



serle court

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# serle court in 2016

## ...and have maintained a strong presence in company, insolvency and partnership disputes.

Philip Marshall QC and Matthew Morrison represent the Independent Directors of Carlyle Capital Corporation defending liquidator claims seeking US\$1bn for alleged breaches of fiduciary duty and wrongful trading. The almost six-month long trial has just concluded. The case involves a number of complex legal issues relating to directors' duties, wrongful trading, statutory remedies, causation and quantum not previously considered in Guernsey.

In *Galasys plc v Well Oriental Investments & other shareholders*, Lance Ashworth QC, Matthew Morrison and Thomas Elias were instructed on behalf of the defendants in this multi-jurisdictional company law dispute where it was disputed which members of the board were entitled to give instructions on behalf of the company to pursue litigation. English interlocutory hearings in the Commercial Court raised issues such as the approach that the court should take when there is doubt as to the validity of the instructions given to solicitors purporting to act on behalf of a company. In *Representation of Galasys plc* [2016] JRC 188, the Jersey Court agreed with the defendants that a majority of shareholders could give directions to discontinue the litigation, relying on the principle that where the board is unable or unwilling to act the shareholders in general meeting have a residual power to exercise the powers of the company.

Timothy Collingwood successfully represented the majority shareholder at trial in an unfair prejudice petition, defeating an allegation of quasi-partnership and establishing that there was no unfairness in the exclusion of the petitioner or the operation of compulsory transfer provisions under the articles (*Brett v Migration Solutions Holdings Ltd* [2016] EWHC 523 (Ch)).

In *Griffith v Gorgey*, Simon J struck out the combined defences of the respondents to 3 unfair prejudice petitions for failing to comply with an unless order and refused to grant them relief from sanctions. Daniel Lightman QC is instructed to represent the respondents at their appeal in January 2017, in which the Court of Appeal is expected to consider the circumstances in which partial relief from sanctions should be granted.

Timothy Collingwood represented the claimants at trial in personal and derivative claims against a director and joint venture partner and his brother (also a director of the joint venture company) in *Cullen v Brown*, which claims concerned allegations of conflicts of interest and issues as to the extent of duties owed.

In *Jakob v Mazur*, Justin Higgs represents the claimant in avoidance proceedings under section 423 of the Insolvency Act 1986 to set aside transactions alleged to have been entered into to avoid creditors; Richard Wilson QC represents an offshore corporate defendant who challenges the English Court's jurisdiction.

Ruth den Besten is acting for the administrators of BHS on their application to wind up Dominic Chappell's company, Retail Acquisitions Ltd.

Kathryn Purkis is acting for the first defendant in *O'Keefe v Caner*, in which the High Court will decide on expert evidence the vexed question of what limitation period applies (or periods apply) under Jersey law to breaches of directors' duties, both fiduciary and of skill and care.

John Machell QC acted for Jeremy Hosking in *Hosking v Marathon Asset Management LLP* [2016] EWHC 2418 (Ch) in which Newey J decided that the fiduciary forfeiture principles apply to partnership and LLP profit shares.

Philip Jones QC successfully acted for Conran Holdings, a company owned by Sir Terence Conran and his children, in defending a claim brought by a former shareholder and chief executive who objected to his shares having been compulsorily purchased at nil value.

John Machell QC and Adil Mohamedbhai appeared before Murray Rosen QC (sitting as a deputy judge) in *Campbell v Campbell*, a case concerning a jewellery business and the extent of the partnership relationship between two brothers.

Philip Jones QC has spent a significant amount of time in the Cayman Islands in respect of a claim by a shareholder to wind up the Sterling Macro Fund on just and equitable grounds, which involved some 8 weeks dealing with numerous interlocutory applications and a two-week trial.

relating to the sale of his home, a Grade II\* listed manor house, for £16.5m. The original purchaser failed to comply with a Notice to Complete and then, after the vendor had rescinded the sale contract (in order to sell to a third party), brought proceedings for specific performance of the original contract.

Jonathan Fowles has been advising the Jehovah's Witnesses in matters relating to charity law.

who have acted this year on mediations covering the full range of commercial chancery disputes.

## Our Property and Charities practices continue to go from strength to strength

Christopher Stoner QC acted for the Port of London Authority in an appeal seeking to establish whether the mooring of a vessel was sufficient for the purposes of acquiring title by adverse possession.

Jonathan Fowles provided advice and drafting in connection with land transactions undertaken by a foreign government and an associated charity.

Andrew Bruce represented a world-renowned film producer in proceedings

## ...and finally...

Chambers' mediation practice continues to grow. We now have 17 mediators, including former judges, silks and juniors,



**In 2016, Serle Court has again been at the front of Commercial and Chancery Litigation. The range of cases covered includes those in the Supreme Court and Court of Appeal, some well-known, and others establishing new points of principle. The depth and breadth of our work also includes cases not widely known and reflects the quality of our members from senior to junior. I hope you will find the review interesting.**

Alan Boyle QC Head of Chambers

## In 2016 we have been involved in a number of large and high profile cases, including a number of precedent-setting cases in the Court of Appeal, Supreme Court and Privy Council.

David Blayney QC, Simon Hattan, Zahler Bryan and Adrian de Froment are acting for the RBS Group defending actions brought by shareholder and investor groups regarding RBS's £12bn rights issue in 2008. These actions, brought under the Financial Services and Markets Act 2000, challenge the information provided in relation to the RBS rights issue. This high profile case is believed to be the largest claim currently going through the English courts and is scheduled for trial in March 2017.

Constance McDonnell appeared for the respondent in *Ilott v Mitson*, the first appeal in a claim under the Inheritance (Provision for Family and Dependents) Act 1975 to be heard by the Supreme Court.

In *Loose v Lynn Fisheries* [2016] 2 WLR 1126, Tom Braithwaite and Zahler Bryan acted for the Crown Estate as intervenors before the Supreme Court, persuading the court to overturn the judgments below with respect to the operation of the doctrine of accretion in tidal waters and the nature of prescriptive rights.

Ruth den Besten appeared in the Supreme Court for *Lehman Brothers Ltd*, the Lehman group service company, in the "Waterfall I" application concerning distributions to be made in the estate of the main Lehman trading entity: LBIE (on appeal from [2015] EWCA Civ 485; [2016] Ch 50). She continues to act, led by Philip Marshall QC, in the "Waterfall III" application, with two trials concerning detailed and new points of insolvency law listed for 2017.

In *Shlosberg v Avonwick*, Philip Marshall QC and James Mather, assisted by Oliver Jones, obtained an injunction to prevent solicitors from acting for the principal creditor in a bankruptcy where they also acted for the trustee in bankruptcy and had in that capacity received privileged materials [2016] EWHC 1001 (Ch). They successfully defended the firm's appeal to the Court of Appeal [2016] EWCA Civ 1138, [2016] All ER (D) 141 (Nov). The case raised an important point of principle about the extent to which a trustee in bankruptcy is entitled to obtain and make use of documents subject to legal professional privilege in favour of the bankrupt.

Philip Marshall QC and Ruth den Besten, assisted by James Mather, were successful in the Court of Appeal

establishing the correct test to be applied by the courts under CPR 25.13(2)(a) for an order for security for costs against a defendant resident outside the jurisdiction and the EU/Lugano Convention area: *Bestfort Developments LLP and Ors v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099.

*Fiona v Privalov*: Dominic Dowley QC, Justin Higgs and Dan McCourt Fritz continue to act for the Russian state owned shipping corporation, Sovcomflot, and its subsidiaries in the inquiry into damages caused as a consequence of the imposition of pre-trial worldwide freezing injunctions against a Russian oligarch and his shipping companies; permission to appeal has recently been granted to appeal the latest decision by Males J in this long running saga.

In *Re Burberry Group plc*, Timothy Collingwood represented the appellant in the Court of Appeal on the leading case on public access to a company's register of members under the Companies Act 2006. A decision is awaited.

Elizabeth Jones QC, Philip Marshall QC, Justin Higgs, Gareth Tilley, Paul Adams and Oliver Jones have all been involved in representing the interests of New Zealand businessman and philanthropist Sir Owen Glenn in 3 sets of proceedings arising from the breakdown of a property joint venture with Eric Watson, set down initially for a 12-week trial commencing in May 2017. *Glenn v Watson* seeks accounts of profits for breach of fiduciary duty and rescission of over £100m of loans to the joint venture company on the basis of fraudulent misrepresentation; *Kea Investments Ltd v Novatrust Ltd* seeks the winding up of the joint venture vehicle; and *Novatrust Ltd v Kea Investments Ltd* is a derivative claim brought on behalf of the joint venture company that is defended by the Glenn interests.

Philip Jones QC has continued to act for the Kazakh bank BTA in its claim to recover in excess of \$4bn from which it has been defrauded by Mukhtar Ablyazov. He was involved in a trial which sought to recover assets from Mukhtar Ablyazov's son.

Prof Jonathan Harris QC (Hon.) gave expert evidence to the House of Lords EU Justice Select Committee on Brexit and its implications for cross-border litigation in the UK.

## We remain at the forefront of Commercial Litigation and Civil Fraud work

Elizabeth Jones QC and Gareth Tilley have been advising and acting for the claimant in a confidential arbitration claim brought against a major automotive manufacturer by a territorial distributor. The claim, for over US\$500m, alleges bad faith and wrongful termination of the distribution agreement by the manufacturer.

In **Mahdavi v Sterling Avram**, Daniel Lightman QC represents the claimant, who was the victim of an elaborate and daring fraud by a consultant to a firm of solicitors: the consultant falsely represented that the firm was instructed by the owner of a property, and arranged for the sums paid by the claimant to his firm which were intended to be the purchase monies to be misappropriated by being paid out to third parties connected to him. The victim of the fraud is claiming damages in the Chancery Division against that solicitors' firm.

David Casement QC and Sophie Holcombe act for Ecoquest, a company that specialises in ethical investments, to recover £2.2m of losses arising from a fraudulent scheme which offered investment in Brazilian teak plantations: **ECO Quest plc v GFI Consultants Ltd**.

Adil Mohamedbhai acted for a German-listed property asset manager defending a claim for unpaid commission in excess of £10m. The action settled during the trial before Jay J in the Queen's Bench Division.

Ruth den Besten acted for Igor Kolomoisky, a Ukrainian businessman, in a successful Commercial Court application to challenge jurisdiction and discharge a worldwide freezing order. The claimants' case, for \$340m in damages following the alleged diversion of oil monies, was struck out.

Elizabeth Jones QC and Jonathan McDonagh acted for the Government of The Gambia in defence of a claim under a purported contract for the purchase of oil, which the Government alleges was a contract procured by bribery.

Hugh Norbury QC and Dan McCourt Fritz continue to act for a defendant firm of solicitors in a £100m+ conspiracy claim brought in the Commercial Court by Accident Exchange Ltd. The claim is to recoup alleged under-recoveries in earlier litigation through allegedly manipulated evidence. A 3-month trial is scheduled to take place in 2018.

In **Grupa Ozarow v Clean Energy Trading CL** [2016] EWHC 2322 (Comm), Prof Jonathan Harris QC (Hon.) and Sophie Holcombe acted for the defendant company trading in Carbon Credits in successfully discharging an *ex parte* injunction obtained in support of Polish proceedings on the basis, *inter alia*, that the relevant EU jurisdiction rules were arguably infringed.

John Machell QC and Oliver Jones act for two of six defendants defending claims

valued at over £50m arising out of the sale of the defendants' fund of hedge funds business. Oliver Jones acts for the second defendant, an individual. John Machell QC acts for the fifth defendant, a trustee, and also acts in related proceedings in the Cayman Grand Court (**Liongate SPC v Dillard and Ors**), a case concerning the authority of directors of the fund management vehicle and the proprietary consequences of an alleged lack of authority.

David Drake appeared for the claimants in the **Secretary of State for Health v Servier Laboratories Ltd** litigation, in which Henderson J considered ([2016] EWHC 2381 (Ch)) whether it was a prerequisite of a defence of failure to mitigate loss that the claimant knew or ought to have known of the defendant's wrongdoing or the loss as a result of it.

Lance Ashworth QC is leading Dan McCourt Fritz on behalf of Bank Alkhair and Dar Al Arkan Real Estate against the bank's former CEO, Majid Al Refai, enforcing multi-million dollar Bahraini judgments and defending a counterclaim for in excess of US\$23m.

Sophie Holcombe is instructed on behalf of Georgian billionaire Bidzina Ivanishvili and family in a dispute against Credit Suisse for losses over mismanagement of an investment portfolio said to be worth US\$1bn, leading to criminal proceedings against the bank's fund manager.

In **Nissany v Michelson**, Timothy Collingwood acted for the respondents in an appeal concerning the proper construction of a settlement agreement and the allocation of jurisdiction in respect of claims concerning distinct obligations under the agreement.

James Weale is acting for a shareholder in a billion dollar LCIA arbitration in a dispute concerning a real estate development opportunity in Moscow.

Ruth Jordan is acting for HMRC in a series of appeals in relation to tax avoidance schemes exploiting derecognition rules in relation to the loan relationships and derivatives codes. She appeared in **Union Castle Mail Steamship Co Ltd v HMRC and Ladbrokes Group Finance plc v HMRC**. The taxpayers' appeals are being heard next year.

Philip Jones QC acted for HMRC in a test case seeking to challenge recently well-publicised tax avoidance schemes whereby companies seek to use employee benefit trust to reward senior employees without any tax being payable.

Elizabeth Jones QC succeeded in defeating an application for a renewed freezing order. The application was brought by a wife against a husband who was (wrongly) accused of frittering the family fortune on "boys toys", leading to much colourful press coverage.

bread (Case C-285/16 P), and in the next round of the **GOLDENBALLS** saga against BALLON D'OR, which was the first time before the Board of Appeal, and will shortly go to the General Court for the second time. While all involved points of law or procedure, the most peculiar was PRET A DINER that concerned where an intervener should sit in cases before the General Court.

Suzanne Rab represented the Federation of Independent Practitioner Organisations in its appeal to the Court of Appeal against

the Competition Appeal Tribunal (CAT) judgment rejecting its application for review of part of the Competition and Markets Authority's final report on its private healthcare market investigation (**Federation of Independent Practitioner Organisations v CMA** [2016] EWCA Civ 777). The appeal, which followed a rare majority judgment of the CAT, addressed the correct approach to economic evidence in judicial review of

## We appeared in significant domestic and offshore Trusts, Probate and Private Client cases

Richard Wilson QC and James Weale acted for the claimant and his wife respectively in **Van der Merwe v Goldman** [2016] 4 WLR 71. To prevent a significant tax charge, the claimant sought to set aside a settlement on the grounds of equitable mistake following the decision of the Supreme Court in **Pitt v Holt** [2013] 2 AC 108. HMRC intervened, represented by Philip Jones QC. The court gave guidance on the circumstances in which the doctrine would be engaged and its relationship to contractual mistake.

Giles Richardson was instructed in **Davidson v Seelig** for the principal beneficiaries of substantial English trusts in legally complex proceedings concerning the validity of appointments of new protectors at their settlor-parents' insistence and of an appointment of new trustees by their settlor-parents.

Meantime, in Queen's Bench Division proceedings commenced by the settlor-parents, for whom Justin Higgo acts, they seek to recover and establish ownership of several hundred valuable chattels now located in the Gloucestershire country home they previously occupied and which is owned by their children; Giles Richardson represents the children who seek to recover various chattels and claim accounts.

Richard Wilson QC acted with James Weale in **Woodridge v Woodridge** [2016] Fam Law 451, with Dakis Hagen representing the infant son. This was one of the most high profile and high value 1975 Act claims in recent years.

Emma Hargreaves acted for the Husband and Jonathan McDonagh acted for the Husband's father in financial remedy proceedings giving rise to issues including the extent to which a Liechtenstein foundation worth over £60m established by the Husband's father was a "resource" available to the Husband and whether the court had jurisdiction to transfer outright to the Wife certain assets owned by the foundation by way of variation of a "nuptial settlement". An anonymised judgment will be published shortly.

Constance McDonnell appeared for the trustee in **Gestrust v Sixteen Defendants** [2016] EWHC 3067 (Ch), an application for directions as to how to direct companies which were ultimately wholly owned by the trust in relation to proceedings brought against those companies by a third party associated with several of the beneficiaries. The court considered whether the companies should be treated as trust assets, and the extent of the trustee's *Bartlett* duties.

Richard Wilson QC and Oliver Jones appeared in **Inchbald v Inchbald**, a high profile contentious probate claim in the High Court.

**Elliott v Simmonds** [2016] WTLR 1355 was the first reported decision to consider the nature and scope of the (passive) procedure for challenging a will set out in CPR 57.7(5). James Weale acted for the defendant.

Kathryn Purkis is acting in **Webster v K&L Gates** for a beneficiary, resisting an attempt on behalf of executors to extend the scope and application of section 22 of

decisions of specialist regulators.

Christopher Stoner QC acted in a number of classification matters, including acting before an International Panel, in the lead up to the Paralympic Games.

Christopher Stoner QC also successfully represented a number of athletes and their governing body before the Court of Arbitration for Sport in respect of the ratification of world records.

the Limitation Act 1980 (claims for recovery of personal estate).

The "Hyderabad Fund" case (a dispute over a transfer in 1948 of funds belonging to HEH the 7th Nizam of Hyderabad) continued, with a number of cross-applications for summary judgment/strike out heard in 2016 ([2016] EWHC 1465 (Ch)). Khawar Qureshi QC acts for Pakistan. Dakis Hagen and Jonathan McDonagh act for Prince Muffakham Jah, grandson of the 7th Nizam; and Giles Richardson acts for the 7th Nizam's estate.

Alan Boyle QC and Giles Richardson continue to act in proceedings in the BVI and Bermuda for trustees holding the proceeds of commission payments made by Madoff feeder funds to their investments adviser in defending claims by the liquidators of the funds.

Richard Wilson QC appeared for the trustees of a BVI trust seeking directions concerning the administration of the trust where serious allegations of criminal activity had been made against the settlor. Dominic Dowley QC appeared for the settlor/beneficiary.

John Machell QC appeared for the trustees of a Cayman trust, in a directions application relating to the capacity of the settlor to change the beneficiary of the trust.

Richard Wilson QC appeared in the BVI Court of Appeal for the successful appellants in **Khan v Gany Holdings**, a claim which alleged that trustees failed to account for valuable trust assets. He will also be appearing in the appeal to the Privy Council, assisted by Zahler Bryan.

Frank Hinks QC acted for the plaintiff trustees in the Cayman case of **Y No 1 Trust**, in which Smellie CJ gave judgment dealing with defective or non-existent protector consent and the appropriateness of appointing Private Trust Companies in place of individual trustees.

John Machell QC is advising the trustee of a Cayman trust in relation to the effect of US criminal forfeiture proceedings relating to the assets of the trust.

Prof Jonathan Harris QC (Hon.) gave expert evidence in Russian proceedings in relation to enforceability of a Russian judgment against very high value offshore trust assets.

Richard Wilson QC continues to act for a beneficiary in multi-jurisdictional litigation in which a challenge is made to appointments of funds of almost \$400m.

Ruth Jordan advises an environmental NGO and its directors in a number of ongoing high profile judicial reviews and constitutional proceedings in The Bahamas. In 2016 she acted for the plaintiff in its historic constitutional action against the Government of The Bahamas for breaching the Constitution of The Bahamas in the course of parliamentary proceedings. The case – currently pending appeal – established the primacy of a written constitution over parliament in the context of an assertion of parliamentary privilege (**Coalition to Protect Clifton Bay & Ors v Hon Jerome Fitzgerald MP and the Attorney General of The Bahamas**).

## ...and have been active in Intellectual Property, EU and Competition and Sports cases.

Thomas Elias acted for the defendant in **Gama Healthcare Ltd v Pal International Ltd** [2016] EWHC 75 (IPEC) in successfully resisting a passing off claim based on the packaging of clinical wet wipes used in the NHS.

Michael Edenborough QC appeared in a number of trade mark appeals to the General Court and Court of Justice, including **NIAGARA** for bottled water (Case T-89/15), **SPA VILLAGE** for hotels (Case T-625/15), **PRET A DINER** for various food products, and **BIMBO** for