

# serle court in 2008

IN 2008 OUR CASES HAVE DEMONSTRATED THE BREADTH OF OUR PRACTICE ACROSS A BROAD RANGE OF CHANCERY AND COMMERCIAL DISCIPLINES. WE CONTINUE TO COVER THE WHOLE RANGE OF 'BUSINESS' LAW, FROM MAJOR OFFSHORE LITIGATION TO SMALL PIECES OF DOMESTIC ADVICE.

## Civil fraud was a major theme in a number of our high profile cases:

Philip Marshall QC and Ruth Holtham continued to represent the administrators of Lexi Holdings plc following its collapse amidst the discovery of substantial frauds committed by the company's managing director, Shaid Luqman. In particular, they appeared in **SFO v Lexi Holdings** [2008] Lloyd's Rep (Financial Crime) 489, in which it was established that a criminal restraint order will only be varied to permit the enforcement of a proprietary claim to restrained funds. Philip and Ruth also acted in **Lexi Holdings v Luqman** [2008] EWHC 1639 (Ch), an important case decided by Briggs J on directors' common law duties of care and causation of loss.

In **Abramovich v Sibir Energy plc** Alan Boyle QC and Richard Walford obtained an order that, even had there been merit in a US\$4bn fraud claim brought against Roman Abramovich, those proceedings were dismissed because of material non-disclosure to the Court.

Richard Walford is also a member of the counsel team in **Yugraneft v Roman Abramovich** which obtained reverse summary judgment against a Russian company which claimed that dilution of its interest in another company from 50% to 1% had been procured by fraud.

Philip Jones QC and Ruth Holtham appeared in **Mobilx Ltd (In Administration) v HMRC**, one of the first cases on the meaning of constructive knowledge of MTIC fraud.

Dominic Dowley QC, Philip Jones QC, Justin Higgo and Andrew Moran continue to act in **Fiona Trust & Holding Corporation & Ors v Privalov**, a multi-million US dollar misappropriation, conspiracy, fraud and bribery case brought by two operators of Russian tanker fleets against their former director general/president, their business associates and various companies.

In 2008 the case was reported at [2008] 2 P&CR DG 21 on the issue of the degree of connection necessary to invoke the 'clean hands' principle in equity, and on whether non-disclosure can be relied upon to deny equitable relief at a trial.

Simon Hattan and Gareth Tilley appeared for the claimants in **Royal Bank of Scotland Group plc v Winterthur (UK) Holdings Ltd**, a £37m claim for breach of warranty and fraudulent misrepresentation arising from the takeover of Churchill Insurance. The case settled mid-trial.

Hugh Norbury obtained judgment for more than £1m on behalf of the NHS in relation to a prescription form fraud: **London Strategic Health Authority v Pandya** [2008] EWHC 967 (Ch).

Nicholas Harrison acted for Kyrgyz Mobil in **BITEL LLC v Kyrgyz Mobil Tel Ltd and Ors; Kyrgyz Mobil Tel Ltd and Ors v BITEL LLC & Ors**, a claim to enforce a judgment from Kyrgyzstan in the Isle of Man, which was met with a counterclaim for several hundred million dollars in respect of the fraudulent misappropriation of shares in the leading Kyrgyz mobile telephone operator. The defendants to the counterclaim contested jurisdiction successfully, but the first instance decision has now been reversed by the Manx Court of Appeal. An application by the Defendants to the Counterclaim for special leave to appeal to the Privy Council will be made early in the New Year.

In December Philip Jones QC and Hugh Norbury obtained a freezing order for US\$125m (recently continued until trial by consent) arising out of fraudulently undervalued charters entered into with offshore entities by the management of the Latvian Shipping Corporation, the former Latvian state shipping business.

## Our work in offshore jurisdictions confirmed Chambers & Partners 2009 view that we possess 'an impressive offshore trusts litigation practice'.

2008 saw the start of the trial in the long-running *Alhamrani v Alhamrani* litigation in Jersey, a multi-million pound claim for breach of trust and fiduciary duty brought by members of a Saudi family against the defendant protector and trustees of Jersey trusts of the family's assets. Elizabeth Jones QC, Nicholas Harrison, Simon Hattan and Gareth Tilley are instructed on behalf of the protector, with Serle Court associate tenant Kathryn Purkis appearing as the team's Jersey Advocate before the Royal Court. The team successfully appealed against the striking-out of the Protector's case before the commencement of the trial in November. Douglas Close and Giles Richardson represent JP Morgan, the corporate trustee. Victor Joffe QC represents the plaintiff beneficiaries.

Justin Higgo was acting for the plaintiffs in what promised to be the final chapter of the *Jahre* litigation, the estate's claim that

the defendants had dishonestly misappropriated assets from trusts causing loss in excess of US\$150m. The action was compromised shortly before trial in the Grand Court of the Cayman Islands, bringing what promises to be an end to litigation which has been active since the death of Anders Jahre in 1982.

Daniel Lightman appeared before the Chief Justice of the Cayman Islands in *Tritton Development Fund Ltd v Fortis Bank (Cayman) Ltd & Ors*, the trial of a multi-million claim against Fortis Bank Cayman for breach of fiduciary duty, breach of contract and negligence in respect of its actions as nominee director and investment manager of a SPV. The case was settled during the course of the trial.

In the Bahamas, Frank Hinks QC and Jonathan Adkin continue to appear in *St George v Hayward*, a bitter contest about the ownership and control of Freeport, the second largest port in the Bahamas.

## Our property work in 2008 included several important cases before the House of Lords and Court of Appeal demonstrating why we are regarded by Chambers & Partners 2009 as a "strong name in the field of real estate litigation".

Christopher Stoner represented the successful respondent before the House of Lords in *Scottish and Newcastle plc v Raguz* [2008] UKHL 65. Their Lordships overturned the only aspect of the litigation on which S&N had previously been unsuccessful and confirmed the correct procedure for services of notices pursuant to section 17 of the Landlord and Tenant (Covenants) Act 1995, in so doing banishing the concept of 'nil' notices introduced by the judge at first instance.

Christopher also appeared before the Court of Appeal in *Greatorex v Newman* [2008] EWCA 1318 a case relating to what inferences are permissible as to the scope of user of a right of way where no evidence remains as to its past use.

Frank Hinks QC and Tom Braithwaite successfully appeared on behalf of the Crown Estates Commission in two further instalments of the Lord Marcher litigation. In *Roberts v Swangrove Estates Ltd* [2008] Ch 439 the Court of Appeal established the ability of the Crown to gain title by adverse possession in the face of textbooks and authorities going back

to the 16th century. In *Crown Estate Commissioners v Roberts* [2008] 4 All ER 828 they were successful in establishing the Crown's title to the coastline of Pembrokeshire and resisting an extravagant claim to franchise and manorial rights going back to the Norman conquest.

Andrew Francis successfully appeared before the Court of Appeal on behalf of the Respondents in *RHJ v Patten* [2008] EWCA Civ 151 in which the Court of appeal held that a term in a lease could be a 'consent' within section 3 of the Prescription Act 1932 without expressly referring to light. Accordingly, no easement of light could be acquired by the claimant's building by prescription.

Alan Boyle QC and Nicholas Asprey acted for the claimant in *Odogwu v Vastguide Ltd* [2008] All ER (D) 267, which concerned the current live issue of whether the court has jurisdiction under schedule 4 of the Land Registration Act 2002 to rectify the register where the signature of the registered proprietor has been forged on a legal charge,

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the property has then been sold by the mortgagee, and the purchaser is registered as proprietor in place of the original proprietor. The Chief Land Registrar asked to be joined, and following advice from counsel agreed, contrary to the view set out in

*Ruoff & Roper* on Registered Conveyancing, that the court does have jurisdiction. The purchaser then conceded the issue. It then sought to renege on its concession, but was finally held at the trial to be estopped from doing so.

## We also acted in important cases across all our major practice areas, including some decidedly unusual cases...

Frank Hinks QC and Jonathan Adkin appeared before the Court of Appeal in *Brown v Executors of HM The Queen Mother and HRH Princess Margaret* [2008] WTLR 425 CA, resisting an application to unseal Royal Wills brought by a Jersey accountant who claims to be the illegitimate son of Princess Margaret.

David Blayney is instructed in the prominent bank charges litigation, *Abbey National & Ors v OFT*, the test case concerning the charges on personal current accounts from which the banks generated an estimated £2.6bn each year. A series of hearings took place in 2008, including a hearing in the Court of Appeal in October/November.

Nicholas Lavender QC was instructed in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 and 1793 (Comm), a mis-selling claim against a bank relating to a US\$600m portfolio of emerging markets bonds which collapsed in value following the Russian government's default on its debt. The 68-day trial raised issues as to the existence and scope of any duty of care owed by the Bank, whether the Bank was in breach of duty and what losses resulted.

In Hong Kong, Victor Joffe QC appeared in *Waddington v Chan* [2008] HKCU 1381 deciding that multiple derivative actions may be brought and that the *Giles v Rhind* exception to the no reflective loss rule does not exist.

Intellectual Property specialist Michael Edenborough appeared in several prominent patent and trade mark cases. Before the House of Lords, Michael appeared for the Comptroller General of Patents in *Rhone-Poulenc Rorer International Holdings Inc v Yeda Research and Development Co Ltd* [2008] RPC 1, an important case on entitlement proceedings in patent matters and amendment of pleadings in patent office actions. Michael also represented the UK Government in *Adidas AG v Marca Mode CV* [2008] ETMR 44, an article 234 reference to the European Court of Justice raising the issue of how much protection should be conferred upon a mark that was only registerable by reason of acquired distinctiveness, in this case the adidas three-stripe logo.

Philip Marshall QC, David Blayney and Ruth Holtham represented Kamos Finanz AG in proceedings brought to recover a US\$235m loan

advanced to purchase commercial rights relating to Formula One.

Daniel Lightman represented Mr Sugar in *BBC v Sugar* [2008] 1 WLR 2289, where the Court of Appeal for the first time decided whether (i) where the Information Commissioner had ruled that under the Freedom of Information Act 2000 the BBC was not a 'public authority' for the purposes of the Act, he had issued a decision notice and (ii) the Information Tribunal had jurisdiction to hear an appeal against the Information Commissioner's ruling.

Victor Joffe QC and Tim Collingwood appeared in *Re Southern Counties Fresh Foods Ltd* [2008] EWHC 2810 (Ch), an unfair prejudice case deciding nature and extent of fiduciary duties of directors of competing companies.

Chambers & Partners Chancery Junior of the year William Henderson appeared in a number of charities cases. In *Right Reverend Crispian Hollis (Bishop of Portsmouth) v Rolfe & Ors* [2008] EWHC 1747 (Ch), the court held that the transfer of a property belonging to a community of Benedictine nuns had not been in breach of the oral charitable trusts under which the property had been purchased, had not breached the rule against trustees self-dealing and had not been induced by undue influence. William represented the Attorney General.

William is also instructed on behalf of the Attorney General in *Seevaratnam v Charity Commission and Attorney General*, the first ever appeal to the Charity Tribunal established under the Charities Act 2006.

James Behrens acted for the successful respondent in *Clark v Clark Construction Initiatives Ltd* [2008] EWCA Civ 1446, where the Court of Appeal said that litigants and the public were entitled to expect reasoned judgments which were "candid, intelligible, transparent and coherent". The Court of Appeal held that the employment tribunal's decision, though it contained unfortunate faults, passed this test.

In *Stow v Stow* [2008] 3 WLR 827, David Drake appeared as junior counsel representing trustees whose administration of a settlement had been paralysed by their anticipation of claims, *inter alia* from a potentially insolvent estate of which there were no personal representatives;

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the trustees brought a claim for declaratory relief to which they joined HMRC and the widow on the basis of their intimated claims against the estate. HMRC's challenge to the High Court's jurisdiction, on the basis that the fact sought to be decided was also in issue in disputed tax assessments raised against the trustees directly, was rejected by Warren J on the basis that the case fell outside the exclusive jurisdiction of the Special Commissioners.

In *Expandable Ltd v Rubin* [2008] 1 WLR 1099, [2008] BPIR 314, The Times, March 10, 2008, for the first time the Court of Appeal determined the requirements for a document to be deemed to be 'mentioned' in a statement of case or witness statement for the purposes of CPR rule 31.14, and decided whether mentioning a document in a witness statement gave rise to an automatic right to inspect it under that rule. Daniel Lightman appeared on behalf of the Appellants.

In *Harding v HM Revenue & Customs Commissioners* [2008] BTC 722 Ruth Jordan appeared as junior counsel representing the successful respondent in an appeal to the Court of Appeal relating to the construction of section 117(1)(b) of the Taxation of Chargeable Gains Act 1992. The issue was whether a lapsed foreign currency provision in a loan note constituted a security 'in respect of which no provision is made for redemption in a currency other than sterling' for the purposes of the section 117(1)(b) definition of

qualifying corporate bonds. Ruth is instructed by HMRC to appear on another forthcoming case that turns on a related point of construction.

Philip Jones QC and Ruth Holtham are instructed to appear in the '**TAG 2**' litigation, a multi-million pound professional negligence action brought by AXA following the failure of the Composite Legal Expenses after the event insurance scheme.

In *Re Bechal, Blackman v Man* [2008] WTLR 389 William Henderson represented the Attorney General in a case that received significant press coverage concerning an elderly widow who left virtually her whole estate (£10m+) to restaurateurs who were tenants of her and her deceased husband's property company. The will was held to be valid despite medical evidence of Alzheimers.

Philip Jones QC, Hugh Norbury and John Machell are all involved in ongoing litigation between Russian-born Israeli billionaire Michael Cherney and Frank Neuman arising out of a series of London and other property purchases in the last few years. Philip and Hugh act for Mr Cherney; John acts for Mr Neuman. A jurisdiction application by Mr Neuman is due to be heard in the early part of 2009.

Finally, Justin Higgo acted for Ocean Trawlers Europe Ltd, the successful claimant on an application to obtain a freezing order for £3.2m to preserve substantial amounts of missing and misappropriated frozen fish!

## Whilst in chambers...

Our expertise has again been acknowledged by the directories in 2008. In *Chambers & Partners* we have 92 individual recommendations placing us 4th in the 'recommendations per member' table. As a set we are recommended in 11 practice areas and only 4 other sets are recommended in more. Whilst in *The Legal 500* we have 85 individual recommendations and are recommended as a set in 10 practice areas.

We have also received a number of award nominations this year including: Chambers of the Year at the STEP Private Client Awards; 3 nominations at the Chambers & Partners Bar Awards

– Chancery Set of the Year, Chancery Junior of the Year and Client Service Set of the Year; Chambers of the Year at the British Legal Awards; and we are the only Chancery Commercial set nominated as Chambers of the Year at the Legal Business Awards. For the second year running a member of Serle Court, William Henderson, was named Chancery Junior of the year at the Chambers & Partners Bar Awards.

In 2008 we were delighted to welcome 3 new tenants: Michael Edenborough, Dan McCourt Fritz and Gareth Tilley. We also extend our congratulations to Peter McMaster and Nicholas Lavender who both took silk this year.