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This term's Supreme Court commercial law cases

Article by David Bowden

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There are 16 cases that the Supreme Court will hear between January and April 2017 which will be of interest to commercial law practitioners. These cases cover hardy perennials such as tax, patents and libel. Unusually the Supreme Court will hear 2 separate appeals in which the recoverability of success fees and after the event insurance premiums are challenged.

They are a glut of employment law cases including:

- **Deductions from wages of striking workers,**
- **Part time worker's pension rights, and**
- **Employment Tribunal fees.**

There are 2 planning cases it will hear too. One of which concerns compensation due under compulsory purchase powers and the other the construction of the National Planning Policy Framework which developers are resorting to in order to obtain planning permission to build new housing estates.

There are more than the usual number of cross-border disputes this term including:

- **Enforcing foreign arbitral awards in English courts,**
- **Direct claims in an English court against Spanish companies under the EU Judgements Regulation, and**
- **Third party debt orders against foreign companies.**

Finally there are a couple of unusual cases such as:

- **Fines for taking children out of school during term time,**
- **Damages for breach of public procurement rules, and**
- **Earn outs or claw backs in a business share purchase agreement.**

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1. Homes and Community Agency v. JS Bloor

What are the relevant agreed facts?
In May 2003, the appellant (JS Bloor) acquired a site of two plots of grazing land extending to 26.85 acres. The site was within an area subject to a compulsory purchase order ('CPO') made by the North-West Development Agency for the purposes of the construction of a business park in Rochdale. Subsequent to the confirmation of the CPO by the Secretary of State in 2004, the appellant sought compensation for the value of the Site under the Land Compensation Act 1961.

The respondent (which took over the rights and liability of the NWDA in 2011), estimated the existing value of the site at £2,000 per acre based on its use as grazing land. The appellant sought compensation in the sum of £2,593,000 on the basis of the prospect of planning permission being granted for residential development on the site.

What is the issue for the Supreme Court?
Whether, in disregarding the increase or diminution in value of a site acquired compulsorily which is attributable to other land subject to the same compulsory purchase order, it is permissible to modify the planning status of the site in question.

Who will hear the case?
Lords Neuberger PSC, Clarke, Sumption, **Carnwath** and **Hughes** JJSC.
Lady Hale DPSC was also on panel who granted permission on 23 December 2015.

When it is listed for and for how long?
It is listed for 1 day on 12 January 2017.

What happened in the Court of Appeal?
On 22 May 2015 Jackson, Patten and Sales LJJ allowed HCA's appeal - **[2015] EWCA Civ 540**. It set aside the UT's decision and remitted the assessment of compensation back to the UT to be decided without regard to the scheme of development as defined in its judgment.

What happened in the lower courts?
The Upper Tribunal awarded compensation in the sum of £746,000 to the appellant on the basis that there was a 50% chance of planning permission being granted for a 74 unit residential development on part of the Site.

What could be the implications of its ruling?
The determination of compensation following compulsory purchase is usually left to surveyors to establish. It will be interesting to see if any new principles emerge from this case which causes any rethinking of established principles.

2. PNM v. Times Newspapers

What are the relevant agreed facts?
The Appellant (PNM) was arrested on 22 March 2012 in connection with an investigation into allegations of child sexual grooming/prostitution. He has never been charged with any offence as a result of the investigation and was 'de-arrested' in July 2013. Nine men were prosecuted in connection with the investigation. The Crown Court made a reporting restriction order varied on 4 February 2013 prohibiting the publication of any report which referred to evidence presented in the criminal trial which might identify or tend to identify the Appellant. The Appellant had been released on bail by that time but proceedings against him remained 'active'.

The reporting restriction application and subsequent applications to lift the order, reference was made in open court to the fact of the Appellant's arrest and associated identifying information. In October 2013, the Appellant was informed that the criminal trial judge was proposing to discharge the reporting restriction order. The Respondents wish to publish a report concerning the imposition, maintenance and discharge of the order. The Appellant applied to the High Court for an interim non-disclosure order preventing his identification as an arrestee, including in reports of open court proceedings.

What is the issue for the Supreme Court?
Whether the Court of Appeal erred in its interpretation and application of the approach to be taken in balancing the privacy rights of a person arrested but not charged with a crime against the right of the press to report open court proceedings following the Supreme Court's decision *in A v. British Broadcasting Corporation (Scotland)* [**2014] UKSC 25**.

Who will hear the case?
Lord Neuberger PSC, Lady Hale DPSC, Lords **Kerr**, Clarke, **Wilson**, Sumption and **Reed** JJSC.
A panel granted permission on 18 Feb 2015.

When it is listed for and for how long?
It is listed for 1½ days from 17 January 2017.

What happened in the Court of Appeal?
On 1 August 2014 Lord Dyson MR, Sharp and Vos LJJ dismissed PNM's appeal - **[2014] EWCA Civ 1132.**

What happened in the lower courts?
On 22 October 2013 Tugendhat J dismissed PNM's application for a non-disclosure order is dismissed - **[2013] EWHC 3177 (QB).** However the judge ruled that PNM's details would remain anonymised until after his appeal had been determined.

What could be the implications of its ruling?
As the phone hacking cases demonstrate, once someone's privacy has been breached it is not possible to put Pandora back into the box. No doubt the Supreme Court will be alert to the danger of others seeking to take the law into their own hands if the identity is revealed.

3. Times Newspapers v. Flood

What are the relevant agreed facts?
On 2 June 2006, Times Newspapers Limited ('TNL') published an article, in print and on its website, stating that there were strong grounds to believe that Mr Gary Flood, a detective sergeant with the Metropolitan Extradition Unit, had been corrupt. Mr Flood brought libel proceedings in May 2007. He was subsequently exonerated by the Directorate of Professional Standards of the Metropolitan Police in its report, made available to the parties on 5 September 2007.

TNL did not report the outcome of this investigation or update its online article until 21 October 2009.

In the proceedings, TNL relied on, amongst other defences, the *Reynolds* defence of public interest *(Reynolds v. Times Newspapers Ltd* **[2001] AC 127**). This was tried as a preliminary issue. The Supreme Court had earlier ruled that TNL could rely on the *Reynolds* defence **before** 5 September 2007 but not afterwards. This meant that the *Reynolds* defence was successful in relation to the printed copies as well as 3,777 publications on its website.

TNL subsequently admitted liability for publications between 5 September 2007 and 21 October 2009, during which approximately 550 publications took place. At the damages hearing, Mr Flood was awarded damages of £60,000 and his costs incurred for both the preliminary issue and the trial to be assessed if not agreed.

Mr Flood had a Conditional Fee Agreement with his lawyers. The costs order included a success fee and an 'after the event' (ATE) insurance premium. Mr Flood claims costs against TNL of £1,698,192 plus interest.

What is the issue for the Supreme Court?
Whether having to pay the entire costs of the other side, including success fee and ATE insurance premiums arising from a Conditional Fee Agreement, in a libel case in which it was partly successful violated TNL's rights under Article 6 and 10 of the European Convention of Human Rights.

Who will hear the case?
Lord Neuberger PSC, Lords **Mance**, Sumption, Hughes and **Hodge** JJSC.
Lord **Clarke** JSC was also on panel who granted permission on 3 May 2016.

When it is listed for and for how long?
It is listed for 3 days from 24 to 26 January 2017.

What happened in the Court of Appeal?
On 4 December 2014 Macur, Sharp and Lloyd LJJ refused TNL's appeal **- [2014] EWCA Civ 1574**
In an agreed appendix all 3 judges castigate TNL as having taken a course which went '*beyond misjudgment'* being rather '*dogged refusal to take a course which was professional, responsible and fair*' which they said '*was devoid of any consideration for the position of the claimant*'.

What happened in the lower courts?
On 19 December 2013, Nicola Davies J assessed libel damages at £60,000 and ordered TBL to pay Flood's costs - **[2013] EWHC 4075 (QB)**

What could be the implications of its ruling?
It is unlikely that Mr Flood could have funded his case in any other way. He therefore had no option but to take out a CFA and ATE to cover his costs of losing. The newspaper fought this libel claim and lost. It would seem to ill behove them now to try and resile from paying costs. The result that the a majority of the Supreme Court came to in *Coventry v. Lawrence* remains unsatisfactory with Lord Mance clearly stating that it was an 'awkward case'. What the European Court of Human Rights will make of CFAs when a case does eventually reach it remains to be seen. There is the possibility that the ECHR will find CFAs to breach the Convention and if it does so, that could leave the Ministry of Justice facing a large compensation bill for introducing these in the Access to Justice Act 1999 in the first place.

4. Isle of Wight Council v. Platt

What are the relevant agreed facts?
Mr Platt (the respondent) requested permission to take his daughter out of school for a holiday. This request was refused by the daughter's head teacher. The respondent took his daughter out of school on holiday for 7 days. As a result, he was issued with a fixed penalty notice in respect of the absence. The respondent did not pay the penalty of £60 by the initial deadline and so he was sent a further invoice for £120. The respondent did not pay this either and so he was prosecuted on the basis of his alleged failure to secure '*regular attendance'* at school of his daughter, contrary to section 444(1) of the Education Act 1996.

The respondent pleaded 'not guilty' before the Isle of Wight Magistrates' Court. The defence submitted that there was no case to answer as the respondent's daughter had in fact attended school *'regularly'*. The attendance register showed attendance at 92.3%.

What is the issue for the Supreme Court?
Whether, on an information alleging a failure by a parent over a specified period to secure that his child attends school regularly contrary to section 444(1) of the Education Act 1996, the child's attendance outside the specified period is relevant to the question whether the offence has been committed.

Who will hear the case?
Lord Neuberger PSC, Lady Hale DSC, Lords Mance, Reed and Hughes JJSC.
A panel granted permission on 21 December 2016 and ordered that the appeal be expedited.

When it is listed for and for how long?
It is listed for 1 day on 31 January 2017.

What happened in the Court of Appeal?
This is an appeal by way of case stated from a Magistrates Court ruling. Such appeals are heard by the High Court. There is not an appeal to the Court of Appeal in such cases. The High Court certified that the case raised a point of law of public importance and the Supreme Court then granted permission to appeal.

What happened in the lower courts?
On 12 October 2015 the Magistrates' Court held that the respondent's daughter was a regular attender for the purposes of section 444(1), bearing in mind his daughter's overall percentage attendance. They ruled that there was no case to answer.

On 13 May 2016, Lord Justice Lloyd Jones and Mrs Justice Thirwall sitting in the Administrative Court of the High Court ruled that the Magistrates' Court was entitled to take into account attendance outside the offence dates when determining the attendance of the respondent's daughter **- [2016] EWHC 1283 (Admin)**

Mr Platt's counsel submitted that there was an absence of a definition of '*regular*' in the Education Act 1996 and that the provision was 'far too vague to be the basis of a criminal offence, let alone an offence of strict liability' and that section 444(1) is 'not sufficiently clear and certain for a parent to know before taking a child out of school whether he or she is committing a criminal offence'. However Lloyd Jones LJ ruled that he was not 'expressing any concluded view' on these submissions and would have wanted the views of the Department of Education before coming to such a view.

What could be the implications of its ruling?
This case has Daily Mail written all over it. The Education Act 1996 was promoted through Parliament by Lord Kenneth Baker of Dorking. Despite its length and complexity, it is surprising that it fails to give any adequate meaning to '*regular*'. The facts as found by the Magistrates Court are very helpful showing that the child was a regular attender. If the Supreme Court dismisses the appeal, then that will create a political dilemma for the UK Government as to whether it should seek to tighten the rules to make it easier to prosecute these sort of cases or not. There will no doubt also be pressure on airlines and travel companies not to put a premium on travel during school holidays.

5. Hartley v. King Edward VI College

What are the relevant agreed facts?
The three appellants (Hartley, Panko and Monk) are employees of the respondent, a sixth form college. Each appellant was required to work during 'directed time' at the college, and during 'undirected time', which could be carried out at the college or at home and could be outside of normal term-time hours.

The appellants participated in a day of lawful strike action on 30 November 2011. The respondent deducted a sum from their pay at a rate of 1/260 of their annual pay. The appellants say that the deduction should have been at a rate of 1/365 under section 2 of the Apportionment Act 1870 and that the respondent is in breach of contract.

What is the issue for the Supreme Court?
What is the correct approach to quantifying the amount an employer can withhold from an employee who has lawfully gone on strike? What is the correct interpretation of sections 2 and 7 of the Apportionment Act 1870? If section 7 allows parties to exclude the principle under section 2, did the parties exclude it in this case?

Who will hear the case?
Lady **Hale** DPSC, Lords Clarke, **Wilson** & Hughes JJSC and Lord Gill.
Lord Reed was also on the panel which granted permission on 25 February 2016.

When it is listed for and for how long?
It is listed for 1 day on 1 February 2017.

What happened in the Court of Appeal?
On 14 May 2015 Elias, Tomlinson and Sales LLJ dismissed the employee's appeal - **[2015] EWCA Civ 455.** Elias LJ acknowledging that the issue was '*more problematic if, contrary to my view, section 2 does encompass the principle of equal daily accrual*'.

What happened in the lower courts?
Deputy District Judge Viney in Birmingham County Court approved a consent order in which judgment was entered in the College's favour. This order was lodged because both sides agreed that the judgment of Jay J in the High Court in *Amey v. Peter Symonds College* [2013] **EWHC 2788** was binding upon the County Court. On very similar facts the Jay J ruled that the appropriate deduction was 1/260.

What could be the implications of its ruling?
It has been estimated that the cost to the teaching sector of a finding in the appellants' favour would be about £300,000 per strike day.

6. IPCO (Nigeria) Ltd v. Nigeria National Petrol Company

What are the relevant agreed facts?
IPCO (Nigeria) Limited ('IPCO') is a Nigerian corporation and member of a Hong Kong Group of companies. Nigeria National Petroleum Corporation ('NNPC') is the national petroleum corporation of the Federal Republic of Nigeria. On 14 March 1994, NNPC contracted with IPCO for the design and construction of a petroleum export terminal. The contract was governed by Nigerian law and contained an agreement to arbitrate in accordance with the Nigerian Arbitration and Conciliation Act 1990.

IPCO gave notice of arbitration on 26 February 2003. The Tribunal issued an Award of US$152,195,971 in favour of IPCO on 28 October 2004. NNPC challenged the Award before the Nigerian Federal High Court. A series of applications, preliminary objections and appeals followed, with the result that the challenge had still not been heard by June 2015.

IPCO attempted to enforce the Award in England in November 2004. Save with respect to a small part of the Award, which was paid, the decision on enforcement was adjourned pursuant to section

103(5) of the Arbitration Act 1996, given the ongoing challenge to the Award in the Nigerian court. In 2007, IPCO applied for enforcement of the Award and on 17 April 2008, an order was made for partial enforcement. In October 2008, certain third parties presented to NNPC evidence that suggested the Award had been procured by fraud. The order of 17 April 2008 was stayed and in 2009, NNPC and IPCO agreed a consent order which set aside parts of the order of 17 April 2008 and adjourned the decision on enforcement under section 103(5) of the Arbitration Act.

What is the issue for the Supreme Court?
Is an English court entitled to require a party resisting enforcement of a foreign arbitral award to provide security for the money payable under the award as a condition of being entitled to advance a good arguable defence that enforcement should be refused under section 103(3) of the Arbitration Act 1996? If not, does the Court of Appeal's order infringe this principle on the particular facts of this case?

Who will hear the case?
Lords **Mance**, Clarke, Sumption, **Hodge** and Toulson JJSC
Lord Wilson was also on the panel which granted permission on 11 April 2016.

When it is listed for and for how long?
It is listed for 1 day on 2 February 2017.

What happened in the Court of Appeal?
On 10 November 2015 Christopher Clark, Burnett and Sales LJJ allowed IPCO's appeal in part - **[2015] EWCA Civ 1144** and **[2015] EWCA Civ 1145.** The Court of Appeal set aside the order of Field J and remitted the matter back to the Commercial Court to consider whether enforcement of the Award would be contrary to English public policy under s103 (3) of the Arbitration Act. The Court of Appeal adjourned any further enforcement of the Award pursuant to Section 103(5) of the Arbitration Act in the meantime.

The Court of Appeal's order was conditional upon NNPC providing security of US$100m in default of which the full Award would be enforceable immediately and the s103(3) issues would not be heard at all. NNPC provided the security of US$100m on 4 December 2015 but appeals against the Court of Appeal's decision on security.

What happened in the lower courts?
In 2012, IPCO applied to set aside the consent order, on the grounds that the delays in Nigeria amounted to a change of circumstances, and to enforce the Award. On 14 March 2014 Field J in the Commercial Court dismissed that application – [**2014] EWHC 576 (Comm)**.

What could be the implications of its ruling?
This case underlines how valuable English courts are seen even where, as here, all parties are foreign ones and the award is denominated in US dollars rather the £sterling.

7. Plevin v. Paragon Personal Finance Ltd (No 3)

What are the relevant agreed facts?
Mrs Plevin entered into a credit agreement and was sold payment protection insurance (PPI). Mrs Plevin's PPI policy was arranged by an independent broker who identified its recommended lender. Both the lender and broker received undisclosed commissions. Mrs Plevin claimed that that the broker had failed to carry out a proper assessment of her demands and needs, or of the suitability of the recommended transactions '*on behalf of*' the lender under s.140A(1)(c) of the Consumer Credit Act 1974.

Mrs Plevin's appeal on the commission disclosure issue only was allowed by the Supreme Court on 12 November 2014 - **[2014] UKSC 61.** Mrs Plevin's appeals on the other 2 issues (relating to the FLA Lending Code and that an independent broker did not act on behalf of a lender) were dismissed.

Mrs Plevin's solicitors acted for her on a 'no win, no fee' conditional fee agreement. They had also arranged 'after the event' insurance. A bill of costs for the work in the Supreme Court was prepared by Plevin's solicitors and Paragon has served points of dispute.

What is the issue for the Supreme Court?
Whether Plevin has achieved a 'win' in the Supreme Court. If so, what is the effect on costs on Plevin having failed on 2 of the 3 issues she appealed on? Whether the ATE premium is proportionate and recoverable from Paragon.

Who will hear the case?
Lady Hale DPSC, Lords Clarke, Sumption, Carnwath and Lord Hodge JJSC.
This panel is the same as heard the substantive appeal in June 2014.

When it is listed for and for how long?
It is listed for 1 day on 6 February 2017.

What happened in the Court of Appeal?
On 16 December 2013 Moses, Beatson and Briggs LJJ allowed Plevin's appeal - **[2013] EWCA Civ 1658.** The Court of Appeal allowed Plevin's appeal taking a broad interpretation of section 140A(1)(c).

What happened in the lower courts?
On 4 October 2012 Recorder Amanda Yip QC sitting in Manchester County Court dismissed Plevin's claim - **[2012] EW Misc 24 (CC).** She ruled that any failures by the broker to carry out a proper assessment were not acts done 'on behalf of' the lender and thus the lender incurred no responsibility. Recorder Yip ordered indemnity costs in Paragon's favour. The costs schedule submitted by Plevin for work in the County Court alone claimed costs of £380k including a claimed 100% success fee and an ATE premium of nearly £200k.

What could be the implications of its ruling?
This case should be seen along with *Flood v. The Times* in which the Supreme Court is also considering a challenge to the recoverability of success fees (albeit on different grounds). Only Lords Sumption and Hodge JJSC are on the panel in both cases. It will be interesting to compare the outcomes of these cases. There have been a number of cases recently in which the amount of ATE premiums has been challenged in assessments in the Senior Courts Costs Office. It is unusual for a costs only case to be heard in the Supreme Court. Whatever the ruling is, will mean that all bills of costs in which ATE premiums are either claimed by a receiving party or challenged by a paying party will need to be assessed in the light of the final ruling.

8. Wood v. Capita Insurance Services Ltd

What are the relevant agreed facts?
Capita bought an insurance brokerage company from Mr Wood and two other sellers. It later transpired that the company had substantial liabilities related to mis-selling of financial products. Capita contends that it is entitled to an indemnity from the sellers in relation to such liabilities by virtue of a clause in the share purchase agreement. Mr Wood contends that the clause in question is limited to only to those claims that are registered with certain regulatory authorities.

What is the issue for the Supreme Court?
The correct approach to contractual interpretation. Specifically, whether when interpreting a contract a court should first construe the term in question literally before then asking whether business common sense or other considerations dictate a different interpretation.

Who will hear the case?
Lord Neuberger PSC, Lords **Mance**, Clarke, **Sumption** and Lord Hodge JJSC.
Lord Toulson was also on the panel which granted permission on 25 February 2016.

When it is listed for and for how long?
It is listed for 1 day on 7 February 2017.

What happened in the Court of Appeal?
On 30 July 2015 Patten, Gloster and Christopher Clarke LJJ allowed Wood's appeal - **[2015] EWCA Civ 839.** Christopher Clarke LJJ remarked that the '*fact that the deal may have been, in this respect from Capita's view, a poor one, is not, in my view, a circumstance which should dictate a different interpretation*' of the SPA.

What happened in the lower courts?
On 14 October 2014 Popplewell J sitting in the Commercial Court endorsed Capita's construction of the SPA - **[2014] EWHC 3240 (Comm).**

What could be the implications of its ruling?
It seems that a relatively standard boiler plate indemnity clause was used in the contract in this case. The Court of Appeal ruling was quite surprising and it leads to a harsh result for buyers of businesses.

9. Suffolk Coastal District Council v. Hopkins Homes Ltd & Secretary of State for Communities and Local Government
Richborough Estates Partnership LLP v. Cheshire East Borough Council

What are the relevant agreed facts?
Suffolk Coastal DC had refused planning permission for a development of 26 houses on land in Yoxford. Cheshire East had refused to grant outline planning permission for a development of up to 170 houses in Willaston. The developers appealed.

Public inquiries were held separately in both in each case by an inspector appointed by the Secretary of State for Communities and Local Government.

In September 2013 Suffolk Coastal District Council refused a planning permission application made by Hopkins Homes Ltd. The developer's appeal was dismissed by a planning inspector after a public inquiry in February and June 2014. The inspector's decision letter is dated 15 July 2014. Hopkins Homes successfully challenged this before Supperstone J.

Mr Alan Boyland allowed an appeal by Richborough Estates and granted outline planning permission for up to 146 dwellings on land north of Moorfields, Willaston, Cheshire.

Paragraph 49 of the National Planning Policy Framework states that the policies of local planning authorities for the supply of housing should not be considered up to date if they cannot demonstrate a five year supply of deliverable housing sites.

What is the issue for the Supreme Court?
The meaning and effect of paragraph 49 of the National Planning Policy Framework

Who will hear the case?
Lord **Neuberger** PSC, Lords Clarke, **Carnwath** & **Hodge** JJSC and Lord Gill.
A panel granted permission on 11 July 2016.

When it is listed for and for how long?
It is listed for 1 day on 22 February 2017.

What happened in the Court of Appeal?
The 2 appeals were heard together in the Court of Appeal as they both raised the same issue of the meaning and effect of the National Planning Policy Framework. On 17 March 2016 Jackson, Vos and Lindblom LJJ handed down their reserved judgment - **[2016] EWCA Civ 168**. It dismissed Suffolk Coastal DC's appeal but allowed the appeal of Richborough Estates.

What happened in the lower courts?
On 30 January 2015 Supperstone J in the Planning Court of the Queen's Bench Division handed down his reserved judgement - **[2015] EWHC 132 (Admin**). He quashed the planning inspector's decision granting Hopkins Homes' planning permission.

On 25 February 2015 Mrs Justice Lang in the Planning Court of the Queen's Bench Division handed down her reserved judgement - **[2015] EWHC 132 (Admin).** She ruled that the planning inspector's decision in the Richborough Estates case should be overturned and that the decision to grant planning permission should be considered afresh in the light of her ruling.

What could be the implications of its ruling?
There remains pressure to build homes in order to solve the housing crisis in the UK. The developers' route to trying to obtain planning permission by having regard to this part of the NPPF is their solution to try and speed up that process. It is odd that one council's appeal was allowed and the other council's dismissed on facts which seem indistinguishable.

10. Nuclear Decommissioning Authority v. Energy Solutions EU Limited

What are the relevant agreed facts?
Energy Solution (the respondent) brought a public procurement law claim against the NDA for damages of around $100m, alleging breaches of the Public Contracts Regulations 2006 in connection with its unsuccessful bid for a contract for services to decommission nuclear sites. Two preliminary issues were considered by the judge which correspond to the issues before the Supreme Court.

What is the issue for the Supreme Court?
Whether, in a claim for damages under the Public Contracts Regulations 2006, the *Francovich* (*Francovich v. Italy* **[1991] ECR I-5357**), condition that the infringement be '*sufficiently serious'* must be met. Whether the Court of Appeal erred in holding that the Respondent's failure to issue proceedings before the contract was concluded did not break the chain of causation between the breach and the loss.

Who will hear the case?
Lord Neuberger PSC, Lady Hale DPSC, Lords **Mance**, **Sumption** and **Carnwath** JJSC
A panel granted permission on 16 May 2016.

When it is listed for and for how long?
It is listed for 2 days from 1 to 2 March 2017.

What happened in the Court of Appeal?
On 15 December 2015 Lord Dyson MR, Tomlinson and Vos LJJ handed down the reserved judgement of the Court of Appeal - **[2015] EWCA Civ 1262**. It dismissed NDA's appeal on issue 2 and allowing the Energy Solution's appeal on issue 1. The Court of Appeal ruled that there was no requirement for a 'sufficiently serious' infringement and that the failure to issue proceedings did not mean that the claimant's loss was not attributable to the breach.

What happened in the lower courts?
On 29 July 2016 Fraser J sitting in the Technology and Construction Court handed down his 366 page reserved judgment - **[2016] EWHC 1988 (TCC).** He was quite brutal in his assessment of the NDA noting that '*there were many manifest errors by the NDA SMEs in the evaluation of the RSS tender with the result that the RSS score is, as a result of this judgment, to be increased'* and also that in his '*judgment the NDA sought to avoid the consequence of disqualification by "*fudging*" the evaluation of those Requirements to avoid reaching a situation where CFP would be given a "Fail" or "Below Threshold" score. By the word "*fudging*", I mean choosing an outcome, and manipulating the evaluation to reach that outcome.*'

What could be the implications of its ruling?
If the appeal is resolved against the NDA, no doubt this will be music to hard Brexiteer's ears.

11. Godfrey Keefe v. Hoteles Piñero Canaria and Mapfre Mutualidad Compania de Seguros y Reaseguros SA

What are the relevant agreed facts?
Keefe (the respondent) was injured in Spain allegedly by the Hoteles Piñero Canaria (the appellant), brought a direct action in his own domicile of England against the Appellant's insurer. The insurer is domiciled and incorporated in the Kingdom of Spain.

Having made the claim the respondent added the appellant as a second defendant having discovered that the liability of the appellant's insurer on the policy was limited. The Respondent relied on Article 11(3) of the Council Regulation **(EC) 44/2001** on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('the EU Judgments Regulation')

In making this direct action the respondent relies on section 3, Articles 9(1)(b) and 11(2) of the Judgments Regulation as they were interpreted in *Odenbreit v. FBTO Schadeverzekeringen NV* Case **C-463/06; [2008] 2 All ER (Comm) 733** ('Odenbreit').

What is the issue for the Supreme Court?
Whether an injured claimant is entitled to rely on Article 11(3) of the EU Judgments Regulation to join the foreign-domiciled alleged tortfeasor in circumstances where that claimant had originally brought proceedings in the courts of his domicile by way of direct action against a foreign domiciled liability insurer.

Who will hear the case?
Lord Neuberger PSC, Lords Clarke, **Sumption,** Carnwath and **Toulson** JJSC
Lord Mance was also on the panel which granted permission on3 November 2016.

When it is listed for and for how long?
It is listed for 1 day on 7 March 2017.

What happened in the Court of Appeal?
On 17 June 2015 Moore-Bick, Black and Gloster LJJ dismissed the appeal of Hoteles Piñero Canaria - **[2015] EWCA Civ 598.** Black LJ noted that '*whether or not there is a discretion to decline the jurisdiction conferred by Article 11(3), in this case there is every reason not to do so because there is a real risk of irreconcilable judgments if proceedings were to be brought in both Spain and England*'. Moore-Bick LJ lamented both the '*difficulty and importance of the issues'* in the case.

What happened in the lower courts?
Master Cook by his order dated 17 May 2013 dismissed the insurer's application challenging the jurisdiction of an English court. An appeal against that decision was dismissed by HHJ Higgins on 9 October 2013.

What could be the implications of its ruling?
For an EU Regulation which was meant to make it easier to bring these sort of cross-border claims, this case seems to demonstrate that the tactics employed by those defending these claims are intent on thwarting this and making it as difficult as it ever was to bring a claim in an English court against someone else domiciled in an EU member state.

12. Miller, O'Brien & Walker v. Ministry of Justice

What are the relevant agreed facts?
Mr O'Brien was appointed as a Recorder sitting part-time on the Western Circuit on 1 March 1978, an office he held until 31 March 2005. He is entitled to a pension by virtue of the Part Time Workers Directive (**97/81/EC**) which the United Kingdom was required to transpose into domestic law by 7 April 2000. Mr O'Brien launched a claim in the Employment Tribunal, contending that he was entitled to have his service prior to 7 April 2000 taken into account in the calculation of the amount of his pension.

The Miller appellants contend in a separate appeal that their claims of unlawful discrimination were not made out of time.

What is the issue for the Supreme Court?
Where a pension is calculable by reference to service, whether the period of service prior the coming into effect of the relevant EU Directive should be taken into account in calculating the amount of pension to be paid.

Who will hear the case?
Lady **Hale** DPSC, Lords Kerr, **Reed**, **Carnwath** and Hughes JJSC.
Unusually the Supreme Court held a hearing on 7 July 2016 to decide whether to grant permission to appeal or not.

When it is listed for and for how long?
It is listed for 2 days starting on 8 March 2017.

What happened in the Court of Appeal?
On 6 October 2015 Lord Dyson MR, Lewison and Underhill handed down their reserved judgment - **[2015] EWCA Civ 1000.** It declined to make a reference to the CJEU and dismissed O'Brien's appeal. The Court of Appeal held that, in view of its decision in the O'Brien appeal, the Miller claims were made out of time

What happened in the lower courts?
Judge Macmillan in the Employment Tribunal held that the calculation should take into account all Mr O'Brien's sitting days. However the Employment Appeal Tribunal **UKEAT/466/13** (Sir David Keene) overturned that ruling on appeal.

What could be the implications of its ruling?
It will be tempting for the Supreme Court to restore the judgment of the Employment Tribunal on this. Not only are few people affected by this and the cost is therefore correspondingly low, but it will be loath to make a reference to the CJEU on this point. The Supreme Court will have to refer the case unless it is '*acte clair'*.

13. UNISON v. Lord Chancellor

What are the relevant agreed facts?
From 29 July 2013, persons bringing claims in the Employment Tribunal, and appealing to the Employment Appeal Tribunal, have been required to pay substantial fees, ranging from £390 to £1600. Following the introduction of fees, official statistics show a dramatic reduction in claims brought, by around 80%.

What is the issue for the Supreme Court?
Whether the Employment Tribunal and the Employment Appeal Tribunal Fees Order 2013 (**SI 2013/1893**) imposing fees in the Employment Tribunal and Employment Appeals Tribunal breached the EU principle of effectiveness, and whether it is indirectly discriminatory.

Who will hear the case?
Lord Neuberger PSC, Lady **Hale** DPSC, Lords Mance, Kerr, **Wilson**, **Reed** and Hughes JJSC.
A panel granted permission on 26 February 2016.

When it is listed for and for how long?
It is listed for 2 days starting on 27 March 2017.

What happened in the Court of Appeal?
On 26 August 2015 Moore-Bick, Davis and Underhill LJJ dismissed the trade union's appeal - **[2015] EWCA Civ 935.**

What happened in the lower courts?
Initially on 7 February 2014 Lord Justice Moses and Mr Justice Irwin sitting in the Administrative Court of the QBD dismissed the trade union's challenge - **[2014] EWHC 218 (Admin).** Moses LJ noted that **'***Parliament decided, by affirmative resolution, to introduce the regime, authorised by statute, and debated and positively affirmed by both Houses of Parliament'*. The Equality and Human Rights Commission intervened in the case to support the trade union's case.

Then separately on 17 December 2014 Lord Justice Elias and Mr Justice Foskett sitting in the Administrative Court of the QBD dismissed a further challenge made by the trade union on the same point - **[2014] EWHC 4198 (Admin).** Firstly the trade union alleged that the scheme is unlawful because it infringes the EU principle of effectiveness with the cost said to be such that it is virtually impossible or at least exceptionally difficult for a significant number of potential applicants to afford to bring a claim. Their employment rights are, it is argued, rendered illusory. Second, it alleges that the fee scheme operates in an indirectly discriminatory way with respect to women, ethnic minorities and the disabled, and that the Lord Chancellor has failed to establish that the disadvantageous treatment meted out to these groups is justified. Again the Equality and Human Rights Commission intervened.

What could be the implications of its ruling?
The case was not well handled or managed in the lower courts with criticism being reserved for the way skeleton arguments were produced and the timetabling of the intervenor's submissions. It will be interesting to see what the Supreme Court makes of Moses LJ's observations that the Order was passed by both Houses of Parliament under a positive affirmation procedure. Having ruled against the UK government on the Brexit appeal, the Supreme Court may be wary of going too far on this challenge. If the appeal is allowed, the Ministry of Justice may have to refund the employment tribunal fees it has collected.

14. Eli Lilly v. Actavis

What are the relevant agreed facts?
In order to market a new cancer treatment product, Actavis UK Limited and others applied for declarations of non-infringements of a European patent owned by Eli Lilly and Company and registered in the UK and the corresponding national designations in France, Italy and Spain.

What is the issue for the Supreme Court?
Whether a new pemetrexed based cancer treatment produced by Actavis UK Limited and others infringes Eli Lilly and Company's patent and its foreign designations either indirectly under section 60(2) of the Patents Act 1977 or directly under a proper interpretation of Article 69 of the Europe Patent Convention 2000.

Who will hear the case?
Lord **Neuberger** PSC, Lords Mance, **Clarke**, Carnwath and **Hodge** JSC.
A panel granted permission on 11 February 2016.

When it is listed for and for how long?
It is listed for 3 days from 4 to 6 April 2017.

What happened in the Court of Appeal?
On 25 June 2015 Longmore, Kitchin and Floyd LJJ handed down their reserved judgment – **[2015] EWCA Civ 555.** The Court of Appeal allowed Lilly's appeal and set aside the declarations of non-infringement of the 508 patent by the Actavis AIs.

What happened in the lower courts?
On 15 May 2014 Arnold J sitting in the Patents Court of the Chancery Division ruled in favour of Actavis -**[2014] EWHC 1511 (Pat)**. He summarized his findings as

- neither pemetrexed diacid nor pemetrexed dipotassium nor pemetrexed ditromethamine falls within the scope of the claims 1 or 12 of the UK, French, Italian or Spanish designations of the Patent,
- dealings in pemetrexed diacid, dipotassium and ditromethamine by Actavis will not constitute direct infringement of the UK, French, Italian or Spanish designations of the Patent,

- dealings in pemetrexed diacid, dipotassium and ditromethamine by Actavis will not constitute indirect infringement of the UK, French, Italian or Spanish designations of the Patent,
- the law applicable to the question of whether Actavis are entitled to a DNI is English law,
- applying English law, Actavis are entitled to a DNI in respect of the UK, French, Italian and Spanish designations of the Patent,
- even if French, Italian and Spanish law is the applicable law respectively, Actavis are entitled to a DNI in respect of the French, Italian and Spanish designations of the Patent, and
- if French and Spanish law is applicable, if the 1st and 3rd actions are not well founded, but one or more of Actavis' later actions are well founded, those later actions are not an abuse of process in so far as they relate to the French and Spanish designations.

What could be the implications of its ruling?
This will be amongst Lord Neuberger's last cases before he retires as President of the Supreme Court in the summer. He is a chemistry graduate and no doubt the construction of the patents in this appeal will be right up his street.

15. Taurus Petroleum Ltd v. State Oil Marketing Company of the Ministry of Oil, Republic of Iraq (SOMO)

What are the relevant agreed facts?
Taurus Petroleum Limited ('Taurus'), contracted with the State Oil Marketing Company of the Ministry of Oil, Republic of Iraq ('SOMO'). Disputes arose and in 2013 an arbitral award was made against SOMO in favour of Taurus. Sums of money were owed to SOMO under two letters of credit issued by the London branch of Crédit Agricole, both of which provided that payment was to be made to an account held by the Central Bank of Iraq in New York.

Taurus was granted an order that the arbitral award could be enforced as a judgment in England. A third party debt order and associated receivership order were made concerning the letters of credit. SOMO challenged the third party debt and receivership orders.

What are the issues for the Supreme Court?
It will have to decide these 5 issues:

- The identity of the beneficiary under letters of credit,
- The location of debts under letters of credit,
- Whether there is a free-standing principle of honest dealing beyond the rule that a judgment creditor cannot execute against property that does not belong to the judgment debtor,
- The correct basis on which a court should exercise its discretion to make receivership orders, and
- The circumstances in which sections 13(2)(b), 14(2) and 14(4) of the State Immunity Act 1978 allow immunity from execution.

Who will hear the case?
Lord **Neuberger** PSC, Lords Mance, Clarke, Sumption and **Hodge** JJSC.
Lord Toulson JSC was also on the panel granted permission on 23 December 2015.

When it is listed for and for how long?
It is listed for 2 days from 21 to 22 March 2017.

What happened in the Court of Appeal?
On 28 July 2015 Moore-Bick, Sullivan and Briggs LJJ handed down there reserved judgement - **[2015] EWCA Civ 835.** It upheld the result reached by the trial judge but for different reasons. Briggs LJ disagreed with Moore-Bick LJ on the construction of the letter of credit.

What happened in the lower courts?
On 18 November 2013, Field J sitting in the Commercial Court of the QBD set aside both the third party debt order and the receivership order - **[2013] EWHC 3494 (Comm).**

What could be the implications of its ruling?
Third party debt orders (formerly known as garnishee orders) are a common way for judgment creditors to seek enforcement by obtaining an order for payment from someone else – usually a bank holding deposits from the debtor. The amount of the third party debt order in this case is at the opposite end of the spectrum from that usually seen by judgment creditors. Hopefully the Supreme Court will not in its ruling make it any more difficult to obtain these sorts of orders.

16. Rangers Football Club RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club Plc) v. Advocate General for Scotland

What are the relevant agreed facts?
Murray Group Management Ltd established a Principal Trust for the benefit of its employees and the employees of any group company including the football club which entered into a deed of adherence. The football club established a number of sub-trusts for the benefit of their employee's families. The football club would pay a contribution to the Principal Trustee with a direction that a sub-trust be established and funded for a family of a particular employee. The employee was appointed protector of the sub-trust, and the sub-trust trustee would lend the employee money that had been advanced to the sub-trust from his employer.

The Commissioners for Her Majesty's Revenue and Customs determined that these payments constituted earnings for PAYE and NIC purposes and sought to impose charges to tax.

What is the issue for the Supreme Court?
It will have to determine these 3 issues:

- Whether the Court of Session erred in law in reversing the specialist Tribunals below and concluding that payments of 'emoluments' or 'earnings', for the purposes of the Income and Corporation Taxes Act 1988 and the Income Tax (Earnings and Pensions) Act 2003, had been made by the appellant to its employees,
- Whether, in order for a payment to constitute earnings for PAYE and NIC purposes, it is sufficient that the payment was 'derived from' work done by a particular employee and/or it 'it formed part of the employee's employment package', and
- Whether the powers which each employee held as protector of a sub-trust had the effect that the funds in that sub-trust were unreservedly at the disposal of the employee and were earnings for PAYE and NIC purposes.

Who will hear the case?
Lord Neuberger PSC, Lady Hale DPSC, Lords Reed, Carnwath and Hodge JJSC.
This is a Scottish appeal under the old regime which did not need permission to appeal from the Supreme Court. The Court of Session granted permission to appeal on the question of whether the payments were earnings.

When it is listed for and for how long?
It is listed for 2 days from 15 to 16 March 2017.

What happened in the Court of Session?
On 4 November 2015 Lords Carloway, Menzies and Drummond Young in the Inner House of the Court of Session handed down their reserved judgement - **[2015] CSIH 77.** It ruled that payments of earnings for PAYE and NIC purposes had been made by the football club. It found that the payments made to the Principal Trustee, and in due course to the sub-trusts, amounted to a re-direction of income. It allowed the appeal and found in HMRC's favour.

What happened in the lower courts?
On 8 July 2014 Lord Doherty sitting in the Upper Tribunal (Tax and Chancery Chamber) dismissed HMRC's appeal - **[2014] UKUT 0292(TCC)**

On 29 October 2012 the First-tier Tribunal were divided as to their ruling following a 33 day hearing - **[2012] UKFTT 692 (TC).** The majority of the FTT (Mr Kenneth Mure QC and Mr Scott Rae) gave a joint ruling in which they allowed the taxpayer's appeals and held that no payment of earnings had

been made. However, in a detailed dissenting judgement Dr Poon came to the opposite conclusion and would have found in favour of HMRC.

What could be the implications of its ruling?
This is clearly a difficult and finely balanced case in deciding where to draw the line on where payments are taxable or not. This is highlighted in the fact that the FTT hearing took so many days to hear the evidence and submissions. The judge count so far is 4 for HMRC and 3 against. If HMRC succeed, no doubt Dr Poon will feel vindicated in her dissent.

30 January 2017

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.