

# serle court in 2009

2009 HAS BEEN ANOTHER VERY BUSY YEAR WITH CHAMBERS INVOLVED IN CASES ACROSS THE WHOLE SPECTRUM OF COMMERCIAL AND CHANCERY EXPERTISE.

**We have been involved in a number of the year's major civil fraud and commercial litigation cases confirming Chambers & Partners' view that Serle Court 'boast a collection of individuals who can go toe to toe with the best that the more traditional commercial sets have to offer'.**

Alan Boyle QC and Richard Walford appeared in the continuing saga of *Yugraneft v Abramovich* (2008, Christopher Clarke J), a major multi jurisdiction case concerning the affairs of a Russian oil company.

Philip Marshall QC and Ruth Holtham continued to appear on behalf of Lexi Holdings plc in the fall out following its collapse in circumstances of fraud. In *Lexi Holdings v Pannone* Philip appeared in front of Briggs J on a summary judgment application against solicitors in respect of a claim for breach of mandate. The Court considered the scope of the actual and apparent authority of a managing director to give instructions to solicitors leading to misapplication of company funds.

Dominic Dowley QC and Justin Higgo were instructed in the *Fiona* litigation – a trial of conspiracy and bribery claims against the former director general of Sovcomflot, the state-owned Russian commercial fleet operator, in respect of a series of ship financing, S&P, commission and chartering transactions alleged to have been the product of corrupt relationships. The case, worth over US\$600m, commenced before Andrew Smith J in the Commercial Court in October 2009 and is scheduled to close mid-April 2010.

Philip Jones QC, assisted by Hugh Norbury, acted for the Claimants in *Antonio Gramsci Shipping (& ors) v Romanica (& ors)* in a commercial fraud worth up to US\$125m relating to undervalued charters in the Latvian shipping industry. It is the largest commercial dispute that Latvia has known.

Philip and Hugh also obtained a £4m proprietary freezing injunction in ongoing litigation by Michael Cherney, one of the world's richest men, against his former fiduciary Frank Neuman.

David Drake and Ruth Holtham appeared as junior counsel for the English and Scottish NHS respectively in freezing injunction applications heard by Lewison J in the long-running *Secretary of State for Health (& ors) v Norton Healthcare Limited (& ors)* litigation.

Andrew Bruce obtained judgment in relation to fraud claims arising out of the theft of frozen fish worth in excess of £3m (*Ocean Trawlers Europe Ltd v Ramus & ors*) and thereafter advised in connection with conversion claims against third parties (*Ocean Trawlers Europe Ltd v RJ Gracey* and *Ocean Trawlers Europe Ltd v Seachill Ltd*).

Dan McCourt Fritz was instructed as junior counsel for the Second Defendant, Mrs Peterson in *Weaving Capital (UK) Ltd v Magnus Peterson, Amanda Peterson and others*, an alleged £500m hedge fund fraud. The Claimants allege that Mrs Peterson breached her duties as a director and employee of WCUK by failing to identify or prevent the alleged fraud.

In broader commercial litigation, Philip Marshall QC led Ruth Holtham for the Defendant, Orton Oil, in *Tchigirinski v Orton Oil*, a decision of Beatson J on the effect of equitable assignment and the grant of interlocutory relief in relation to arbitration proceedings.

Richard Walford and Ruth Holtham acted on behalf of the company in *Iesini & Ors v Westrip Holdings*, the leading authority on minority shareholder disputes under the Companies Act 2006.

Hugh Norbury appeared in *Vercoe v Rutland*, the trial of a confidential information claim arising out of the private equity takeover by Rutland of Harvey & Thompson, the UK's largest chain of pawnbrokers, where the developers of the idea were ousted by the private equity firm.

## This year our trusts work has continued to demonstrate our 'particular strength in offshore trusts disputes' Legal 500.

Members of Serle Court acted for all three of the principal parties in the **Alhamrani litigation**: the case revolved around a very substantial family trust and involved extensive allegations of breaches of trust and fiduciary duty. The litigation has involved innumerable interlocutory hearings over recent years which have ruled on significant legal issues, including the availability of 'dog leg' claims and trustees' rights to indemnification for legal costs incurred by them. The trial commenced in November 2008, and, before settling in July 2009, involved three separate hearings before the Jersey Court of Appeal. The barristers involved were Elizabeth Jones QC, Victor Joffe QC, Peter McMaster QC, Nicholas Harrison, Douglas Close, Tim Collingwood, Giles Richardson, Simon Hattan, Matthew Morrison and Gareth Tilley.

James Corbett QC appeared in the Royal Court and Court of Appeal in Jersey advising the Third Party in **Marett v Marett, Marett (Third Party)**. These proceedings involved claims to ancillary relief between divorcing spouses and allegations of impropriety and concealment of property

ownership and transfers between the husband and his brother (the third party). The claim included allegations of sham transactions, constructive and resulting trusts and duties to account under Jersey law together with issues of the proper form of proceedings against third parties in ancillary relief and discovery obligations.

In **Chvetsov v BNP Paribas & Anr** [2009] JRC120 (Royal Ct of Jersey) Dakis Hagen advised a corporate trustee's subsidiary in relation to its successful striking out of breach of trust and other claims brought by a Russian businessman, on grounds that the defendant in question owed no relevant duties. The Royal Court ([2009] JRC141), Geoffrey Vos QC (as a single justice of the Court of Appeal) ([2009] JRC157) and the full Court of Appeal ([2009] JCA 200) all refused Mr Chvetsov leave to appeal.

Dakis Hagen also advised a corporate trustee of two offshore trusts in **C Trust Company v Temple & Ors** [2009] JRC048 (Royal Ct of Jersey) in relation to requests by a beneficiary that assets be isolated to protect her and her children in the context of matrimonial finance claims brought by a non-beneficiary ex-wife of the settlor.

## Our banking and finance practices were also busy this year – we were described by Legal 500 as 'a very professional set in banking litigation'.

Philip Jones QC, Giles Richardson, James Mather and Gareth Tilley acted for various US Lehman entities in the on-going proceedings in London concerning the fate of a number of substantial pots of Lehman monies held within its European structures, involving them in detailed analysis of the banking group's internal structures and accounting and legal policies.

David Blayney continued to act as senior junior for The Royal Bank of Scotland Group in the bank charges litigation, in which the Supreme Court surprised many commentators by overturning the decisions of the Commercial Court and Court of Appeal and ruling in the banks' favour (**Abbey National & Ors v OFT** [2009] UKSC 6). The ruling has significant implications for the application of the Unfair Terms in Consumer Contracts Regulations 1999, both in the banking context and more generally.

Philip Marshall QC led Daniel Lightman for the Claimant in **Golfrate v Aziz**, a decision of Sir Donald Rattee on the propriety of awarding security for costs in relation to a claim brought by an Isle of Man holding company with an Angolan

operating subsidiary (being the largest supermarket chain in Angola). The case involved an analysis of the significance of a bank guarantee and the ability to meet a costs award timeously if made. An application to amend the pleadings went to the Court of Appeal ([2009] EWCA Civ 250).

**Titan Steel Wheels Ltd v The Royal Bank of Scotland** involved the trial of preliminary issues by David Steele J in the Commercial Court in an action alleging that the Bank missold foreign exchange derivatives to a manufacturing company. The issues tried were (1) whether the company was a 'private person' within the meaning of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001; (2) whether the Bank owed the company a common law duty of care in respect of the sale of currency swap products; and (3) whether the terms relied on by the Bank as negating liability for negligence were exclusions clauses and, if so, whether they were reasonable within the meaning of the Unfair Contract Terms Act 1977. Judgment has been reserved. James Corbett QC appeared for the Claimant.

## We continued to act in major cases across the whole spectrum of commercial and chancery litigation.

In traditional chancery fields, there have been two firsts this year. Alan Boyle QC appeared in **Re H** (2009, before Lewison J), which was the first reported case on the test for making statutory wills under the Mental Capacity Act. Will Henderson appeared for the Claimants in **Pitt v Holt** in the Chancery Division before Mr Robert Englehart QC sitting as a Deputy Judge, regarding the settlement of a patient's assets made by his receiver acting under the authority of the Court of Protection and a failure to consider the IHT impact. This was the first case to come to trial in which HMRC have been joined to argue against the application of the rule in Hastings-Bass.

Members of Chambers appeared for all the various parties in **Cawdron v Merchant Taylors' School** [2009] EWHC 1722 (Ch) in which issues as to the nature of trusts created during the First World War were resolved to enable the land to be sold for development and replacement sports facilities to be provided for the benefit of the School and its Old Boys. Philip Jones QC and Dakis Hagen appeared for the applicant trustees, Will Henderson appeared for HM Attorney General, Jonathan Adkin for the school, James Mather for the Merchant Taylors' Livery Company, and Robin Rathmell for a representative old boy.

Members of chambers continue to appear in major cases involving petitions for unfair prejudice. In **Re Lifemarque**, the Petitioner's expert valued the company's shares at almost three times the value assessed by the Respondent's expert. The court considered, apparently for the first time, the relative merits of the differing valuation methodologies, preferring that adopted by the Respondent's expert. Victor Joffe QC and Tom Braithwaite acted on behalf of the Respondent majority shareholder.

Victor also appeared in **Re Southern Counties Fresh Food Ltd** [2009] EWHC 1362, on this occasion assisted by Tim Collingwood. This unfair prejudice case decided the nature and extent of the fiduciary duties of directors of competing companies, which gave rise to additional issues in respect of valuation.

An unfair prejudice petition also formed part of a family partnership dispute in **Amin & Amin v Amin & Ors** [2009] EWHC 3356 (Ch), in which no relief was granted to the petitioners. Patrick Talbot QC and Dan McCourt Fritz appeared for the principal Defendants, the Respondent majority shareholder in the unfair prejudice proceedings. Tom Braithwaite appeared for a number of other Defendants, successfully claiming a number of diverse interests in the family home and businesses.

In the field of property, Tom also acted on behalf of the Vale of Glamorgan Council in their successful resistance

of the manorial claims of Mark Roberts (the self-proclaimed Lord Marcher of Trelleck) to the bed of Barry Harbour in Wales.

Meanwhile, Christopher Stoner appeared for British Waterways in **Nigel Moore v British Waterways Board** where it was determined as one of a number of preliminary issues that the public right of navigation does not encompass a right to moor other than temporarily during the course of a journey.

He was also involved in **EDF Energy Networks (EPN) plc v BOH Limited & Others** [2009] EWHC 3193, a case which determined difficult issues relating to the service of section 25 notices and the doctrine of merger in the context of a severed reversion.

Andrew Bruce, who this year was appointed a Deputy Adjudicator to HM Land Registry, obtained Mareva relief in connection with retention of rents and deposits by an estate agent in **Chesside Homes Ltd v Charles Lawson Lettings**.

James Corbett QC appeared for the Claimant, with Tim Collingwood, in **A v A** the hearing of an arbitration claim in the Commercial Court. The parties, a Middle Eastern corporate entity and a corporation in the United States, had entered into an agreement by which the former was the latter's exclusive supplier in the Middle East. The agreement, which was governed by English law, provided for disputes to be settled by an ICC arbitration tribunal in London. The Claimant alleged that the Defendant had terminated the agreement unlawfully and applied to the Commercial Court for leave to serve out and for an order for the preservation of assets pending the constitution of the arbitral tribunal pursuant to s44(3) of the Arbitration Act 1996.

In Intellectual Property matters, Michael Edenborough appeared in the ECJ in **C-542/07 P Pure Digital**, concerning the trade mark Pure Digital for digital radios. The case established the appropriate date on which to ascertain if a trade mark had acquired a distinctive character. He also appeared in the ECJ in **C-59/09 P Hasbro**, a case on the rights of audience of Trade Mark and Design litigators.

Michael was also involved in the latest instalment of the **Budweiser** litigation in the Court of Appeal [2009] EWCA 1022 in attempting to invalidate the Czech company's UK trade mark registration for the word BUDWEISER. He also led Thomas Elias in **Evans (t/a Firecraft) v Focal Point Fires plc** [2009] EWHC 2784 (Ch), obtaining summary judgment for the Claimants on a passing off claim based on an estoppel arising from an invalidation decision of the trade mark Registry. That decision has now led to a change in Registry practice.



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### And there were a number of more unusual cases...

Will Henderson acted for HM Attorney General in *Dean v Burne* [2009] EWHC 1250 (Ch) (Blackburne J), involving the transfer of allegiance of the senior priest, bishop, some of the clergy and worshippers from the Moscow Patriarchate to the Ecumenical Patriarchate. It was held that this transfer did not trigger powers in two charitable trust deeds to permit the object of the promotion of the religious lives of the Moscow communities to be replaced by the object of the promotion of the religious lives of the Ecumenical communities.

Nicholas Lavender QC appeared in the Bahamas Court of Appeal, successfully overturning an earlier decision of the judge not to recuse herself on grounds of apparent bias – receiving much local press coverage.

In *Save Guana Cay Reef Association v The Queen & Ors* [2009] UKPC 44 Ruth Jordan acted for the Appellants in a three day Privy Council challenge to the Government of the Bahamas' approval of a \$500m development with far-reaching economic, social and environmental consequences. Ruth, assisted by Thomas Elias, is currently engaged on a similar challenge to the Bahamian Government's approval of a plan to build a bunker C oil burning power plant in the Bahamas. Leave is

currently being sought to petition the Privy Council.

Daniel Lightman appeared in *Chahal & Sons Ltd v RSC Holland BV* [2009] EWCA Civ 881, where the Court of Appeal dismissed an application to adduce evidence newly obtained after trial from a handwriting expert of forgery of documents. He also appeared for the Defendant in *Serious Organised Crime Agency v Perry* [2009] EWHC 1960 (Admin), (2009) ACD 68: the appeal against Foskett J's decision that there is jurisdiction to make disclosure orders under the Proceeds of Crime Act 2002 in respect of persons who are outside the UK will be heard by the Court of Appeal in May 2010.

In *British Library Board v Hakimzadeh* Will Henderson and Jonathan Fowles acted for the British Library in its claim to recover damages for the alleged theft of pages from its collections by a private collector.

#### And finally...

David Drake appeared for the defendant in *Overy v PayPal (Europe) Ltd*, a case brought by a claimant who had enlisted the defendant's electronic payments services in connection with his abortive attempt to sell a house by means of a spot-the-ball type online competition.

### Whilst in chambers...

2009 has been another excellent year in the directories. In Chambers & Partners we have 94 individual recommendations placing us fourth in the 'recommendations per member' table. As a set we are recommended in 11 practice areas and only four other sets are recommended in more. Whilst in The Legal 500 we have 95 individual recommendations and are recommended as a set in 10 practice areas.

We have also received a number of award nominations this year including four for chambers of the year: the STEP Private Client Awards, the

Lawyer awards, the British Legal Awards and the Legal Business Awards. At this year's Chambers & Partners Bar Awards we received three nominations - Chancery Set of the Year, Chancery Junior of the Year and Client Service Set of the Year; we were delighted to win the Client Service award and would like to extend our thanks to all of our clients for their recommendations.

In 2009 we were delighted to welcome four new tenants: David Casement QC, Professor Jonathan Harris, Paul Adams and Thomas Elias.