



OVERSEAS DECISIONS BULLETIN

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Volume 10 Number 2 (23 January 2013 – 18 March 2013)

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 [Constitutional Law](#): *Saskatchewan (Human Rights Commission) v Whatcott*

See also [Public Health and Welfare Law](#): *Sebelius, Secretary of Health and Human Services v Auburn Regional Medical Centre et al*

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Citizenship and Migration Law

Chaidez v United States

Supreme Court of the United States: [Docket No 11-820](#).

Judgment delivered: 20 February 2013.

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

Catchwords:

Citizenship and Migration law – Deportation and removal – The Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea (*Padilla*) – Whether *Padilla* applies retroactively to give a

person whose conviction became final before the decision in *Padilla* can benefit from it.

Criminal law – Habeas corpus – Retroactivity of decisions – *Teague* rule – *Teague* makes the retroactivity of the US Supreme Court's criminal procedure decisions turn on whether they are novel – Only when the Supreme Court applies a settled rule may a person avail herself of the decision on collateral review – Whether this was a novel decision.

Held (7-2): *Padilla* does not apply retroactively to cases already final on direct review.

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Civil Procedure

See also [**Constitutional Law**](#): *Manitoba Metis Federation Inc v Canada (Attorney General)*

See also [**Corporations Law**](#): *Sun Indalex Finance, LLC v United Steelworkers*

See also [**Corporations Law**](#): *VTB Capital Plc v Nutritek International Corp and Others*

See also [**Financial Services Law**](#): *Gabelli et al v Securities and Exchange Commission*

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See also [**Public Health and Welfare Law**](#): *Sebelius, Secretary of Health and Human Services v Auburn Regional Medical Centre et al*

R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another

Supreme Court of the United Kingdom: [\[2013\] UKSC 1](#).

Judgment delivered: 23 January 2013

Coram: Lord Neuberger PSC, Lord Hope DPSC, Lord Walker, Lord Mance, Lord Clarke, Lord Sumption, Lord Reed JJSC.

Catchwords:

Civil Procedure - Discovery - Legal professional privilege - Accountants advised taxpayer company on tax law - Inspector of

taxes served notices requiring disclosure of communications passing between taxpayer and accountants - Whether advice given by accountants on tax law protected by legal advice privilege - Whether material sought privileged - Taxes Management Act 1970 (c 9), s. 20(1)(3) (as substituted by Finance Act 1976 (c 40), s. 57(1), Sch. 6 and amended by Finance Act 1989 (c 26), s. 142).

Held: Appeal dismissed. Legal advice privilege universally understood as applying only to communications between a client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice.

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In the matter of L and B (Children)

Supreme Court of the United Kingdom: [\[2013\] UKSC 8](#).

Judgment delivered: 20 February 2013

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

Catchwords:

Civil Procedure - Judgment - Preliminary fact-finding hearing - Judge gave extempore judgment in preliminary fact-finding hearing in care proceedings - Judge determined father to be sole perpetrator of child's injuries - Decision recorded in order but order not sealed - Judge gave second judgment reversing earlier conclusion and stated unable to conclude which parent had caused injuries - Judge's power to revisit decision before order sealed - Whether to be exercised only in exceptional circumstances.

Held: Appeal allowed. The power of a judge to reverse his decision at any time before his order was drawn up and perfected by being sealed by the court is not limited to exceptional circumstances.

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Financial Services Authority (a company limited by guarantee) v Sinaloa Gold plc and others (Barclays Bank plc intervening)

Supreme Court of the United Kingdom: [\[2013\] UKSC 11](#).

Judgment delivered: 27 February 2013

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

Catchwords:

Civil Procedure – Injunction - Interlocutory - Undertaking as to damages - Financial Services Authority alleged defendants operated share scam and obtained interlocutory freezing injunction against them - Order included standard cross-undertaking to pay third parties' costs and losses - Authority subsequently sought to exclude losses from undertaking - Whether court to exercise discretion to require authority exercising law enforcement role to give undertaking to third parties.

Held: Appeal dismissed. No general rule that an authority like the Financial Services Authority acting pursuant to a public duty should be required to give such an undertaking, whether at the without notice or the on notice stage of proceedings, unless circumstances appeared which justified a different position: In the present case, there were no particular circumstances which did justify such a change of position.

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Competition Law

Federal Trade Commission v Phoebe Putney Health System Inc et al

Supreme Court of the United States: [Docket No 11-1160](#).

Judgment delivered: 19 February 2013.

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

Catchwords:

Competition law – Anticompetitive behaviour – Substantial lessening of competition – Availability of State-action immunity – Whether State legislation expressed a policy allowing Respondent health authority to make acquisitions that substantially lessened competition.

Public Health and Welfare Law – Hospital Authorities Law O.C.G.A. permits a hospital authority to exercise public and essential governmental function and delegates all powers necessary or convenient to carry out and effect the law's purpose – Power includes ability to acquire by purchase – whether acquisition was anti-competitive.

Held: Because Georgia has not clearly articulated and affirmatively expressed a policy allowing hospital authorities to make acquisitions that substantially lessen competition, state-action immunity does not apply.

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Constitutional Law

Quebec (Attorney-General) v A
Supreme Court of Canada: [2013 SCC 5.](#)

Judgment delivered: 25 January 2013

Coram: McLachlin CJ, LaBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Catchwords:

Constitutional law — Charter of rights — Right to equality — Discrimination based on marital status — De facto spouses — Whether provisions of the Civil Code of Québec dealing with family residence, family patrimony, compensatory allowance, partnership of acquests and obligation of spousal support infringe the guaranteed right to equality because their application is limited to private legal relationships between married spouses and civil union spouses — If so, whether infringement justified — Civil Code of Québec, S.Q. 1991, c. 64, arts. 401 to 430, 432, 433, 448 to 484, 585 — Canadian Charter of Rights and Freedoms, ss. 1, 15(1).

Constitutional law — Charter of rights — Right to equality — Analytical framework applicable to claim under s. 15(1) of Canadian Charter of Rights and Freedoms — Whether prejudice and stereotyping are separate elements into which claim of discrimination must fit — Distinction between two stages of analysis on right to equality, namely stage of review under s. 15 and that of justification under s. 1 — Stage of analysis at which freedom of choice and autonomy of spouses should be considered in relation to partition of property and support.

Family law — De facto spouses — Separation — Support — Spousal support — Family assets — De facto spouses not covered by protections granted in Civil Code of Québec to married and civil union spouses in relation to support and partition of property — Whether failure to grant same rights to de facto spouses infringes right to equality guaranteed by Canadian Charter of Rights and Freedoms — Civil Code of Québec, S.Q. 1991, c. 64, arts. 401 to 430, 432, 433, 448 to 484, 585.

Held: (Deschamps, Cromwell and Karakatsanis JJ) dissenting in part in the result and Abella J dissenting in the result). The appeals of the Attorney General of Quebec and B should be allowed and the appeal of A should be dismissed. Articles 401 to 430, 432, 433, 448 to 484 and 585 of the *Civil Code of Québec* are constitutional.

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Pontsho Doreen Motswagae and Others v Rustenburg Local Municipality and Another

Constitutional Court of South Africa: [\[2013\] ZACC 1.](#)

Judgment delivered: 7 February 2013

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

Catchwords:

Constitutional law – Human rights – Section 26(3) of the Constitution provides that no one may be evicted from their home, or have their home demolished without a court order – First respondent authorised construction work on property occupied by the first applicant – Whether section 26(3) of the Constitution confers a right not to be disturbed in the peaceful occupation and possession of one's home without a court order – Whether the conduct authorised by the first respondent is likely to result in unlawful interference with the right of the applicants to occupy or possess their homes peacefully.

Held: Appeal upheld, respondents restrained from performing or causing to be performed any construction work on the properties on which the applicants' homes are situated, without the applicants' written consent or a court order.

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Chafin v Chafin

Supreme Court of the United States: [Docket No 11-1347.](#)

Judgment delivered: 19 February 2013.

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

Catchwords:

Constitutional law – The Judiciary – Case or controversy – Standing – Parties must continue to have a personal stake in the ultimate disposition of the law suit, it is not enough that a dispute was alive when suit filed – Whether return of a child to a foreign country pursuant to Convention return order renders appeal of that order moot.

International law – Treaty Interpretation – Hague Convention on the Civil Aspects of Child Abduction.

Held: The return of a child to a foreign country pursuant to a Convention return order does not render an appeal of that order moot.

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Clapper, Director of National Intelligence et al v Amnesty International USA et al

Supreme Court of the United States: [Docket No 11-1025.](#)

Judgment delivered: 26 February 2013.

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

Catchwords:

Constitutional law – The Judiciary – Case or controversy – Standing – Separation of powers doctrine – Higher standard required when decision of the merits of the case would force the court to decide whether an action taken by one of the other two branches of federal government was unconstitutional.

Constitutional law – Federal government – Domestic security – Legislation authorising federal government to intercept foreign communications – Whether respondent has standing to question the validity of such legislation.

Held (5-4): Respondents do not have Article III standing.

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The New Zealand Maori Council and Others v The Attorney General and Others

Supreme Court of New Zealand: [\[2013\] NZSC 6.](#)

Judgment delivered: 27 February 2013.

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

Catchwords:

Constitutional law – Judicial review – Whether 2012 amendments to the State-Owned Enterprises Act and the Public Finance Act permit the Court to review the proposed partial privatisation of Mighty River Power Ltd, a state enterprise, for consistency with the principles of the Treaty of Waitangi.

Constitutional law – Treaty of Waitangi – Whether partial privatisation of Mighty River Power Ltd will prejudice Maori treaty claims to waters.

Held: Appeal unanimously dismissed. Judicial review available but the proposed partial privatisation of Mighty River Power Ltd will not impair to a material extent the Crown's ability to remedy any Treaty breach in respect of Maori interest in water.

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Saskatchewan (Human Rights Commission) v Whatcott
Supreme Court of Canada: [\[2013\] SCC 11](#).

Judgment delivered: 27 February 2013.

Coram: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, and Cromwell JJ.

Catchwords:

Constitutional law — Charter of Rights — Freedom of religion — Hate publications — Whether provincial human rights legislation prohibiting publications that expose or tend to expose to hatred, ridicule, belittle or otherwise affront dignity of persons on basis of prohibited ground infringes guaranteed freedom of religion — If so, whether infringement justified — Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 14(1)(b) — Canadian Charter of Rights and Freedoms, ss. 1, 2(a).

Administrative law — Appeals — Standard of review — Human rights tribunal found that hate publications infringe provincial human rights legislation and that provincial human rights legislation prohibiting hate publications is constitutional — Whether decision reviewable on standard of correctness or reasonableness — Whether tribunal made reviewable error.

Held: Appeal allowed in part. Statutory prohibition against hate speech at s 14(1)(b) of the Criminal Code infringes the freedom of expression guaranteed under s 2(b) of the Charter. This limitation is demonstrably justified in a free and democratic society. While the standard of review of the tribunal's decision on the constitutionality of s. 14 of the Code is

"correctness", the standard of review of the tribunal's decision that the flyers contravene that provision must be "reasonableness".

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Pilane and Another v Pilane and Another
Constitutional Court of South Africa: [\[2013\] ZACC 3.](#)

Judgment delivered: 28 February 2013

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

Catchwords:

Constitutional law – Freedom of expression, assembly and association – Dispute over Tribal authority – Whether interdict prohibiting the applicants from organising a meeting purporting to be a meeting of the Traditional Community or Motlhabe Tribal Authority without authorisation by the respondents is valid – Whether interdict prohibiting the applicants from conducting themselves in any manner contrary to the provisions of statute or customary or tribal law was validly made – Whether interdict prohibiting the applicants from holding themselves out as a traditional authority was validly made – Whether finding that all three interdicts were invalid erodes rule of law.

Customary law – Traditional communities – Circumstances in which a *Kgotha Kgothe* can be convened – Whether "Bakgatla-Ba-Kautlwale" and "Bakgatla-Ba-Motlhabe" are forms of authority or signifiers of ancestral lineage – Consequences of this.

Held (8-2): Appeal upheld. Three interdicts set aside as invalidly curtailing freedom of expression, assembly and association.

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Ngewu and Another v Post Office Retirement Fund and Others
Constitutional Court of South Africa: [\[2013\] ZACC 4.](#)

Judgment delivered: 7 March 2013

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

Catchwords:

Constitutional law – Section 9 of the Constitution guarantees equality before the law and equal protection and benefit of the law – Divorcees of members of the Pension Funds Act and the Government Employees Pension Law can claim their share of their former spouse's pension interest at the date of divorce – Divorcees of members of the Post Office Retirement Fund cannot claim their entitlement until their former spouse terminates their membership in the fund – Whether this discrimination breaches section 9 of the Constitution.

Held: Yes. The differentiation clearly violates s 9 of the Constitution. Legislation invalid. Declaration of invalidity suspended for eight months for the legislature to cure the defect.

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Manitoba Metis Federation Inc v Canada (Attorney General)

Supreme Court of Canada: [\[2013\] SCC 14](#).

Judgment delivered: 8 March 2013

Coram: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Catchwords:

Constitutional law – Aboriginal law — Métis — Crown law — Honour of the Crown — Canadian government agreed in 1870 to grant Métis children shares of 1.4 million acres of land and to recognise existing Métis landholdings — Promises set out in ss. 31 and 32 of the Manitoba Act, 1870, a constitutional document — Errors and delays interfered with division and granting of land among eligible recipients — Whether Canada failing to comply with the honour of the Crown in the implementation of ss. 31 and 32 of the Manitoba Act, 1870.

Constitutional law – Aboriginal law — Métis — Fiduciary duty — Canadian government agreed in 1870 to grant Métis children shares of 1.4 million acres of land and to recognize existing Métis landholdings — Promises set out in ss. 31 and 32 of the Manitoba Act, 1870, a constitutional document — Errors and delays interfered with division and granting of land among eligible recipients — Whether Canada in breach of fiduciary duty to Métis.

Civil procedure – Limitation of actions — Declaration — Appellants seeking declaration in the courts that Canada breached obligations to implement promises made to the Métis people in the Manitoba Act, 1870 — Whether statute of limitations can prevent courts from issuing declarations on the constitutionality of Crown conduct — Whether claim for declaration barred by laches.

Civil procedure — Parties — Standing — Public interest standing — Manitoba Act, 1870, providing for individual land entitlements — Whether federation advancing collective claim on behalf of Métis people should be granted public interest standing.

Held (6-2): The appeal should be allowed in part. The MMF should be granted standing. The action advanced is a collective claim for declaratory relief for the purposes of reconciling the descendants of the Métis people of the Red River Valley and Canada. It merits allowing the body representing the collective Métis interest to come before the court. The federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown. No fiduciary duty exists.

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Contract Law

Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc
Supreme Court of the United Kingdom: [\[2013\] UKSC 3](#).

Judgment delivered: 23 January 2013

Coram: Lord Hope DPSC, Lord Mance, Lord Clarke, Lord Reed, Lord Carnwath JJSC.

Catchwords:

Contract - Construction - Deed of covenant - Provision for payments to be made by banking group to charitable foundation by reference to group profit or loss before taxation "shown in the audited accounts" - Change in accounting regulations required negative goodwill to be included in pre-tax profit in group's consolidated income statement - Group including such item as unrealised gain in income statement - Whether deed to be construed in light of parties' original intentions and purposes - Whether negative goodwill to be included for purposes of calculating payments under deed - Whether equitable adjustment available to exclude negative goodwill from calculation.

Held: Appeal allowed. Having regard to the landscape, matrix and aim of the 1997 deed and its predecessors, the deeds, when made, had been and could only have been concerned with the realised profits or losses before taxation for the relevant accounting period.

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Corporations Law

Sun Indalex Finance, LLC v United Steelworkers
Supreme Court of Canada: [\[2013\] SCC 6.](#)

Judgment delivered: 1 February 2013

Coram: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

Catchwords:

Corporations Law — Pensions — Bankruptcy and Insolvency — Priorities — Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Pension funds did not have sufficient assets to fulfil pension promises made to plan members — Company entering into debtor in possession ("DIP") financing allowing it to continue to operate — CCAA court granting priority to DIP lenders — Proceeds of sale of business insufficient to pay back DIP lenders — Whether pension wind-up deficiencies subject to deemed trust — If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of federal paramountcy — Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), 57(4), 75(1)(a), 75(1)(b) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Equity — Pensions — Trusts — Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA — Pension funds did not have sufficient assets to fulfil pension promises made to plan members — Whether pension wind-up deficiencies subject to deemed trust — Whether company as plan administrator breached fiduciary duties — Whether pension plan members are entitled to constructive trust.

Civil Procedure — Costs — Appeals — Standard of review — Whether Court of Appeal erred in costs endorsement concerning one party.

Held (5-2): Appeal allowed.

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VTB Capital Plc v Nutritek International Corp and Others
Supreme Court of the United Kingdom: [\[2013\] UKSC 5.](#)

Judgment delivered: 6 February 2013

Coram: Lord Neuberger PSC, Lord Mance, Lord Clarke, Lord Wilson, Lord Reed JJSC.

Catchwords:

Corporations Law - Corporate personality - Piercing corporate veil - Claimant induced to enter loan agreement with company by representations made by third parties - Company controlled by third parties - Claimant alleged representations dishonest - Whether appropriate to pierce corporate veil - Whether third parties liable with company for breach of agreement.

Civil Procedure - Claim form - Service out of jurisdiction - Application to set aside permission to serve out of jurisdiction - Action in tort by English claimant against Russian defendants arising from failure to repay loan - Torts allegedly committed in England and governed by English law - Whether English court clearly appropriate forum for trial of action - Whether service out of jurisdiction to be permitted - CPR r 6.36, Practice Direction 6B, para 3.1(9)(a).

Held: Appeal re permission to serve out of jurisdiction dismissed. Permission to serve out of jurisdiction should only be granted where the court was satisfied that England was the proper place in which to bring the claim. The onus lay on the claimant to establish that the courts of that jurisdiction were clearly the appropriate forum for trial of the action. Appeal re permission to amend particulars of claim dismissed.

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Joint Administrators of Heritable Bank plc v Winding up Board of Landsbanki Islands hf

Supreme Court of the United Kingdom: [\[2013\] UKSC 13.](#)

Judgment delivered: 27 February 2013

Coram: Lord Hope DPSC, Lord Walker, Lord Kerr, Lord Reed, Lord Carnwath JJSC.

Catchwords:

Corporations Law – Insolvency - Winding up - Credit institution - Insolvencies of credit institutions in European Economic Area member states - Icelandic and Scottish banks subject to insolvency proceedings in Iceland and Scotland respectively - Each claimed in other's insolvency - Scottish bank's claim in Icelandic proceedings extinguished after being withdrawn - Whether claim thereby extinguished for purposes of Scottish proceedings - Whether claim capable of being set off against Icelandic bank's claims in Scottish proceedings - Credit

Institutions (Reorganisation and Winding up) Regulations 2004 (SI 2004/1045), regs 5(1), 22(2)(3)(d) - Council Directive 2001/24/EC, art 10(2).

Held: Appeal dismissed.

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Criminal Law

See also [Citizenship and Migration Law](#): *Chaidez v United States*

R v Sanichar

Supreme Court of Canada: [\[2013\] SCC 4](#).

Judgment delivered: 24 January 2013

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

Catchwords:

Criminal law — Appeals — Trial judge convicted accused of several charges involving physical and sexual abuse — Court of Appeal set aside convictions and ordered new trial — Whether appeal raises question of law — Whether Court of Appeal erred in setting aside convictions and ordering new trial.

Held: (Fish J dissenting): The motion to quash the appeal should be dismissed. The appeal should be allowed and the convictions should be restored.

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B (Algeria) (FC) v Secretary of State for the Home Department
Supreme Court of the United Kingdom: [\[2013\] UKSC 4](#).

Judgment delivered: 30 January 2013

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

Catchwords:

Criminal law – Contempt of court - Sentence - Civil contempt - Detainee disobeyed order to disclose true identity to Special

Immigration Appeals Commission during appeal against deportation - Detainee admitted contempt of court but adduced medical evidence that prison sentence likely to lead to recurrence of mental illness giving rise to inhuman or degrading treatment contrary to Convention right - Commission rejected evidence and imposed four-month sentence of imprisonment - Court of Appeal reversed commission's factual finding but rejected claim of breach of Convention right and confirmed sentence as not manifestly excessive - Whether open to Court of Appeal itself to conduct fresh assessment of appropriate sentence - Whether permissible to conduct assessment by reference to whether lower court's sentence manifestly excessive - Whether permissible to impose sentence unlikely to have coercive effect.

Held: Appeal dismissed. A sentence imposed for contempt of court could be justified on the basis that it was necessary in order to punish the contemnor, even though it was unlikely to have any coercive effect.

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Bailey v United States

Supreme Court of the United States: [Docket No 11-770.](#)

Judgment delivered: 19 February 2013.

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

Catchwords:

Criminal law – Fourth Amendment – Right to be free from unreasonable search and seizure – Standard of probable cause – Whether rule in *Summers*, which allows detention if incidental to search warrant as an exception to probable cause under the Fourth Amendment operates in circumstances where the accused is a former occupant of the premises, is found away from the scene of the search and there is no danger to the safety of the officers.

Held (6-3): The rule in *Summers* is limited to the immediate vicinity of the premises to be searched and does not apply here, where Bailey was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question.

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Florida v Harris

Supreme Court of the United States: [Docket No 11-817.](#)

Judgment delivered: 19 February 2013.

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

Catchwords:

Criminal Law – Search and seizure – Warrantless searches – Dog sniff searches – Test of probable cause – Whether “fair probability” is the correct standard.

Evidence – Presumptions – Whether evidence of a dog’s satisfactory performance in a narcotics certification or training program can itself provide sufficient reason to trust his alert.

Held: Because training and testing records supported Aldo’s reliability in detecting drugs and Harris failed to undermine that evidence, Wheetley had probable cause to search Harris’s truck.

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Henderson v United States

Supreme Court of the United States: [Docket No 11-9307](#).

Judgment delivered: 20 February 2013.

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

Catchwords:

Criminal law – Appeals – Standard of Review – Meaning of “plain error” – Defendant sentenced to 60 month imprisonment – After appellate review but before sentence Supreme Court issued a declaration making sentence unlawful – Defendant’s counsel failed to object in trial court – Federal court of appeals will not normally correct a legal error made in criminal trial court proceedings unless the defendant first brought the error to the trial courts attention –A plain error that affects substantial rights may be considered at time of appellate review notwithstanding it was not brought to the trial court’s attention – Whether this situation was a “plain error”.

Held: Regardless of whether a legal question was settled or unsettled at the time of trial, an error is “plain” within the meaning of Rule 52(b) so long as the error was plain at the time of appellate review.

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Johnson v Williams

Supreme Court of the United States: [Docket No 11-465](#).

Judgment delivered: 20 February 2013.

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

Catchwords:

Criminal law – Habeas corpus – Review – Standard of review – Contrary and unreasonable standard – Whether a federal habeas court may grant relief to a state prisoner whose claim has already been adjudicated on the merits in State court – Whether disqualification of juror during trial meant that adjudication was not conducted on the merits.

Evidence – Presumptions – Whether §2254(d) requires a state court to give reasons before its decision can be deemed to have been adjudicated on the merits.

Held: For purposes of §2254(d), when a state court rules against a defendant in an opinion that rejects some of the defendant's claims but does not expressly address a federal claim, a federal habeas court must presume, subject to rebuttal, that the federal claim was adjudicated on the merits.

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Evans v Michigan

Supreme Court of the United States: [Docket No 11-1327](#).

Judgment delivered: 20 February 2013.

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

Catchwords:

Criminal law – Double jeopardy – Trial court acquitted petitioner of charge of arson because the State had failed to prove that a building petitioner allegedly burned was not a dwelling – Court mistakenly believed this was an element of Michigan Compiled Laws § 750.73 – Whether doctrine of double jeopardy protects individual from being tried for same conduct a second time when trial court made an error of law.

Held (8-1): The Double Jeopardy Clause bars retrial for Evans' offense.

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J.F. v The Queen

Supreme Court of Canada: [\[2013\] SCC 12](#).

Judgment delivered: 1 March 2013

Coram: McLachlin C.J. and LeBel, Fish, Rothstein, Cromwell Moldaver and Moldaver JJ.

Catchwords:

Criminal law – Offences — Conspiracy — Parties to offences – Whether a person can be a party to the offence of conspiracy — Whether party liability attaches to someone who knows of conspiracy and does something for the purpose of furthering unlawful object — Whether trial judge erred in instructions to jury pertaining to conspiracy — Whether curative proviso should be applied to uphold conviction — Co-conspirators' exception to the hearsay rule — Criminal Code, R.S.C. 1985, c. c-46, ss. 21(1), 465(1), 686(1)(b)(iii).

Held: Appeal dismissed. Party liability to conspiracy is an offence known to Canadian law. Unlike attempted conspiracy, it does not involve stacking one form of inchoate liability upon another, and does not suffer from remoteness.

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R v Pham

Supreme Court of Canada: [\[2013\] SCC 15](#).

Judgment delivered: 14 March 2013

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

Catchwords:

Criminal law — Sentencing — Considerations — Collateral consequences of sentence — Accused sentenced to two years' imprisonment — Sentencing judge not made aware that sentence would result in loss of right to appeal removal order under Immigration and Refugee Protection Act — Court of Appeal refused to vary sentence to two years less a day — What weight should be attributed to collateral consequences in sentencing — Whether sentence can be varied by appellate court on basis that accused would face collateral consequences — Criminal Code, R.C.S. 1985, c. C-46, ss. 718.1, 718.2.

Held: Appeal allowed and sentence of imprisonment reduced to two years less a day.

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Customary Law

See also [Constitutional Law](#): *Pilane and Another v Pilane and Another*

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Discrimination Law

O'Brien v Ministry of Justice (Formerly the Department of Constitutional Affairs)

Supreme Court of the United Kingdom: [\[2013\] UKSC 6.](#)

Judgment delivered: 6 February 2013

Coram: Lord Hope DPSC, Lord Walker, Lady Hale, Lord Clarke, Lord Dyson JJSC.

Catchwords:

Discrimination - Part-time worker - Judicial office holder - Part-time fee-paid recorder - Whether in "employment relationship" - No pension provision for recorders - Whether justified - Whether recorder entitled to pro rata pension of full-time salaried judge - Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551), regs 5, 17 - Council Directive 97/81/EC, Annex, cl 2.1.

Held: Appeal allowed.

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Equity

See also [Corporations Law](#): *Sun Indalex Finance, LLC v United Steelworkers*

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Evidence

See also [Criminal Law](#): *Florida v Harris*

See also [Criminal Law](#): *Johnson v Williams*

R v Named Person B

Supreme Court of Canada: [\[2013\] SCC 9.](#)

Judgment delivered: 22 February 2013

Coram: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Catchwords:

Evidence — Informer privilege — Individual with informer privilege with one police force provided information relating to himself and others to second police force — Whether individual has status of police informer with second police force — Whether implicit promise of confidentiality by second police force exists as result of nexus between two police forces.

Held (6-2): Appeal allowed. B had informer privilege with second police force.

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Extradition

Zakrzewski v The Regional Court in Lodz, Poland

Supreme Court of the United Kingdom: [\[2013\] UKSC 2.](#)

Judgment delivered: 23 January 2013

Coram: Lord Neuberger PSC, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption JJSC.

Catchwords:

Extradition - European arrest warrant - Validity - Polish judicial authority issued European arrest warrant for convicted person's extradition to serve sentences of imprisonment - Warrant

specifying sentences imposed - Polish court subsequently imposed cumulative sentence combining original sentences - Whether warrant containing accurate particulars of sentence imposed - Whether imposition of cumulative sentence renders warrant invalid - Whether continuation of proceedings after order imposing cumulative sentence is an abuse of process - Extradition Act 2003 (c 41), s. 2(6)(e).

Held: Appeal dismissed as the convicted person had returned voluntarily to Poland after the argument on the appeal and had been arrested there, resulting in the warrant having been withdrawn by the requesting court. In any case the validity of an European arrest warrant depended on whether the prescribed particulars were to be found in it, and not on whether they were correct.

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Family Law

See also [Constitutional Law](#): *Quebec (Attorney-General) v A*

In the matter of J (Children)

Supreme Court of the United Kingdom: [\[2013\] UKSC 9.](#)

Judgment delivered: 20 February 2013

Coram: Lord Hope DPSC, Lady Hale, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed, Lord Carnwath JJSC.

Catchwords:

Family law – Children - Care proceedings - Threshold conditions - Judge found that child suffering significant harm caused by either mother or father or both - Identity of perpetrator not proven on balance of probabilities - Mother subsequently formed relationship with different man and cared for his two children - Mother had further child - Local authority brought care proceedings in respect of all three children - Whether children "likely to suffer significant harm" - Whether court able to rely on judge's finding in previous proceedings - Children Act 1989 (c 41), s. 31(2).

Held: Appeal dismissed. Since the purpose of the threshold criteria in section 31(2) of the Children Act 1989 for the making of a care or supervision order in respect of a child was to protect both the child and his family from unwarranted interference by the state, where the court had to determine whether the threshold had been crossed by reason of likelihood of future harm to a child the prediction of future harm had to

be based upon findings of fact proven on the balance of probabilities. Because the real possibility that a person, whom a court had previously found to be one of a pool of possible perpetrators of harm which had been inflicted on a child, had caused that harm did not establish that he or she had in fact done so it could not by itself, found a prediction of likelihood of future harm to a child by that person.

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Financial Services Law

In the matter of Digital Satellite Warranty Cover Limited and another v Financial Services Authority
Supreme Court of the United Kingdom: [\[2013\] UKSC 7.](#)

Judgment delivered: 13 February 2013

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

Catchwords:

Financial services - Insurance - Regulated activities - Provision of extended warranties for malfunction of satellite television equipment - Providers of warranties undertaking repair or replacement of faulty equipment but under no obligation to pay money for costs incurred - Financial Services Authority contended that warranties were contracts of general insurance - Whether benefits in kind insurance effected and carried on by providers falls within any class of general insurance listed in domestic legislation - Whether classes limited to those set out in European Directive given effect to by domestic legislation - Whether warranties are contracts of general insurance - Whether providers breach general prohibition - Financial Services and Markets Act 2000 (c 8), s. 19 - Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544), art 3(1), Sch. 1, Pt I, para 16(b).

Held: Appeal dismissed.

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Gabelli et al v Securities and Exchange Commission
Supreme Court of the United States: [Docket No 11-1274.](#)

Judgment delivered: 27 February 2013.

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

Catchwords:

Financial services – Securities law – US Securities and Exchange Commission – As part of enforcement actions, the Securities and Exchange Commission may seek civil penalties, 15 U.S.C.S. § 80b-9(e), (f), in which case a five year statute of limitations applies – Except as if provided otherwise, an action for the enforcement of any civil penalty shall not be entertained unless commenced within five years from the date when the claim first accrued, §2462 – Whether action is time barred.

Civil Procedure – Statutes of limitations – Accrual of actions – Discovery rule – Whether the discovery rule applies in the context where the plaintiff is the government bringing an enforcement action for civil penalties.

Held: The five-year clock in §2462 begins to tick when the fraud occurs, not when it is discovered.

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Amgen Inc et al v Connecticut Retirement Plans and Trust Funds
Supreme Court of the United States: [Docket No 11-1085](#).

Judgment delivered: 27 February 2013.

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

Catchwords:

Financial services – Securities Law – Liability – Securities of Exchange Act of 1934 § 10(b) actions – Whether to recover damages in a private securities fraud action a plaintiff must prove (among other elements) (1) a material misrepresentation or omission by the defendant.

Held (6-3): Proof of materiality is not a prerequisite to certification of a securities fraud class action seeking money damages for alleged violations of §10(b) and Rule 10b-5.

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International Law

See also [**Constitutional Law**](#): *Chafin v Chafin*

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Landlord and Tenant

Daejan Investments Limited v Benson and others

Supreme Court of the United Kingdom: [\[2013\] UKSC 14](#).

Judgment delivered: 6 March 2013

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

Catchwords:

Landlord and tenant — Covenant — Service charge — Landlord's failure to comply with statutory consultation requirements prior to major works — Landlord thereby precluded from recovering full cost of works from tenant unless leasehold valuation tribunal dispensed with consultation requirements — Tribunal to make decision by reference to actual prejudice caused to tenants — Whether open to tribunal to grant dispensation on terms — Landlord and Tenant Act 1985, ss 20(1), 20ZA(1) (as substituted by Commonhold and Leasehold Reform Act 2002, s 151) — Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987), Sch 4, Pt 2, para 4(5)

Held (3-2): Appeal allowed. Court granted Daejan dispensation from the Requirements on terms that (i) the respondents' aggregate liability to pay for the works be reduced by £50,000, and (ii) Daejan pay the reasonable costs of the respondents in relation to the proceedings before the LVT.

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Patent Law

See also [**Statutory Interpretation**](#): *Werit (UK) Limited v Schutz (UK) Limited; Werit (UK) Limited v Schutz (UK) Limited No 2*

Gunn et al v Minton

Supreme Court of the United States: [Docket No 11-1118](#).

Judgment delivered: 20 February 2013.

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

Catchwords:

Patent law – Jurisdiction and review – Subject matter jurisdiction – United States Code §1338 grants Federal Courts exclusive jurisdiction over cases arising under any Act of Congress relating to patents – Meaning of “arising under” – Whether §1338 deprives State courts of subject matter jurisdiction over malpractice claims relating to patent law.

Civil procedure – Jurisdiction – subject matter jurisdiction – Whether State courts enjoy jurisdiction over patent law claims.

Torts – Malpractice – Elements that must be proved to found a malpractice claim.

Held: Section §1338(a) does not deprive the state courts of subject matter jurisdiction over Minton’s malpractice claim.

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Property Law

Antrim Truck Centre Ltd v Ontario (Transportation)

Supreme Court of Canada: [\[2013\] SCC 13](#).

Judgment delivered: 7 March 2013

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

Catchwords:

Property law – Expropriation — Injurious affection — Nuisance — Compensation — Construction of new highway diverting traffic away from appellant’s truck stop business — Ontario Municipal Board awarded appellant compensation for injurious affection for business loss and loss of market value of property — Court of Appeal dismissed claim on basis that Board failed to balance competing rights adequately — Whether interference with private enjoyment of land was unreasonable when resulting from construction serving important public purpose — Whether Court of Appeal erred in finding that Board’s application of law of nuisance was unreasonable — Expropriation Act, R.S.O. 1990, c. E.26.

Held: Appeal allowed. The interference with the appellant's land caused by the construction of the new highway inflicted significant and permanent loss.

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Public Health and Welfare Law

See also [Competition Law](#): *Federal Trade Commission v Phoebe Putney Health System Inc et al*

Sebelius, Secretary of Health and Human Services v Auburn Regional Medical Centre et al

Supreme Court of the United States: [Docket No 11-1231](#).

Judgment delivered: 22 January 2013.

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

Catchwords:

Public Health and Welfare Law – Social Security – Medicare – Providers – Reimbursement – Respondent hospitals sought review of ten year old Medicare reimbursement payments – Statute of limitations was limited at 180 days with equitable tolling extension up to three years for good cause – Whether equitable tolling could apply to internal appeal deadline.

Civil Procedure – Legislation – Statute of Limitations – Whether equitable tolling could extend the statute of limitations.

Administrative Law – Judicial review – Standards of review – Statutory interpretation – Whether statute of limitations is jurisdictional or not – If yes, then section 1395oo(a)(3) unable to be extended beyond time-limit and relief sought would be denied.

Held: Statute of limitations was not jurisdictional and equitable tolling available. Decision of D.C. Circuit court reversed and case remanded for further proceedings.

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Statutory Interpretation

National Director of Public Prosecutions v Elran
Constitutional Court of South Africa: [\[2013\] ZACC 2.](#)

Judgment delivered: 19 February 2013

Coram: Mogoeng CJ, Mosenke DCJ, Jafta, Nkabinde, Yacoob, Cameron, Froneman, Van der Westhuizen, Zondo JJ.

Catchwords:

Statutory interpretation – Interpretation of section 44 of the Prevention of Crime Act (POCA) – POCA authorises a High Court to grant a preservation order in respect of property believed on reasonable grounds to be proceeds or instrumentalities of criminal offences – Effect of a preservation order is that no one may deal in any manner with property forming the subject matter of the order – Section 44 provides that a High Court may permit a payment of reasonable living and legal expenses from the property that is subject to a preservation order – In 2006 applicant obtained an order that preserved property of the respondent – Respondent applied for living and legal expenses – Whether section 44(2) requires "full disclosure" of interest in property

Held (5-4): Section 44(2) creates two preconditions for the exercise of the power conferred in section 44(1). The first is need. The second is disclosure. The respondent did not disclose fully his interest in property and as such appeal is allowed.

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The London Borough of Camden v Sharif (FC)
Supreme Court of the United Kingdom: [\[2013\] UKSC 10.](#)

Judgment delivered: 20 February 2013

Coram: Lord Hope DPSC, Lord Walker, Lady Hale, Lord Kerr, Lord Carnwath JJSC.

Catchwords:

Statutory interpretation – Housing Act 1966 imposes a duty on local housing authorities to provide accommodation for those who are, or claim to be, homeless or threatened with homelessness – Appellant provided accommodation for the respondent, her father and sister (aged 14) – Appellant sought to move respondent and family members to two units – units were separated by only a few yards – Respondent refused, claiming unsuitable for her father who suffered from a certain medical condition – Court of Appeal

held that housing the family in two units was not "suitable" per section 176 of the Act because of father's medical condition – Proper construction of "suitable".

Held: Appeal allowed. Section 176 of the Housing Act 1966 does not preclude housing authorities from offering a homeless family two separate units of accommodation provided they are located so they enable the family to live "together" in practical terms.

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Marx v General Revenue Corp.

Supreme Court of the United States: [Docket No 11-1175.](#)

Judgment delivered: 26 February 2013.

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

Catchwords:

Statutory interpretation – Federal Rules of Civil Procedure Rule 54(d)(1) gives district courts discretion to award costs to prevailing defendant's unless a federal statute provides otherwise – Whether section §1692k(a)(3), which awards costs to defendants for 'bad faith' or harassment provides otherwise.

Held (7-2): Section §1692k(a)(3) is not contrary to, and, thus, does not displace a district court's discretion to award costs under, Rule 54(d)(1).

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Werit (UK) Limited v Schutz (UK) Limited; Werit (UK) Limited v Schutz (UK) Limited No 2

Supreme Court of the United Kingdom: [\[2013\] UKSC 16.](#)

Judgment delivered: 13 March 2013

Coram: Lord Neuberger PSC, Lord Walker, Lady Hale, Lord Mance, Lord Kerr JJSC.

Catchwords:

Statutory interpretation – Patents Act 1977 – Proper interpretation of section 60(1)(a) which provides that a person infringes a patent for a particular product if he "makes" the product without the consent of the patentee – Schutz manufactures intermediate bulk containers (IBC) used by

suppliers of liquids for transport of liquids – Schutz also manufactures bottles to be placed inside the IBCs – IBCs allow for re-bottling – Werit manufactures bottles – Delta acquires discarded IBCs originally put on the market by Schutz and replaces the original bottles with Werit bottles – These bottles then compete with Schutz IBC and bottles – Whether Delta “makes” a patented article when it removes a damaged Schutz bottle from a Schutz cage, and replaces it with a Werit bottle.

Patents – Statutory interpretation – Meaning of section 60(1)(a).

Held: Appeal allowed. Delta did not “make” the patented article contrary to section 60(1)(a) of the 1977 Act.

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Hattingh and Others v Juta

Constitutional Court of South Africa: [\[2013\] ZACC 5.](#)

Judgment delivered: 14 March 2013

Coram: Mogoeng CJ, Mosenke DCJ, Yacoob, Cameron, Froneman, Jafta, Nkabinde, Skweyiya, Van der Westhuizen and Zondo JJ.

Catchwords:

Statutory interpretation – Section 6(2)(d) of the Extension of Security of Tenure Act (ESTA) provides that an occupier of premises on another’s land has a right to family life in accordance with the culture of that family – Respondent permits applicant to live indefinitely in premises on his land – Whether applicant’s two adult sons, daughter-in-law and youngest son can remain on respondent’s property indefinitely under section 6(2)(d) of ESTA – Respondent required second cottage to be used by farm manager – Balancing of landowner’s rights against right of occupiers.

Held: Appeal dismissed. The right to family life allows an occupier to enjoy as much of a family life as possible when this will not be unjust and inequitable to the landowner. This will depend on the facts of each case. In this case it was just and equitable that the applicants be evicted.

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Taxation

Her Majesty’s Revenue and Customs v Amia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)

Supreme Court of the United Kingdom: [\[2013\] UKSC 15](#).

Judgment delivered: 13 March 2013

Coram: Lord Hope DPSC, Lord Walker, Lord Wilson, Lord Reed, Lord Carnwath JJSC.

Catchwords:

Taxation – VAT – Service charge – Respondent operates Nectar loyalty card scheme – Scheme involves three separate contracts; between respondent and consumer, respondent and sponsor, and respondent and redeemer – Sponsor pays respondent an agreed sum per loyalty point issued on which respondent charges VAT – Respondent pays the redeemers a “service charge” at an agreed value per point redeemed – The redeemers charge VAT on this service charge – Whether the respondent, under the relevant EU legislation, is entitled to deduct as input tax the VAT element of the service charge

Held (3-2): Minded to dismiss the appeal but invite the parties to file written submissions as to the precise form of the order to be made.

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Torts

See also [Patent Law](#): *Gunn et al v Minton*

Levin v United States

Supreme Court of the United States: [Docket No 11-1351](#).

Judgment delivered: 4 March 2013.

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

Catchwords:

Torts – Public entity liability – Federal Tort Claims Act - Exclusion of liability – Intentional torts – The Federal Tort Claims Act, 28 U.S.C.S. §§ 1346(b), 2671-2680, waives the Government's sovereign immunity from tort suits except for certain intentional torts, including battery. 28 U.S.C.S. § 2680(h) – Petitioner veteran sued respondent United States for battery, alleging Navy doctor performed cataract surgery on him after he withdrew consent – Gonzalez Act 10 U.S.C.S. § 1089 declares that the

intentional tort exception to the FTCA shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical functions – Whether Congress intended that the Gonzalez Act abrogated the FTCA's intentional tort exception.

Held: The Gonzalez Act direction in §1089(e) abrogates the Federal Tort Claims Act's intentional tort exception and therefore permits Levin's suit against the United States alleging medical battery by a Navy doctor acting within the scope of his employment

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