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This term's Supreme Court commercial law cases

Article by David Bowden

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There are 8 cases that the Supreme Court will hear between October and December 2016 which will be of interest to commercial law practitioners. These cases cover hardy perennials such as VAT, insolvency and tax liability for repairs.

They also include other interesting seasonal ones on:

- **dependency claims where a family member is written out of a will,**
- **the scope of solicitor's professional indemnity cover, and**
- **whether a regulator seeking to take enforcement action against a corporate body has to give special rights to an individual at that company who is being criticized.**

There are a couple of unusual cases too such as:

- **whether negligent advice was or was not collateral to an adviser's breach of contract, and**
- **the scope of Brussels 1 as to whether English courts can deal with a derivatives contract governed by German law.**

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1. AMT FUTURES v. MARZILLIER, DR MEIER & DR GUNTNER RECHTSANWALTSGESELLSCHAFT mbH

What are the relevant agreed facts?
AMT Futures ('AMTF') is a UK incorporated derivatives broker which provided brokerage services for individual investors. Most of these were based in Germany and introduced to AMTF by independent introducing brokers in Germany in relation to the purchase and sale of derivative instruments. Some of AMTF's former clients issued proceedings in Germany against AMTF claiming damages based on German tort law in respect of losses on derivatives trades.

The agreements governing the relationship between the former clients and AMTF provided for English law to apply to the dealings, and purported to bestow exclusive jurisdiction in relation to any disputes on an English court. AMTF now seeks to claim against MMGR, a German law firm which represented each of the former clients in their German proceedings. This is on the basis that MMGR induced its former clients to issue proceedings in breach of their contractual obligations to AMTF to bring any such claims before the English Courts and under English law.

AMTF claims injunctive relief and damages in tort for inducement of breach of contract.

What is the issue for the Supreme Court?
Whether English Court has jurisdiction to try this case under EU Regulation Number **44/2001** dated 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. This is commonly known as the Brussels I regulation.

Who will hear the case?
Lord **Neuberger PSC**, Lord **Mance**, Clarke, Sumption and **Hodge** JJSC.
A panel granted permission on 2 February 2016.

When it is listed for and for how long?
It is listed for 1½ days from 5 to 6 October 2016.

What happened in the Court of Appeal?
On 26 February 2015 Laws, Tomlinson and Christopher Clarke LJJ allowed MMGR's appeal– **[2015] EWCA Civ 143.** However this was through much gritted teeth with Tomlinson LJ poignantly observing that '*I view with little enthusiasm the result to which we are compelled*'.

What happened in the lower courts?
In the High Court, QBD, Commercial Court on 11 April 2014, Popplewell J gave his judgment – **[2014] EWHC 1085 (Comm).** He was required to rule on an application by MMGR for a declaration that an English court does not have jurisdiction over it in respect of the subject matter of the claim and for an order setting aside service of the Claim Form. He had to construe the scope and application of Article 5(3) of the Brussels 1 Regulation. He dismissed MMGR's application in quite trenchant terms

concluding that '*there are serious issues to be tried that one or more of the claims commenced by AMT's former clients against it in Germany constituted a breach of a valid and enforceable exclusive jurisdiction clause binding on the former client*.'

What could be the implications of its ruling?
The timing of the hearing coming so soon after the EU referendum could scarcely be better. The coded message from the Court of Appeal is that it really wanted to uphold the sensible first instance ruling. Whatever the shape of Brexit looks like, the UK is likely to want to either retain Brussels 1 or negotiate something similar. In many commercial contracts, companies want to retain the flexibility to choose which country's courts will have jurisdiction and for that freely negotiated choice to be respected. There is also the separate issue of whether English as either a choice of law or jurisdiction will remain as popular after Brexit or not.

2. AIG EUROPE v. WOODMAN & THE INTERNATIONAL LAW PARTNERSHIP

What are the relevant agreed facts?
ILP, a solicitors' firm, was wound up in 2010. It was restored to the register of companies for the purposes of meeting certain claims brought against it by 214 investors. These claims sought damages of £10 million which arose from ILP's engagement by a property development company to assist with building holiday resorts in Turkey and Morocco. Proceedings in relation to those claims remain ongoing.

AIG provided professional indemnity insurance to ILP. The insurance policy incorporates the minimum terms and conditions of PII for solicitors in England and Wales. The policy is subject to a 'per claim' limit of £3 million.

AIG brought proceedings in the Commercial Court seeking a declaration that the investors' claims against ILP should be aggregated pursuant to the aggregation clause in the insurance policy, on the basis that the claims '*arose from … similar acts or omissions [of ILP] in a series of related matters or transactions'*.

What is the issue for the Supreme Court?
What is the true construction of the words '*in a series of related matters or transactions'* within the aggregation clause of a professional indemnity insurance policy?

Who will hear the case?
Lords **Mance**, **Clarke**, Reed, Sumption and Toulson JJSC.
Lord Wilson JSC was also on panel who granted permission on 19 July 2016.

When it is listed for and for how long?
10 October 2016 for 1 day.

What happened in the Court of Appeal?
On 14 April 2016 Longmore, Kitchin and Vos LJJ allowed AIG's appeal in part - **[2016] EWCA Civ 367**. It should be noted that the Law Society of England & Wales acting in its regulatory capacity as the SRA intervened in the appeal. The Court of Appeal partly reversed the first instance judgment. It did however reject AIG's interpretation of the aggregation clause.

What happened in the lower courts?
Mr Justice Teare on 14 August 2015 refused to grant declaratory relief to AIG - **[2015] EWHC 2398 (Comm)**

What could be the implications of its ruling?
Although this case has arisen in the context of a claim against a solicitor's practice, the aggregation clause is in common form used in many similar PII policies that other professionals such as architects, accountants, actuaries, and so on use. Any ruling which seeks to limit the scope of PII cover in the way that the insurers contend cannot be good news for professionals.

3. FCA v. ACHILLES MACRIS

What are the relevant agreed facts?
The Financial Conduct Authority ('FCA') issued a warning notice, a decision notice, and a final notice to an investment bank informing it that it was imposing a fine as a result of losses incurred in a trading portfolio. Mr Macris had a role in the management structure of the portfolio. Although the notices did not name Mr Macris, he argued that there were references to a part of the bank's management structure which identified him and that he should therefore have been given third party rights in relation to the notices under s.393 of the Financial Services and Markets Act 2000 ('FiSMA').

What is the issue for the Supreme Court?
What is the meaning of the words '*any of the reasons contained in [a notice] relates to a matter which identifies a person*' in s.393(1) and (4) of the FiSMA?

Who will hear the case?
Lord **Neuberger PSC**, Lords Mance, Wilson, Sumption and **Hodge** JJSC.
Lord Clarke JSC was also on panel who granted permission on 3 November 2015.

When it is listed for and for how long?
13 October 2016 for 1 day.

What happened in the Court of Appeal?
On 19 May 2015 Longmore, Patten and Gloster LJJ dismissed the FCA's appeal– **[2015] EWCA Civ 490.** Lady Justice Gloster said although she did **'***not consider that the judge adopted the correct test for resolving the issue of identification for the purposes of section 393, nonetheless he clearly reached the right conclusion on the evidence before him, or at least would have done so had he applied what I regard as the appropriate test*'. The Court of Appeal held that Mr Macris was identified by FCA notices.

What happened in the lower courts?
In the Upper Tribunal (Tax & Chancery Chamber), the FCA lost with a judgement given by Judge Timothy Herrington on 10 April 2014 - **FS/2013/0010.** The Upper Tribunal held too that Mr Macris was identified by the FCA notices.

What could be the implications of its ruling?
FiSMA gives the FCA wide powers and it is a complex piece of legislation with lengthy provisions. Section 393 of FiSMA is framed in wide terms. With the Senior Manager's Regime now in place, where the FCA does take action against a firm it will invariably have to include some failings by regulated individuals (be they within the SMR or not) when it does so. The reputation and interests of individuals and firms may diverge particularly where an individual maintains (s)he advised or was against a certain course of action that a firm subsequently engaged in.

4. LEHMAN BROTHERS LTD (in administration) v. LEHMAN BROTHERS INTERNATIONAL (EUROPE) LTD (in administration)

What are the relevant agreed facts?
Lehman Brothers International (Europe) (LBIE) entered administration in September 2008 during the global collapse of the Lehman Brothers group. LBIE has a large surplus following payment of, or provision for, unsubordinated proved debts in full. Various groups of creditors claim to be entitled to payments from the surplus. They include creditors claiming statutory interest, subordinated debt holders and foreign currency creditors.

LBIE is an unlimited company with 2members:

- LB Holdings Intermediate 2 Limited, and
- Lehman Brothers Limited.

Both have filed ordinary unsecured claims against LBIE and LB Holdings Intermediate 2 Limited has filed a large claim as a subordinated loan creditor. Lehman Brothers Holdings Inc is the ultimate parent company for the Lehman Brothers group.

What is the issue for the Supreme Court?
The Supreme Court will have to determine these 6 insolvency issues:

- The proper ranking of certain subordinated debt in an insolvency '*waterfall*',
- Whether the creditors of a company in administration whose provable claims are denominated in a foreign currency are entitled to payment (as non-provable liabilities of the company) of the balance of such claims which remains outstanding following the process of proof as a result of a decline in value of sterling against the currency of the claim between the commencement of the administration of that company and the dates of dividend distributions and, if so, the proper ranking of such claims,
- Whether statutory interest accruing but unpaid during a company's administration is payable in that company's subsequent liquidation,
- The scope of liability of members in an unlimited company under s.74 of the Insolvency Act 1986,
- Whether an unlimited company in administration can submit a proof of debt in a distributing administration or liquidation of one of its members, with respect to a contribution claim pursuant to s.74 of the Insolvency Act 1986, and
- Whether the 'contributory rule' (whereby a contributory of a company in liquidation could not recover anything in respect of any claims he might have as a creditor until he had fully discharged his obligations as a contributory) extends to administrations.

Who will hear the case?
Lord **Neuberger PSC**, Lords Kerr, **Clarke**, Sumption and Reed JJSC.
Lord Hodge JSC was also on panel who granted permission on 3 November 2015.

When it is listed for and for how long?
It is listed for 4 days from 17 to 20 October 2016.

What happened in the Court of Appeal?
On 14 May 2015 Moore-Bick, Lewison and Briggs LJJ in a lengthy and complex judgment dismissed the appeal brought by the joint administrators of LB Holdings Intermediate 2 Limited - **[2015] EWCA Civ 485**

What happened in the lower courts?
In the High Court, Chancery Division, Companies Court on 14 March 2014, David Richards J gave his judgment – **[2014] EWHC 704 (Ch).** He noted that the case involved **'***important legal issues of complexity and, in some instances, obscurity*'.

He summarised his 9 conclusions as:

- The claims of LBHI2 under its subordinated loan agreements with LBIE are subordinated not only to provable debts but also to statutory interest and un-provable liabilities.
- Creditors of LBIE whose contractual or other claims are denominated in a foreign currency are entitled to claim against LBIE for any currency losses suffered by them as a result of a decline in the value of sterling as against the currency of the claim between the date of the commencement of the administration of LBIE and the date or dates of payment or payments of distributions to them in respect of their claims. Such currency conversion claims rank as un-provable liabilities, payable only after the payment in full of all proved debts and statutory interest on those debts.
- If the administration of LBIE is immediately followed by a liquidation, any interest in respect of the period of the administration which has not been paid before the commencement of the liquidation will not be provable as a debt in the liquidation nor will it be payable as statutory interest under either rule 2.88 of the Insolvency Rules or section 189 of the IA 1986.
- Those creditors of LBIE with debts which carry interest by reason of contract, judgment or other reasons unconnected with the administration or liquidation of LBIE will be entitled to claim in a liquidation of LBIE, which immediately follows the administration, for interest which accrued due during the period of the administration, as an un-provable claim against LBIE, payable after the payment in full of all proved debts and statutory interest on such debts.
- The obligation of members to contribute under section 74(1) of the IA 1986 extends not only to provide for proved debts but also for statutory interest on those debts and un-provable liabilities.

- The contributory rule (that is, the rule that a contributory of a company in liquidation cannot recover anything in respect of any claims he may have as a creditor until he has fully discharged his obligations as a contributory) applies only in a liquidation. It does not apply in an administration, including the administration of LBIE. The equitable rule in *Cherry v Boultbee* **(1838) 2 Keen 319, (1839) 4 My & Co 442** does not apply.
- LBIE, acting by its administrators, will be entitled to lodge a proof in a distributing administration or a liquidation of either LBL or LBHI2 in respect of those companies' contingent liabilities under section 74(1) of the IA 1986 which may arise if LBIE were to go into liquidation. The valuation of such claims would be a matter of estimation under the provisions of the Insolvency Rules.
- In a distributing administration or liquidation of LBL or LBHI2, the claims of those companies respectively as creditors of LBIE would be the subject of mandatory set-off against the claims of LBIE in respect of those companies' contingent liabilities as contributories. I have reached the conclusion that the decision in *In re Auriferous Properties Limited (No 1)* **[1898] 1 Ch 691** was wrong and should not be followed.
- In the administration of LBIE the contingent liabilities of LBL and LBHI2 as contributories will be the subject of mandatory set-off against the admitted proofs of debt of those companies as creditors of LBIE.

What could be the implications of its ruling?
Whilst this should attempt to bring some finality to the complex insolvency of Lehmans, the appeal remains very broad in scope for one to the Supreme Court. It has 6 issues to determine including the proper ranking of subordinated debts in an insolvency waterfall. Although it will be tempting for it to affirm the first instance ruling, no doubt their enquiry on obscure points of insolvency law and practice will run wide and deep during this 4 day appeal. Office holders will also be able to draw comfort from what will be a final ruling from the Supreme Court especially in relation to distribution of surpluses where there are competing interests.

5. VW FINANCIAL SERVICES v. HMRC

What are the relevant agreed facts?
VWFS procures vehicles to supply to customers under hire purchase agreements. This supply includes the taxable supply of that vehicle and the exempt supply of finance. Because of this mixture, HMRC and VWFS agreed a *'partial exempt special method'* (or **PESM**) for apportioning tax, a system provided for by EU law and its UK implementing instruments.

Under an industry agreement reached by the Finance Houses Association and HMRC, the PESM finance companies are entitled to recover (in respect of HP transactions) all of the input tax incurred on the goods **plus 15%** of the residual input tax. Here the parties reached different interpretations of the PESM. From October 2007, VWFS accounted for VAT according to its preferred method with HMRC raising assessments for under-claimed VAT in response. From October 2008, VWFS adopted HMRC's methodology, submitting voluntary disclosures for unpaid tax in the process which HMRC rejected. HMRC's decisions to raise assessments and reject voluntary disclosures are the decisions challenged in this case.

What is the issue for the Supreme Court?
Under the PESM what is a fair and reasonable apportionment of residual input tax on costs incurred by VWFS in its retail sector in relation to its general overheads in respect of hire purchase transactions? These include a mixture of supplies some of which are liable to VAT and the others are exempt.

Who will hear the case?
Lord **Neuberger PSC** and Lords Kerr, Reed, Carnwath and **Hodge** JJSC.
Lord Toulson JSC was also on panel who granted permission on 23 December 2015.

When it is listed for and for how long?
3 November 2016 for 1 day.

What happened in the Court of Appeal?
On 28 July 2015 Patten, Sharp & King LJJ allowed the taxpayer's appeal - **[2015] EWCA Civ 832.**

What happened in the lower courts?
In the Upper Tribunal (Tax and Chancery), the HMRC won with the judgement given by Vos J and Tribunal Judge Timothy Herrington on 12 November 2012 - **[2012] UKUT 394 (TCC).** The taxpayer won in the First Tier Tribunal with the judgement given by Tribunal Judge Roger Berner and lay member Elizabeth Bridge On 18 August 2011- **[2011] UKFTT 556 (TC).**

What could be the implications of its ruling?
PESM is an industry standard for the treatment of VAT used by all hire purchase companies. Hire purchase still remains the most common method of financing the acquisition of new and second hand vehicles by consumers. It is only the UK and Ireland in the EU which have hire purchase as a product. The European Commission has consistently failed to understand the nature of this product. Hire Purchase has difficulty slotting in exactly to the definitions used in the Principal VAT Directive. If HMRC wins, the effect could be to put up the cost of hire purchase which will in the end be borne by consumers.

6. NEWBEGIN (valuation officer) v. SJ & J MONK (a firm)

What are the relevant agreed facts?
Monk is the owner of office premises. Newbegin is a Valuation Officer who assessed those premises for entry in the 2010 non-domestic rating list. At the time when the premises fell to be valued, they were stripped to a shell under a scheme of works to convert them into three separate office suites. The Local Government Finance Act 1988 provides that rateable value is to be determined on the assumption that the property is '*in a state of reasonable repair'*. The appellant contends that the works being carried out at the time went beyond '*repairs*', and the rating valuation ought to reflect that the premises were not in a condition to be rented out.

What is the issue for the Supreme Court?
Where a commercial property has been stripped out for renovation, what physical state is it assumed to be in?

Who will hear the case?
Lord **Neuberger PSC**, Lords Kerr, Reed, **Carnwath** and Hodge JJSC.
Lord Wilson JSC was also on panel who granted permission on 14 July 2015.
(As Lady Justice Arden is Lord Mance's wife he is recused from this case).

When it is listed for and for how long?
7 November 2016 for 1 day.

What happened in the Court of Appeal?
On 13 February 2015 Arden, Davis and Lewison LJJ allowed the valuation officer's appeal - **[2015] EWCA Civ 78**

What happened in the lower courts?
In the Upper Tribunal (Lands Chamber), the valuation officer won on 1 issue and the taxpayer on the other with the judgement given by Mr A J Trott FRICS on 26 February 2014 - **[2014] UKUT 14 (LC).** The taxpayer lost in the Valuation Tribunal for England on 19 October 2012.

What could be the implications of its ruling?
Although this case arises in the context of a rates case, the Supreme Court will have to determine the nature of 'repairs'. The distinction between repairs and improvements to property have implications for tax payers not just in the rating field with the former often allowable against corporation tax liability whilst the latter is not.

7. LOWICK ROSE LLP v. SWYNSON LIMITED

What are the relevant agreed facts?
Swynson Limited is a company ultimately owned by Mr Hunt. In 2006, Swnyson made a substantial loan to a company, EMSL, in order to facilitate a management buy-out. Swynson made this loan in reliance on negligent advice from Lowick Rose. EMSL's business did not perform as expected, however, and Swynson was forced to make two further loans to EMSL in 2007 and 2008. Mr Hunt also became EMSL's ultimate majority shareholder.

In 2008, a refinancing was carried out in order to reduce EMSL's liability to Swnyson. This involved Mr Hunt making a substantial loan to EMSL, which EMSL used to pay-off two of its loans from Swynson in full. When EMSL's business was ultimately wound up, Mr Hunt did not recover any of his loans to EMSL, and Swnyson did not recover any of its one outstanding loans. Swnyson and Mr Hunt claimed in negligence against Lowick Rose for damages representing the full amount of Swynson's three loans to EMSL.

What is the issue for the Supreme Court?
Whether the Court of Appeal erred in law in holding that a lender could recover damages from its negligent adviser representing loans that had been repaid by the borrower, on the basis that the borrower's repayments were collateral to the adviser's breach of contract. (The Latin for 'collateral to' is '*res inter alios acta*').

Who will hear the case?
Lord Neuberger PSC, Lords **Mance**, Clarke, Sumption and **Hodge** JJSC.
Lord Wilson JSC was also on panel who granted permission on 8 December 2015.

When it is listed for and for how long?
It is listed for 4 days from 21 to 24 November 2016.

What happened in the Court of Appeal?
On 25 June 2015 the Court of Appeal were divided. Longmore and Sales LJJ (in the majority) dismissed Lowick Rose's appeal. However Lord Justice Davis dissented and was in favour of allowing it - **[2015] EWCA Civ 629**

What happened in the lower courts?
In the High Court, Chancery Division on 30 June 2016, Rose J gave her judgment - **2014] EWHC 2085 (Ch).** At the end of the trial, negligence and causation had been conceded. Her conclusions on the outstanding issues were:

- Lowick Rose did not owe a duty of care to Mr Hunt personally in addition to the duty of care they owed to Swynson,
- The partial refinancing of the debt at the end of 2008 was *res inter alios acta* and does not affect the liability of Lowick Rose to Swynson,
- The deemed value of the assets referred to in the collateral surrender agreement in May 2011 does not affect the quantum of Swynson's loss,
- The 2007 and 2008 Loans were made by Swynson in reasonable mitigation of the losses arising from the 2006 Loan, and
- The cap on Lowick Rose's liability was increased to £15 million by agreement between Lowick Rose and Swynson in February 2007.

What could be the implications of its ruling?
Lord Justice Longmore in the Court of Appeal spends much of his judgement analyzing the case on the basis of unjust enrichment. This is a remedy that is increasing sought by litigants and granted by the courts. The scope or boundaries of the remedy are not always clear. In *Futter and Pitt v HMRC* **[2013] UKSC 26** the Supreme Court looked at unjust enrichment in the context of mistake. One of the categories was a category of mere causative ignorance rather than that of incorrect conscious belief or incorrect tacit assumption which it said would not qualify for unjust enrichment. This case will give it a further opportunity to delineate the boundaries of the unjust enrichment remedy.

8. ILLOTT v. LANE, BLUE CROSS ANIMAL WELFARE CHARITY, RSPB & RSPCA

What are the relevant agreed facts?
Mrs Jackson died in 2004. By her will, she left the majority of her estate valued at £486,000 to three charities. The will made no provision for Mrs Jackson's only child, Mrs Ilott. The mother and daughter had become estranged many years before and their attempts at reconciliation had failed. Mrs Ilott made an application under the Inheritance (Provision for Family and Dependants) Act 1975 for reasonable financial provision from her late mother's estate.

What are the issues for the Supreme Court?
It has these 5 issues to determine namely whether the Court of Appeal was wrong:

- To set aside the award made at first instance on Mrs Ilott's claim under the 1975 Act,
- In deciding to re-exercise the court's discretion to make an award under the 1975 Act, it erred in taking account of the factual position as at the date of the appeal rather than the date of the original hearing,
- In its approach to the '*maintenance*' standard under the 1975 Act,
- To structure an award under the 1975 Act in a way which allowed Mrs Ilott to preserve her entitlement to state benefits, and
- In its application of the balancing exercise required under the 1975 Act.

Who will hear the case?
Lord **Neuberger PSC**, Lady Hale DPSC, Lords Kerr, Clarke, Wilson, **Sumption** and **Hughes** JJSC. A panel granted permission on terms on 22 February 2016.

When it is listed for and for how long?
12 December 2016 for 1 day.

What happened in the Court of Appeal?
On 27 July 2015 Arden, Ryder and Rimer LJJ allowed Mrs Ilott's appeal - **[2015] EWCA Civ 797.** It substituted its own award of:

- £143,000, to enable Mrs Ilott to buy her housing association home,
- the reasonable costs of the purchase, and
- payments up to a maximum of £20,000 structured in a way that would allow Mrs Ilott to preserve her state benefits.

What happened in the lower courts?
In the High Court, Family Division the charities won with the judgement given by Mrs Justice Parker on 3 March 2014 - **[2014] EWHC 542 (Fam).** On 7 August 2007, District Judge Million had made an award in Mrs Ilott's favour of £50,000.

What could be the implications of its ruling?
The appeal is brought by 3 charities. The effect of the Court of Appeal's ruling on the 1975 Act is that they have received a far smaller sum than they envisaged under the terms of the will. Many charities depend on legacies to support their work. The terms of the 1975 Act are framed in broad terms giving the court discretion in deciding what is appropriate provision for family or dependants. Fall outs within families are not uncommon. With Generation Z saddled with large amounts of debt from student loans and the like, there is a clear incentive for them to make dependency claims from a deceased relative's estate where they feel they have been wrongly cut out.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.