allowed; cross-appeal dismissed.

Montréal (City) v Dorval

Supreme Court of Canada: [\[2017\] SCC 48](#)

Judgment delivered: 13 October 2017

Coram: McLachlin CJ, Abella, Moldaver, Wagner, Gascon, Côté and Brown JJ

Catchwords:

Procedure – Prescription – *Civil Code of Québec*, arts 2925, 2930 – *Cities and Towns Act*, CQLR, c. C-19 s 586 – Where victim murdered by former spouse after reporting death threats to police – Where members of victim's family brought action against City of Montréal for damages alleging police negligently failed to act – Where trial judge concluded action prescribed under s 586 – Where Court of Appeal held action not prescribed – Whether action "based on obligation to make reparation for bodily injury caused to another" within meaning of art 2930 – Whether general three-year prescriptive period in *Civil Code of Québec* prevails over a six-month period provided for in *Cities and Towns Act*.

Held (5:2): Appeal dismissed.

Canada (Attorney General) v Fontaine
Supreme Court of Canada: [\[2017\] SCC 47](#)

Judgment delivered: 6 October 2017

Coram: McLachlin CJ, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ

Catchwords:

Procedure – Class actions – Settlement administration – Where class action brought by persons abused at residential schools settled by Indian Residential Schools Settlement Agreement – Where settlement agreement provided persons who suffered serious psychological consequences could bring claim under Independent Assessment Process (IAP) – Where application forms, hearing transcripts, medical reports, reasons for decisions and other documents generated in IAP held by Government – Where supervising judge held IAP records must be destroyed following 15 year retention period during which individual claimants could elect to have records preserved – Where order substantially upheld by majority of Ontario Court of Appeal – Whether IAP records are court records or government records subject to federal privacy, access to information, and archiving legislation – Whether supervising judge erred in concluding settlement agreement allowed for destruction of records – Whether supervising judge had jurisdiction to order destruction of documents.

Held (7:0): Appeal dismissed.

Duthie & Ors v Roose & Ors
New Zealand Supreme Court: [\[2017\] NZSC 152](#)

Judgment delivered: 6 October 2017

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

Catchwords:

Procedure – Statute of limitations – *Limitation Act* 1950 – Where respondents brought claim for damages on 1 May 2014 alleging accountants gave negligent advice as to tax consequences of proposed sale of land – Where agreement for sale of land entered into on 14 April 2008 and settled on 2 May 2008 – Where High Court concluded loss occurred on date agreement entered into and accordingly six-year limitation period elapsed before proceedings commenced – Where Court of Appeal allowed appeal – Whether Court of Appeal erred in concluding respondents first suffered loss on 2 May 2008 such that proceedings commenced in time.

Held (5:0): Appeal dismissed.

PricewaterhouseCoopers v Walker & Ors
New Zealand Supreme Court: [\[2017\] NZSC 151](#)

Judgment delivered: 6 October 2017

Coram: Elias CJ, Glazebrook, Arnold, O'Regan and Ellen France JJ

Catchwords:

Procedure – Abuse of process – Litigation funding – Where liquidators brought claim against appellant for breach of contract and negligence in carrying out functions as auditor – Where liquidators obtained funding for proceeding from third-party litigation funder – Where funding agreement conditional on litigation funder entering into agreement with secured creditor of company under which creditor assigned rights against company to litigation funder – Where appellant applied to High Court for stay of proceedings on basis funding agreement and assignment of rights by creditor to litigation funder were abuse of process – Where High Court refused application – Where Court of Appeal dismissed appeal – Whether Court of Appeal erred in upholding refusal to stay proceeding – Whether impermissible assignment of bare cause of action – Whether Supreme Court should deliver judgment where parties settled dispute after hearing.

Held (5:0): Appeal dismissed.

Canada (Attorney General) v Thouin & Anor; Ultramar Ltd & Ors v Thouin & Anor

Supreme Court of Canada: [\[2017\] SCC 46](#)

Judgment delivered: 28 September 2017

Coram: McLachlin CJ, Abella, Moldaver, Wagner, Gascon, Brown and Rowe JJ

Catchwords:

Procedure – Crown immunity – *Crown Liability in Proceedings Act*, R.S.C. 1985, c. C-50, s 27 – Statutory interpretation – Where respondents instituted class action against appellant oil companies and retailers – Where respondents' allegations already investigated by Competition Bureau of Canada – Where respondents sought permission to examine Bureau's chief investigator and order requiring Attorney General as Bureau's legal representative to disclose all intercepted communications and documents – Where Superior Court granted respondents' motion – Where Court of Appeal dismissed appeal – Whether Court of Appeal erred in concluding Crown immunity could not be relied on because of s 27.

Held (7:0): Appeal allowed.

Mtokonya v Minister of Police

Constitutional Court of South Africa: [\[2017\] ZACC 33](#)

Judgment delivered: 19 September 2017

Coram: Nkabinde ADCJ, Cameron, Froneman, Jafta, Khampepe, Madlanga, Mhlantla JJ, Mojabelo, Pretorius AJJ and Zondo J

Catchwords:

Procedure – Prescription – *Prescription Act* 1969 s 12 – Where appellant arrested by members of South African Police Service on 27 September 2010 – Where appellant detained for longer than 48 hours without being brought before court – Where appellant did not know conduct of police wrongful until July 2013 – Where appellant instituted proceedings against respondent for damages for wrongful arrest and detention – Where High Court held appellant’s claim had prescribed – Where Supreme Court of Appeal dismissed application for leave to appeal – Whether High Court erred in holding s 12(3) does not require creditor to have knowledge conduct of debtor giving rise to debt wrongful and actionable before prescriptive period may start running against creditor.

Held (7:3): Appeal dismissed.

Real Property

Penny’s Bay Investment Co Ltd v Director of Lands; Director of Lands v Penny’s Bay Investment Co Ltd

Hong Kong Court of Final Appeal: [\[2017\] HKCFA 60](#); [\[2017\] HKCFA 61](#); [\[2017\] HKCFA 62](#); [\[2017\] HKCFA 63](#); [\[2017\] HKCFA 64](#); [\[2017\] HKCFA 65](#); [\[2017\] HKCFA 66](#); [\[2017\] HKCFA 67](#); [\[2017\] HKCFA 68](#)

Judgment delivered: 16 October 2017

Coram: Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Fok PJ, Mr Justice Bokhary NPJ and Lord Neuberger NPJ

Catchwords:

Real property – Acquisition – Compensation – Calculation of compensation – Where land owned by Penny’s Bay Investment Company Limited (“PBIC”) enjoyed rights of access to sea – Where Government scheme authorised by Governor in Council in 1995 deprived PBIC of marine rights – Where PBIC entitled to compensation for loss of rights under *Foreshore and Sea-bed (Reclamations) Ordinance* – Where Government subsequently abandoned scheme in 1999 and instead promoted Disneyland Project – Where PBIC surrendered land to Government in 2001 for Disneyland Project – Where Court of Final Appeal held compensation for loss of marine rights should be paid on basis of difference in value of

land as at 1995 with and without marine rights – Where Lands Tribunal assessed difference – Where parties appealed from assessment to Court of Appeal – Whether Court of Appeal erred in concluding Lands Tribunal misconstrued expression “godown purposes” in original grant of land to PBIC – Whether Court of Appeal erred in concluding Lands Tribunal erred in calculating value of land without marine rights on assumption Government scheme would be carried out.

Held (5:0): Appeal dismissed; appeal allowed.

Tort

Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ

Constitutional Court of South Africa: [\[2017\] ZACC 37](#)

Judgment delivered: 31 October 2017

Coram: Zondo DCJ, Cameron, Froneman, Jafta JJ, Kathree Setiloane, Kollapen AJJ, Madlanga, Mhlantla, Theron JJ and Zondi AJ

Catchwords:

Tort – Negligence – Vicarious liability – Where respondent’s child disabled due to hospital staff negligence – Where appellant admitted vicarious liability for negligence – Where appellant submitted compensation for child’s future medical expenses should be paid when expenses arise not as lump sum – Where High Court rejected submission – Where Supreme Court of Appeal dismissed appeal – Whether common law “once and for all” rule precludes payment of future medical expenses in form sought by appellant – If yes, whether common law should be modified in accordance with ss 39(2) and 173 of Constitution.

Held (10:0): Appeal dismissed.

Teva Canada Ltd v TD Canada Trust

Supreme Court of Canada: [\[2017\] SCC 51](#)

Judgment delivered: 27 October 2017

Coram: McLachlin CJ, Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ

Catchwords:

Tort – Conversion – *Bills of Exchange Act*, R.S.C. 1985, c. B-4 – Where employee of pharmaceutical company drafted false cheque requisition forms for business entities with similar or identical names to company’s

real customers – Where company issued cheques based on false cheque requisition forms – Where employee deposited fraudulent cheques into bank accounts – Where company brought claim against collecting banks for conversion – Where primary judge held banks liable because payees not “fictitious or non-existing” within meaning of s 20(5) of Act – Where Court of Appeal allowed appeal – Whether Court of Appeal erred in concluding collecting banks should not bear loss resulting from fraud.

Held (5:4): Appeal allowed.

Armes v Nottinghamshire County Council

United Kingdom Supreme Court: [\[2017\] UKSC 60](#)

Judgment delivered: 18 October 2017

Coram: Lady Hale, Lord Kerr, Lord Clarke, Lord Reed, Lord Hughes

Catchwords:

Tort – Non-delegable duty – Vicarious liability – *Child Care Act 1980* – Where appellant placed in foster care by respondent – Where appellant physically, emotionally and sexually abused by foster parents – Where appellant brought claim alleging respondent breached non-delegable duty or vicariously liable for wrongdoing of foster parents – Where claim dismissed by High Court and Court of Appeal – Whether local authority under non-delegable duty to ensure reasonable care taken for safety of children while in care and control of foster parents – Application of *Cox v Ministry of Justice* [2016] UKSC 10.

Held (4:1): Appeal allowed.
