



serle court

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serle court in 2011

In *Daud & others v a firm* Geraldine Clark acted for the claimants in their action against their former solicitors alleging that a barrister employed by the firm had made a secret profit from advising them to invest in an unsuitable tax avoidance scheme.

John Machell acted for the appellants in the Court of Appeal on two occasions in *North Shore v Anstead*. The first hearing concerned the duty of disclosure by prospective guarantors to sureties and conclusive evidence clauses ([2012] Ch 31); and the second concerned the Court's power under CPR 31 to compel a beneficiary to disclose documents held by his trustee ([2012] EWCA Civ 11).

The case of *Hicks v Broughton*, involving the high profile claim in the High Court concerning the sale of Liverpool Football Club, continued in 2011. The case concerned allegations of breach of directors duty in connection with the sale of the club and the granting of negative declaratory relief. Earlier the proceedings gave rise to important questions on company procedure and anti-suit injunctions; Philip Marshall QC acted for Sir Martin Broughton and the other independent directors of the club.

Hugh Norbury and Thomas Elias appeared for Michael Cherney in a trial before Henderson J against his former solicitor in respect of various London property purchases in which sale proceeds of over £4m were diverted to third parties. John Machell acted for Frank Neuman one of the defendants. Although it was established that the solicitor had lied and had been in breach of fiduciary duty and negligent, Mr Cherney lost principally because he was found to have known about the diversion of sale proceeds.

Chris Stoner QC was instructed in a representative action on behalf of approximately 100 owners of chalets on a holiday park in Cornwall in respect of a multitude of service charge issues

arising from the redevelopment of the park by the new landlords.

David Drake appeared for the claimant in *Network Rail Infrastructure Ltd v Conarken Group Ltd* [2011] 2 CLC 1. The Court of Appeal decided that where network infrastructure had been damaged by road hauliers' negligence, economic loss consisting in impairments to Network Rail's revenue under track access agreements with train operating companies was recoverable as a matter of scope of duty, causation and remoteness.

Liz Jones QC, Simon Hattan and Gareth Tilley are involved in a share ownership/shareholders dispute between brothers in the BVI. This is the second time they have been involved in the disputes of this family. The former dispute took place in Jersey and was Jersey's largest ever trust dispute.

Robin Rathmell and Sophie Holcombe acted in a seven figure breach of warranty claim for a major mineral water manufacturer following its purchase of a spring in Scotland.

Chris Stoner QC represented British Waterways in *Moore v British Waterways* in which the principal issue was whether a riparian owner can moor a vessel adjacent to his land. Judgment is currently awaited from Hildyard J.

Liz Jones QC and Robin Rathmell successfully upheld a stop notice in relation to Coroin Ltd, the company which is the ultimate owner of Claridges, The Berkeley and The Connaught, in what was the first decided modern case on stop notices.

Jennifer Haywood is acting for one of the world's largest law firms in the arbitration of its claim against a member who left to join another firm as part of a team move. She has also advised a number of other firms and individual partners in relation to moves from and/or to firms and associated litigation, including section 994CA 2006 petitions.

Finally, members of chambers continue to act in *pro bono* cases.

In *Legal Services Commission v Henthorn*, Geraldine Clark and Jennifer Haywood appeared in the Court of Appeal in the test case about the LSC's powers to recover payments on account of Legal Aid fees made in the 1980s and 1990s. At the trial, but not at the appeal, Geraldine appeared *pro bono* for Mrs Henthorn, a retired barrister.

Michael Edenborough QC is instructed in two appeals to the General Court in Luxembourg relating to the mark GOLDEN BALLS (Cases T- T-437/11 and T-448/11). The case concerned a small UK company being threatened by those responsible for the BALLON D'OR football award.

Richard Walford acted for a woman whose fiancé stole £660,000 from his

employer to buy the matrimonial home. She was the subject of a freezing order, and he drafted a witness statement seeking its discharge, which caused the Claimant to concede.

Michael Edenborough QC and Sophie Holcombe are acting for Alison Hendrick of Artjunkie, in a series of combined appeals to the Appointed Person on trade marks. The cases involve such fashionable marks as Too Fast to Live, Too Young to Die and Death before Dishonour.

John Machell acted for the appellant in the Court of Appeal in *Tiffin v Lester Aldridge LLP* [2012] EWCA Civ 35 in which the Court of Appeal considered the meaning of section 4(4) of the LLP Act 2000 and the status of fixed share partners.



I am delighted to be able to share with you a summary of the work undertaken by Serle Court during 2011. The cases in which we were involved show the considerable breadth of our practice ranging from trusts, through civil fraud and banking to general commercial matters. They included some very well known cases, many raised important points of principle and a number were undertaken on a *pro bono* basis. I hope you enjoy reading this summary and find it useful and interesting.
Alan Boyle QC Head of Chambers

In 2011 Serle Court was involved in some very large cases, involving a number of well known people, and in a number of precedent setting cases in the Court of Appeal, Supreme Court and Privy Council.

Philip Jones QC and Jonathan Harris appeared in the Privy Council for the successful appellant trustee in the landmark case of *Hutcheson v Spread Trustee* [2011] UKPC 13. The case concerned the permissible scope of trustee exemption clauses in Guernsey and the sources of Guernsey customary law. This case was the largest claim made in Guernsey against trustees for breach of trust. The majority approved the reasoning in the leading English case on trustee exemption clauses, *Armitage v Nurse*.

Jonathan Adkin and Will Henderson are instructed in *Boris Berezovsky v Estate of Patarkatsishvili & Ors*, one of the highest value cases presently before the Chancery Division. Jonathan and Will appear for the family of Badri Patarkatsishvili, one of the main protagonists, in proceedings brought by his former business associate, Boris Berezovsky. Some of the issues in that action were examined in the *Boris Berezovsky v Roman Abramovich* action tried in autumn 2011 in the Commercial Court. Jonathan represented the family of Badri Patarkatsishvili at that trial.

In *Aeroflot v Berezovsky, Glushkov, Forus Holdings SA & Ors* Aeroflot is suing its former Deputy Director General, Nikolai Glushkov, Boris Berezovsky and a number of companies in which they allegedly held interests in relation to a number of loans which allegedly had no proper commercial justification and resulted in the payment of fees and interest and misappropriation of fees due to Aeroflot. Aeroflot claims to have suffered loss in the sum of US\$102m. Philip Marshall QC and Simon Hattan act for Aeroflot and Philip Jones QC and Jennifer Haywood are acting for Nikolai Glushkov.

In *Pitt v Holt* [2011] EWCA Civ 197 the Court of Appeal allowed an appeal by HMRC against the setting aside of a settlement on *Hastings-Bass* grounds. The Court of Appeal also held that the settlement could not be set aside on the ground of mistake. Permission has been granted to appeal to the Supreme Court and the appeal is likely to be heard in March 2013. The outcome of the Supreme Court appeal is eagerly awaited by trust and estate practitioners

because it will be the first time for some years that the fundamentals of these principles have been examined by the Supreme Court. Will Henderson acts for Mrs Pitt. Philip Jones QC and Ruth Jordan act for HMRC.

In *JSC BTA Bank v Mukhtar Ablyazov, Zharimbetov & Ors* the Bank alleges that Ablyazov engaged in a number of frauds, by which he misappropriated assets from the Bank. Three actions have been ordered to be tried together; in the "*Granton proceedings*" (named after one corporate defendant) Ablyazov is alleged to have engaged in one fraudulent scheme in order unlawfully to advance monies to offshore companies which he owned, and another to expropriate further monies in order to repay the initial unlawful loans. In the *Granton* case Philip Marshall QC leads Ruth den Besten and Matthew Morrison for the Bank; Hugh Norbury and Justin Higgs act for Mr Zharimbetov and Dan McCourt Fritz acted for Mr Ablyazov.

Nicholas Harrison has continued to be engaged in the *BITEL* litigation in the Isle of Man, probably the largest commercial case ever litigated there. The dispute concerns the fraudulent misappropriation of shares in a leading mobile telephone company. The focus of the litigation is a counterclaim brought by Nicholas's clients for over US\$400m against 14 defendants in various jurisdictions. A protracted and highly complex jurisdiction challenge was finally determined by the Privy Council in favour of Nicholas's clients in March (*AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7). In July they also obtained a worldwide freezing injunction against the principal defendant, part of the Russian Alfa group, both in the Isle of Man and in parallel proceedings in the BVI.

In *Serious Organised Crime Agency v Perry*, Philip Jones QC and Daniel Lightman act for the subjects of a major civil recovery investigation by SOCA. In June 2011 the Court of Appeal ([2011] 1 WLR 2817) decided that a civil recovery order can be made under the Proceeds of Crime Act 2002 (POCA) in respect of property located outside the jurisdiction. A nine-judge panel of the Supreme Court will hear the appeal against that decision in March 2012.

We also saw growth in two of our developing practice areas, European Law and intellectual property, with a number of high profile cases in the European courts.

Conor Quigley QC appeared in *Churchill Insurance v Wilkinson*, (judgment of the European Court of Justice of 1 December 2011), which held that the EU Motor Insurance Directives required that all victims of a car accident be properly compensated and that this conflicts with section 158(8) of the Road Traffic Act 1958.

Michael Edenborough QC appeared in a TFEU article 267 reference in Case C-307/10 IP TRANSLATOR which was heard by the Grand Chamber of the Court of Justice (13 judges) to determine the way in which trade mark specifications ought to be construed. It will affect the validity of about 25% of the trade marks in the EU.

Conor Quigley QC appeared in *Air Transport Association of America v Secretary of State for Energy and Climate Change*, (judgment of the European Court of Justice of 21 December 2011) which held that the extension of EU emissions trading to international airlines was not unlawful.

Michael Edenborough QC drafted the successful application for permission to intervene on behalf of AIPPI (a Swiss based international IP organisation) in the Supreme Court. The hearing is due in November 2012. There are now 5 interveners - the Law Society, the Bar Council, the Institute of Chartered

Accountants in E&W, AIPPI and the Legal Standards Board, along with the original parties - Prudential and HMRC. The case concerns the scope of legal professional privilege and whether this should be extended to accountants giving tax advice. AIPPI's position is to ensure that there is no erosion of LPP for IP practitioners, especially patent and trade mark attorneys.

David Drake is acting for the claimants in *Secretary of State for Health & Ors v Reckitt Benckiser Group plc*, a claim for abuse of dominant position in relation to the supply of Gaviscon. David Drake is also instructed, along with Michael Edenborough QC, in another claim by the NHS in England, *Secretary of State for Health & Ors v Servier Laboratories Ltd & Ors*, alleging breach of Articles 101 and 102 TFEU and interference with the claimants' economic interests by unlawful means in relation to the patent protection obtained for the hypertension drug perindopril.

Michael Edenborough QC and Gareth Tilley appeared in *Temple Island Collections Ltd v New English Teas Ltd* [2011] EWPCC 19; [2011] EWPCC 21, a copyright infringement case regarding pictures of Routemaster buses in front of the Houses of Parliament and raising questions about the scope of copyright protection of manipulated photographs.

Trust and charity litigation continue to be major areas for chambers with members appearing in the domestic courts and overseas jurisdictions including Bermuda, BVI, Cayman, Guernsey, Jersey and the Isle of Man.

In *BQ v DQ* [2011] WTLR 373 (the *Q Case*), Frank Hinks QC succeeded in 2010 in persuading Ground CJ that *inter vivos* trusts were void as testamentary dispositions. The matter came back before the Supreme Court of Bermuda in July 2011 and Frank Hinks QC (along with counsel for other parties) succeeded in persuading the Chief Justice to approve the rearrangement of the surviving family trust. Alan Boyle QC, who acted for another party, was among those who appeared in Bermuda in July 2011. Juniors from chambers instructed for various parties included Jonathan Adkin, Dakis Hagen, James Mather and Paul Adams.

Dakis Hagen appeared as chancery counsel in the six day trial of a divorce case, *G v G*, concerning, among other things, the extent to which a wife's family trust assets should limit or reduce her claims against a high earning husband. Judgment is awaited.

Richard Walford acted for the principal beneficiaries of a substantial Guernsey Trust in *Credit Suisse Trust Ltd v Nemni*, a dispute involving the recovery of around €4 m from a former fiduciary agent of the trust.

Robin Rathmell and Giles Richardson were instructed in *Van Dalfsen v Caversham* (eg [2010] JRC 113), a seven figure breach of trust claim in relation to negligent shipping cases.

In the *Almidani* Bankruptcy litigation, David Casement QC and Timothy Collingwood are instructed to represent the trustee in bankruptcy. The bankruptcy proceedings have

continued for nine years and involve asset tracing and cross-jurisdictional proceedings across Europe and the Lebanon, with particular focus currently on the realization of the bankrupt's interest in a property in Spain.

In *Re BBB, Re D Retirement Trust* [2011] JRC 148, Dakis Hagen advised a corporate trustee in proceedings in the Royal Court of Jersey concerning trustees de son tort, invalid appointments and ratification.

Alan Boyle QC and John Machell act for the plaintiffs in a claim in Grand Cayman arising from the long running trust dispute between members of the Ojje family. The case raises a number of trust issues, including the circumstances in which equitable compensation is available as a remedy for breach of trust. The case is due to be tried for 8 weeks later this year.

Will Henderson acted for HM Attorney General in *Attorney General's Reference in relation to educational charities and Independent Schools Council v Charity Commission*. These related matters raised contentious issues as to whether the public derived sufficient benefit from the operation of an independent fee paying school for the operating entity to be capable of being a charity. The Upper Tribunal decision in these matters was issued in October 2011.

Robin Rathmell acted in a US \$300m family dispute in Jersey concerning the interpretation of a compromise agreement and Articles of Association of a Jersey charitable company.

... and there were also a large number of banking, civil fraud and insolvency cases.

Dominic Dowley QC and Justin Higgs continue to be instructed in the claims brought by Sovcomflot, the Russian commercial fleet operators, against a prominent Russian businessman in relation to his commercial dealings with its former director general: *Fiona Trust & Holding and Ors v Y Privalov and Ors*. Sovcomflot (and its related company, Novoship) succeeded in establishing (after a trial spanning a six month period before Andrew Smith J) that their subsidiaries had been the victims of a dishonest commission scheme. The Court of Appeal has recently given permission to Sovcomflot to appeal in respect of the unsuccessful parts of its claims.

Alan Boyle QC, Jonathan Harris and Dan McCourt Fritz acted for the first and second respondents to a contempt application in the long running *Masri v Consolidated Contractors International Co SAL* litigation in the Commercial Court. The case involved myriad English and Lebanese law issues, but the central question for the court was whether a contempt should be held to have occurred in circumstances where a respondent had been ordered to commit the allegedly contemptuous act by a foreign court.

Richard Walford and Jonathan Harris appeared in the Commercial Court for the first and second defendants in separate *Masri* proceedings and successfully argued for the stay of English conspiracy proceedings in favour of the Greek courts.

David Blayney was instructed to advise and act in relation to various matters for the Administrators of Lehman Brothers International Europe, including as senior junior in the ongoing application to determine the effects of extended lien provisions in agreements between Lehman affiliates, which is listed for trial in 2012.

Philip Marshall QC, David Blayney and James Mather act for the claimant in proceedings brought against Bernie Ecclestone and others in relation to a payment of US \$44m allegedly made as a bribe in connection with the sale of the commercial rights in Formula 1 in 2005. The claimant obtained default judgment against one defendant, for damages to be assessed, in December 2011.

David Drake and Giles Richardson are involved in *Raiffeisenlandesbank Niederösterreich-Wien AG v Maxfold Contracts LLP & Ors*, a

multi-jurisdictional dispute concerning allegations of international money-laundering and shortcomings in the governance of off-shore corporate nominee directors.

David Blayney acted for two major banking groups in County Court actions that effectively acted as test cases in relation to the application of the Supreme Court decision in *OFT v Abbey National* to bank charges claims based upon the Consumer Credit Act 2006.

Liz Jones QC and John Machell successfully defended a former chief executive of a Nigerian Bank against a summary judgment application for £83m. The claim, which exceeds US \$700m, is due to be tried in April 2012, at which the defendant will be represented by Paul Chaisty QC.

Jonathan Harris has provided expert opinions on English law for numerous high profile and high value foreign actions, including US class action proceedings in the *BP Oil Spillage* litigation; the *Royal Bank of Scotland* litigation; and the *Madoff* litigation.

David Blayney was instructed to advise and represent the Independent Valuer of Bradford & Bingley in the references to the Upper Tribunal seeking to challenge his nil valuation of shares and subscription rights. Directions were made at a hearing in November 2011 under which references may be struck out early in 2012 where they raise issues that are not admissible or are not actively pursued.

Alan Boyle QC and Thomas Braithwaite successfully resisted summary judgment in a claim concerning ownership of a steel mill in South Wales, and whether the purchaser of assets from an administrator is liable for inducing breach of contract. The issues at trial, due for July 2012, will include whether the mill is a chattel or a fixture, and whether a purchaser of assets from a company in administration is justified as a matter of public policy in inducing breaches of the company's contractual obligations.

Ruth Jordan is instructed to advise the defendants in *Moraes v Paulista Ltd & Ors* an ongoing multi-million dollar minority shareholders' dispute, breach of fiduciary duty and derivative claim relating to the ownership of a Brazilian bank that is being litigated in the Bahamas.

We continue to appear in cases covering many other of our broad Commercial Chancery practice areas including company, partnership, professional negligence, property and general commercial cases.

Philip Marshall QC represented Fulham Football Club in an unfair prejudice petition brought against the Premier League. The main issue was whether the petition should be stayed pursuant to an arbitration clause.

Andrew Bruce appeared in *Company Developments (Finance) Ltd v Coffee Club Restaurants Ltd* at both first instance and in the Court of Appeal. The case concerned the construction of guarantee obligations in a lease. Andrew successfully argued that, notwithstanding a drafting error in the terms of the guarantee, the

Court ought to construe its terms purposively so as to render the guarantors liable. However, the Court of Appeal emphasized the point made in *Chartbrook v Persimmon Homes* [2009] 1 AC 1101 that, in correcting an error of construction, no regard will be had to evidence which only goes to the subjective states of minds of the parties.

Chris Stoner QC successfully defended a first instance judgment in the Court of Appeal, in *Thornhill v Nationwide Metal Recycling*, which determined that his client's scrapyard in Cambridge was not creating a noise nuisance.