David Bowden Law®

ideas are always in credit

Supreme Court commercial law cases for Trinity term 2017

Article by David Bowden

BAR STANDARDS BOARD
REGULATING BARRISTERS

Executive speed read summary

It's the summer – so it's time for whisky, pirates, casinos and compound interest.
Yes for Trinity term in the Supreme Court there are 10 cases it will hear in June and July 2017 which will be of interest to commercial law practitioners.

The biggest case it will hear over 4 days in early July is whether to uphold the lower court's rulings that Littlewoods is entitled by way of restitution to compound interest in relation to over paid VAT. This is also a large case by way of value with an estimated loss to HMRC of £1billion if the taxpayer wins.

As usual there are a couple of other tax cases:

- **Does a standalone claim for loss relief in a film partnership tax avoidance scheme work or not?**
- **Did the First Tier Tribunal go too far in making a debarring order against HMRC for failing to comply with one of its procedural orders?**

There are a couple of unusual or high profile cases some with wide ranging implications:

- **Was a gambler playing Punto Blanco at a casino using the edge-sorting technique dishonest such that the casino was right not to pay out his £7.7million prize?**
- **Can expenses incurred during a period of negotiation with pirates over the terms of a ransom can be deducted from an insurance claim or not?**
- **Is Scotland's minimum price scheme for alcohol lawful or not?**

There are a few planning or property cases this term:

- **Can a planning authority validly claim from developers a financial contribution to a strategic transport fund or not?**
- **What is the correct construction of a contract for the design and build of foundations for a windfarm?**
- **In relation to termination of agricultural tenancies, does the limitation period begin to run on the date a creditor becomes aware he has incurred a financial cost or must he be aware that this cost constitutes damage?**

On employment law, the court will have to decide whether the availability of judicial review proceedings to a doctor prevents her from bringing an employment tribunal claim or not under the Equality Act 2010. The SRA and GPC have also intervened as this case raises issues common to all professionals whose regulation means that a disciplinary body has jurisdiction over them.

Finally there will also be a further hearing in Lady Brownlie's case against Four Seasons Holdings on 20 July 2017.

---

1. Aberdeen City and Shire Strategic Planning Authority v. Elsick Development Company

What are the relevant agreed facts?
Aberdeen CSSPA, a strategic development planning authority for the Aberdeen region, adopted supplementary guidance under the Town and Country Planning (Scotland) Act 1997, which provided for the creation of a strategic transport fund ('STF'). The idea was that all new developments within the Aberdeen CSSPA 's area would make contributions to the STF, which would then be used to fund a number of strategic public transport 'interventions' to relieve the anticipated pressure on public transport services and roads resulting from increased development.

Elsick Development Company was obligated to contribute to the STF in accordance with the guidance under the terms of a s.75 agreement. Elsick argued that data published by Aberdeen CSSPA, showed that the impact of its development on many of the proposed interventions to be funded by the STF was either zero or de *minimis*. The supplementary guidance was therefore unlawful and contrary to national planning policy as it required Elsick to make contributions that would be used to support interventions unrelated to its particular development.

What is the issue for the Supreme Court?
There are these 3 issues for the Supreme Court:

- The correct legal test for the validity of planning obligations,
- the extent to which planning authorities are obligated to comply with national policy when formulating their own supplementary guidance, and
- the extent of the supervisory jurisdiction of the courts when considering challenges to planning policies.

Who will hear the case?
Lord Neuberger PSC, **Lady Hale DPSC** and Lords Mance, Reed & **Hodge** JJSC
Lord Carnwath JSC was also on the panel who granted permission on 21 December 2016

When it is listed for and for how long?
It is listed for 1 day on 13 June 2017.

What happened in the Inner House of the Court of Session?
On 29 April 2016 the Inner House [Lord Carloway (the Lord President), Lord Menzies and Lord Drummond Young] allowed Elsick's appeal and quashed the supplementary guidance - www.bailii.org/scot/cases/ScotCS/2016/[2016]CSIH28.html

What happened in the lower courts?
The Outer House of the Court of Session originally ruled in the planning authority's favour.

What could be the implications of its ruling?
Section 75 agreements are very common between developers and local authorities. It will be interesting to see if the Supreme Court agrees with the Inner House that the local planning authority had gone too far in requiring contributions to transport 'interventions' or not.

---

2. MT Hojgaard AS v. E.On Climate UK Robin Rigg East Limited

What are the relevant agreed facts?
Robin Rigg employed MT as contractor to design and build the foundations for a windfarm. The foundations were designed in accordance with an international industry standard which contained a flaw. The foundations failed soon after they were built. A dispute arose over which party was liable for the remedial work. MT contended that it had complied with its contractual obligations and issued proceedings seeking a declaration that Robin Rigg should pay.

What is the issue for the Supreme Court?
Whether a contract for the design and installation of foundations for an offshore windfarm imposed a fitness for purpose obligation on the contractor amounting to a warranty that said foundations would have a service life of 20 years. Robin Rigg submits that the contract imposed a fitness for purpose obligation which did amount to a warranty for a service life of 20 years.

Who will hear the case?
Lord **Neuberger PSC**, Lords Mance, **Clarke**, Sumption and **Hodge** JJSC
Permission to appeal was granted on 27 November 2015

When it is listed for and for how long?
It is listed for 1 day on 20 June 2017.

What happened in the Court of Appeal?
The Court of Appeal (Jackson, Patten and Underhill LJJ) on 30 April 2015 allowed MT's appeal on the basis that the contract only required that the foundations should have a 'design life' of 20 years, meaning that they would probably, but not necessarily, function for 20 years. Lord Justice Underhill in a short supplementary judgement noted that

> *'There was a conflict in the expert evidence about whether it was likely that large-scale static testing would have revealed the problem which arose. Dr Billington said that it would (and was supported in this by Mr Carstens). The*

oral evidence of Prof Schaumann was that he was "not convinced". Mr Marrin described that position as "neutral", but if the evidence is read as a whole it is clear that that is not a fair characterisation. Prof Schaumann was expressing real doubt as to whether testing of the kind hypothesised would have revealed the problem; and he gave detailed reasons for those doubts, to which he adhered despite probing cross-examination from Mr Marrin (day 5, pp. 110ff), which it is clear from the transcript that the Judge followed with care.'

www.bailii.org/ew/cases/EWCA/Civ/2015/407.html

What happened in the lower courts?
Robin Rigg was unsuccessful at trial with the Mr Justice Edwards-Stuart finding on 15 April 2014 that MT was in breach of a contractual warranty that the foundations would have a service life of 20 years. www.bailii.org/ew/cases/EWHC/TCC/2014/1088.html

What could be the implications of its ruling?
TCC judges hearing these cases and determining them after hearing lay and expert evidence over many days or weeks usually come to the right decision. It is surprising that Mr Justice Edwards-Stuart's ruling was over-turned by the Court of Appeal. This is moreover the case given Underhill LJ's observation that the trial judge followed with care the disputed expert evidence before him. Where the boundary lies between a 'design life' and some other life appears contrived or artificial. Although this concerns a wind farm, any ruling will need to be analysed for product liability claims more generally such as those for the sale and supply of other goods or vehicles.

---

3. De Silva v. HMRC

What are the relevant agreed facts?
The taxpayers were partners in a number of limited film partnerships which participated in marketed tax avoidance schemes. Their aim was to carry back losses in film partnerships to be offset against income received from other sources in earlier years. Following investigations, HMRC disallowed the losses and the claims for relief. The taxpayers' appeals against those decisions were eventually compromised in s.54 partnership settlement agreements between the general partner and HMRC in which some carry-back losses at a reduced level were allowed and the individual partnership returns were statutorily amended.

HMRC submits that the taxpayers as partners were bound by the s.54 agreement because such partnerships were transparent entities for tax law purposes. The taxpayers rely on *Cotter* **[2013] UKSC 69** to submit that a claim under Schedule 1B to the Taxes Management Act 1970 ('TMA') could only be made by way of a 'stand-alone claim' under Schedule.1A, or could only be investigated by means of an enquiry under paragraph 5(1) of Schedule lA to the TMA. The taxpayers submit that their carry-back claims for relief are stand-alone claims made in the earlier years which could only be the subject of enquiry under Schedule 1A paragraph 5(1) and not claims made in a personal tax return under section 8 of the TMA. As no such enquiry had been initiated by HMRC within the relevant time period, any further enquiry was time-barred.

What is the issue for the Supreme Court?
Whether HMRC was entitled to enquire into the tax payer's claims for loss relief otherwise than by opening an enquiry under Schedule 1A of the Tax Management Act 1970, which is subject to a time limit that had elapsed prior to the date of the enquiry.

Who will hear the case?
Lord Neuberger PSC, Lords **Reed**, Carnwath, Hughes and Hodge JJSC
Lady Hale DPSC and Lord Toulson JSC were on the panel who granted permission on 3 August 2016. Lord Mance is recused from hearing this appeal as his wife, Lady Justice Arden, was on the panel in the Court of Appeal whose judgement is under appeal.

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

What happened in the Court of Appeal?
On 2 February 2016 the Court of Appeal (Arden, Gloster and Simon LJJ) dismissed the taxpayer's appeal. www.bailii.org/ew/cases/EWCA/Civ/2016/40.html

What happened in the lower courts?
On 15 April 2014 the Mr Justice Sales sitting in the Upper Tribunal (Tax and Chancery Chamber) dismissed the taxpayer's claim for judicial review of HMRC's amendments to the taxpayer's tax returns by which HMRC declined to accept the taxpayer's claims by for loss relief in relation to their investments in certain film partnerships. www.bailii.org/uk/cases/UKUT/TCC/2014/170.pdf

What could be the implications of its ruling?
This case will give the Supreme Court an opportunity to re-visit their recent decision in HMRC v. Cotter **[2013] UKSC 69.** In this appeal the taxpayer submits that the application of complex provisions of the tax code has been resolved in their favour because of Cotter. We will have to see if the Supreme Court agrees or not. Lords Neuberger, Reed and Hodge were also on the Cotter panel and Lord Hodge gave the unanimous judgment.

---

4. BPP Holdings Limited, BPP Learning Media Limited & BPP University College of Professional Studies Limited v. HMRC

What are the relevant agreed facts?
Judge Hellier sitting in the First Tier Tribunal ('FTT') on 9 January 2014 made an order that unless HMRC provided certain information by 31 January 2014 it would be '*barred from taking further part in the proceedings'*. At a further hearing before Judge Mosedale on 23 June 2014 and by her reserved judgement dated 1 July she granted a debarring order in the taxpayer's favour. On 25 July HMRC applied to the FTT for a direction lifting this de barring order. Judge Herrington in the FTT on 12 September 2014 declined to lift the barring order ruling he was not allowed to do so unless one of two conditions is satisfied:

- the judge making the direction sought to be changed was plainly in error or in overlooked or was ignorant of a material fact or a clearly relevant legislative provision or judicial authority, or
- there had been a material change of circumstance

What is the issue for the Supreme Court?
Whether the Tax Chamber of the First-tier Tribunal erred in imposing an order debarring HMRC from participating in an appeal following HMRC's failure to comply with the Tribunal's directions.

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

When it is listed for and for how long?
It is listed for ½ day on 27 June 2017.

What happened in the Court of Appeal?
On 1 March 2016 the Court of Appeal (Moore-Bick, Richards and Ryder LJJ) allowed the taxpayer's appeal. www.bailii.org/ew/cases/EWCA/Civ/2016/121.html

What happened in the lower courts?
On 3 October 2014 Judge Colin Bishopp sitting in the Upper Tribunal (Tax and Chambery Chamber) ruled in HMRC's favour. However he commented that '*I find much which is unsatisfactory in HMRC's conduct in this appeal, and little to explain, still less to justify, that conduct*.'

Judge Hellier sitting in the First Tier Tribunal ('FTT') on 9 January 2014 made an order that unless HMRC provided certain information by 31 January 2014 it would be '*barred from taking further part in the proceedings'*. At a further hearing before Judge Mosedale on 23 June 2014 and by her reserved judgement dated 1 July she granted a debarring order in the taxpayer's favour. On 25 July HMRC applied to the FTT for a direction lifting this de barring order. Judge Herrington in the FTT on 12 September 2014 declined to lift the barring order ruling he was not allowed to do so unless one of two conditions is satisfied:

- the judge making the direction sought to be changed was plainly in error or in overlooked or was ignorant of a material fact or a clearly relevant legislative provision or judicial authority, or
- there had been a material change of circumstance

What could be the implications of its ruling?
The FTT's decision was handed down shortly after the Court of Appeal's judgment in *Mitchell* but before it had rowed back from this in *Denton v. White*. It is clear that the FTT was heavily influenced by the tough approach in *Mitchell* in making the debarring order. However the Supreme Court will need to tread carefully. If it rules in HMRC's favour then there is the danger that this could unravel some of the Jackson reforms which had compliance with the rules, court timetables and prejudice to other court users at their core.

---

5. Littlewoods v HMRC

What are the relevant agreed facts?
Over a 31-year period from 1973 to 2004 Littlewoods Limited overpaid approximately £204m in VAT to HMRC. HMRC have now repaid the principal sums together with simple interest at the rates provided for under section 78 of the Value Added Tax Act 1994 ('VATA'). Littlewoods seeks to recover in restitution the time value of the principal sums as compound interest. The value of Littlewoods interest claim is around £1 billion.

What is the issue for the Supreme Court?
Whether a tax-payer's claim for restitution of the time value of mistakenly overpaid VAT is prevented by sections 78 and 80 of VATA. If so whether that is contrary to EU law. If so whether, when dis-applied, they must be dis-applied to allow only *Woolwich*-type restitution claims not mistake based restitution claims as well.

Whether the benefit to the Government from VAT overpayments is measured by the '*objective use'* value being the cost of borrowing or by the '*actual benefit'* derived. If objective use, is that consistent with EU law? If compound interest is to be applied, over what period is it to be allowed?

Who will hear the case?
Lord **Neuberger PSC**, Lords Clarke, Reed, Carnwath and **Hodge** JJSC.
Lord Toulson JSC was also on the panel which granted permission on 23 December 2015.
Lord Mance is recused from hearing this appeal as his wife, Lady Justice Arden, gave the judgement in the Court of Appeal which is subject to this appeal.

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

What happened in the Court of Appeal?
On 21 May 2015 the Court of Appeal (Arden, Patten and Floyd LJJ) dismissed both HMRC's appeal and Littlewoods' cross-appeal. www.bailii.org/ew/cases/EWCA/Civ/2015/515.html . The effect of the Court of Appeal's ruling was that Littlewoods' claim for compound interest succeeded.

What happened in the lower courts?
In the High Court, Vos J handed down his liability judgment dated 19 May 2010. Vos J referred certain questions to the CJEU. www.bailii.org/ew/cases/EWHC/Ch/2010/2771.html . A Grand Chamber of the CJEU heard the reference on 22 November 2011 and gave its decision on 19 July 2012. www.bailii.org/eu/cases/EUECJ/2012/C59110.html . By a 2nd judgment, Henderson J ruled also on quantum on 28 March 2014. www.bailii.org/ew/cases/EWHC/Ch/2014/4302.html .

What could be the implications of its ruling?
The law of restitution has come a long way so that is now relied on as a vehicle to claim compound interest. The financial loss to HMRC will be very large if its appeal succeeds. The Supreme Court has a free hand in this as the CJEU left many of the key determinations to the national court. A judgement could come at a politically inexpedient time too given that freeing the UK from the clutches of the CJEU appears to be one of the key Brexit demands.

---

6. Dr Eva Michalak v. General Medical Council, Dickson and Haywood
The Solicitor's Regulatory Authority and General Pharmaceutical Council intervening

What are the relevant agreed facts?
Dr Michalak was the subject of GMC fitness to practise proceedings in 2008. In 2013, she brought an Employment Tribunal claim in respect of her treatment during the investigation into her fitness to practise alleging discrimination on a number of grounds.

What is the issue for the Supreme Court?
Whether the availability of judicial review proceedings in respect of decisions of the GMC excludes the jurisdiction of the Employment Tribunal by virtue of section 120(7) of the Equality Act 2010.

Who will hear the case?
Lady Hale DPSC and Lords Kerr, Wilson, Hughes JJSC and another justice.
Lord Neuberger PSC, Lords Clarke and Carnwath JJSC were on the panel which granted permission on terms on 2 November 2016.

When it is listed for and for how long?
It is listed for 1 day on 4 July 2017.

What happened in the Court of Appeal?
On 23 March 2016 the Court of Appeal (Moore-Bick, Kitchin and Ryder LJJ) overturned the Employment Appeal Tribunal's finding and ruled in the employee's favour.
www.bailii.org/ew/cases/EWCA/Civ/2016/172.html

What happened in the lower courts?
On an application by the GMC, part of the claim was struck out by Employment Judge Keevash sitting at Leeds Employment Tribunal but part was allowed to continue. The GMC appealed to the Employment Appeals Tribunal, submitting that the Employment Tribunal had no jurisdiction to hear the remainder of the claim. By a ruling of Mr Justice Langstaff sitting alone as President of the Employment Appeals Tribunal dated 25 November 2014 ruled in the GMC's favour.
www.bailii.org/uk/cases/UKEAT/2014/0213_14_2511.html

What could be the implications of its ruling?
The SRA and GPC have also intervened as this case raises issues common to all professionals whose regulation means that a disciplinary body (such as the Solicitor's Disciplinary Tribunal – in the case of solicitors) has jurisdiction over them. The Supreme Court will need to unpick where the demarcation between private law rights and public law remedies is properly to lie.

---

7. Ivey v. Genting Casinos (UK) Limited trading as 'Crockfords'

What are the relevant agreed facts?
Mr Ivey is a professional gambler. On 20 and 21 August he won £7.7m playing a version of Baccarat known as Punto Banco at a casino owned by Crockfords Club in Curzon Street, Mayfair. Punto Banco is a game of chance. In order to win, Ivey employed a technique known as edge-sorting which involves identifying small differences in the pattern on the reverse of playing cards and exploiting that information to increase the player's chances of winning. He did not personally touch any cards but persuaded the croupier to rotate the most valuable cards by intimating that he was superstitious.

The casino to pay Ivey his winnings maintaining that by engaging in edge-sorting he had cheated. Ivey brought a claim to recover his winnings.

What is the issue for the Supreme Court?
Whether an implied term not to cheat in a gambling contract is only breached where there is dishonesty.

Who will hear the case?
Lord Neuberger PSC, **Lady Hale DPSC**, Lords Kerr & **Hughes** JJSC and Lord Thomas of Cwmgiedd, Lord Chief Justice. Lord Wilson was on the panel which granted permission on 16 February 2017. The Supreme Court has ordered that the hearing of this appeal be expedited. It is notable that 3 of the judges on the panel have extensive criminal law experience.

When it is listed for and for how long?
It is listed for 1 day on 13 July 2017.

What happened in the Court of Appeal?
On 4 November 2016 the Court of Appeal (Arden, Tomlinson and Sharp LJJ) dismissed Ivey's appeal. Lord Justice Tomlinson thought the scales were evenly balanced saying of Mr Ivery that whilst he was '*surprised that he did not regard what he did as cheating*' he was '*equally surprised'* that Crockfords '*did not know about edge-sorting, in view of the literature on the subject circulating in the U.S. and available on the internet'* and he took with a pinch of salt the claim that '*neither the croupier nor any other member of Crockfords' staff suspected at the time that the integrity of the game was being compromised*'. www.bailii.org/ew/cases/EWCA/Civ/2016/1093.html

What happened in the lower courts?
On 8 October 2014 Mr Justice Mitting sitting in the High Court dismissed Mr Ivey's claim against the casino. He ruled that he derived from the criminal statutes '*little more than that for some of the time at least winning at cards by ill practice has been acknowledged to amount to cheating'*.
www.bailii.org/ew/cases/EWHC/QB/2014/3394.html

What could be the implications of its ruling?
As there are 3 judges on the panel with criminal law expertise, Mr Ivey's counsel is likely to be in for a rough ride. Tomlinson LJ has recently retired from the bench. It is clear from his comments that he saw the scales as evenly balanced and did not have much sympathy for the casino. No doubt there will also be arguments about whether such gambling contracts should be justiciable at all before the courts.

---

8. Mitsui & Co Limited v. Beteiligungsgesellsschaft LPG Tankerflotte MBH & Co KG

What are the relevant agreed facts?
LPG's ship was boarded by pirates in the Gulf of Aden who commanded it to redirect to Somalia and demanded a ransom of $6m. A 51-day period of negotiation with the vessel's owners and managers led to a sum of $1.85m being agreed and paid. It was common ground that the ransom paid was a reasonably incurred expense for the purpose of common safety, and so amounted to a *'general average expense*' under Rule A of the York-Antwerp Rules 1974. This meant it was an expense shared between all parties involved in the voyage rather than falling entirely for the owners' account.

The average adjuster appointed by the owners found that the vessel's operating expenses incurred during the 51-day period of negotiation were also allowable as deemed general average expenses. This was under Rule F on the basis that they were incurred as an alternative to incurring a general average expense - in this case the expense of paying upfront the greater ransom amount initially demanded. The cargo owners and their insurers (Mitsui) challenged that determination.

What is the issue for the Supreme Court?
Where a ship is hijacked by pirates, and the initial ransom sum demanded is not paid, but a period of negotiation is entered into resulting in a lower ransom sum being agreed and paid, whether:

- the expenses incurred during the negotiation period can be deemed to be general average expenses under Rule F of the York-Antwerp Rules (and therefore borne by all parties rather than the owners alone) on the basis that they are expenses incurred as an alternative to paying a general average expense (that is a higher ransom sum), and
- payment of the initially demanded ransom sum would have been 'reasonable' and therefore a general average expense under Rule A of the York-Antwerp Rules**.**

Who will hear the case?
Lord **Neuberger PSC**, Lords Mance, **Clarke**, Sumption and Hodge JJSC.
Lord Hughes JSC was also on the panel which granted permission on 25 January 2017.

When it is listed for and for how long?
It is listed for 2 days on 17 and 18 July 2017.

What happened in the Court of Appeal?
On 13 July 2016 the Court of Appeal (Kitchin, Hamblen and Lloyd LJJ) reversed the first instance judge's decision on the basis that the negotiation period expenses did not fall under Rule F. Although paying the ransom amount initially demanded would have been a general average expense under Rule A, the negotiation period expenses were not incurred as an alternative, or in substitution for that putative expense.

Sir Timothy Lloyd adds a short rider to the main judgment of Lord Justice Hamblen where he sums up the dilemma the Supreme Court as follows:

> *'As he explains, Rule F presents a logical dilemma, at least in certain factual situations, as identified by the so-called Hudson conundrum (see his paragraph 63). The reasoning adopted by Hoffmann LJ (dissenting) in The Bijela and then the rather different reasoning adopted by Lord Lloyd of Berwick on the further appeal in that case does not provide the answer to the dilemma in a pure Rule F case. Hoffmann LJ's approach (hypothesising that the alternative course not only was not, but could not have been, adopted) could not realistically be applied to facts such as the present, even if it were legally relevant. How could one at the same time suppose that the ship-owners could have accepted the pirates' first demand, in order to secure the release of the ship, its crew and cargo, while excluding the very possibility of their responding differently to that first demand by pursuing negotiations with a view to securing the release at lesser cost?'*

www.bailii.org/ew/cases/EWCA/Civ/2016/708.html

What happened in the lower courts?
Deputy Judge Stephen Hofmeyr QC judge dismissed the claim.

What could be the implications of its ruling?
An interesting case – not least because there are rules about piracy. The Supreme Court will have to resolve the logical dilemma that Sir Timothy Lloyd identifies and puts so succinctly. It will have to decide whether to uphold or overturn the dissenting judgments in *The Bijela*.

---

9 Gordon (Trustees of William Gordon) v. Campbell Riddell Breeze Paterson LLP

What are the relevant agreed facts?
The 3 trustees of a trust own three fields in the Killearn area. In 2004 Campbell Riddell Breeze Paterson, solicitors (CRBP) advised the trustees to end the agricultural tenancies over the fields. The solicitors were instructed to serve notices to quit to take effect on 10 November 2005. However, the tenant remained in possession.

In February 2006, having instructed new solicitors, the trustees lodged applications with the Scottish Land Court seeking the tenant's removal. On 24 July 2008, following a hearing on evidence, the applications regarding two of the fields were refused because of defects in the notices. On 17 May 2012, the trustees brought an action against CRBP seeking damages alleging that they had drafted ineffective notices to quit. The damages claimed include legal fees and expenses in relation to pursuing the tenants in the Scottish Land Court.

What is the issue for the Supreme Court?
Whether the five-year prescriptive period under sections 6 of the Prescription and Limitation (Scotland) Act 1973 begins to run on the date on which a creditor becomes aware that he has incurred a financial cost or whether he must also be aware that such a cost may constitute "loss" or "damage".

Who will hear the case?
Lord Neuberger PSC, Lords Mance, Sumption, Reed and Hodge JJSC

When it is listed for and for how long?
It is listed for 1 day on 19 July 2017.

What happened in the Inner House of the Court of Session?
On 8 March 2016 the Inner House (Lady Paton, Lord Bracadale and Lord Malcolm) dismissed the trustees' appeal. www.bailii.org/scot/cases/ScotCS/2016/[2016]CSIH16.html

What happened in the lower courts?
On 25 March 2015 Lord Jones the Lord Ordinary sitting in the Outer House held that the 5 year prescriptive period started from the date on which the legal expenses were incurred that is on 10 November 2005. He ruled that this had therefore expired by the time the trustees' claim was lodged on 17 May 2012. www.bailii.org/scot/cases/ScotCS/2015/[2015]CSOH31.html

What could be the implications of its ruling?
The prescription (or limitation) period in Scotland is 5 years for these sorts of claims but the corresponding period in England, Wales and Northern Ireland is 6 years. The trustees face an uphill battle having lost in all courts below.

---

10 Scotch Whisky Association, spiritsEUROPE and CEEV v. The Lord Advocate

What are the relevant agreed facts?
The Alcohol (Minimum Pricing) (Scotland) Act 2012 amends the Licensing (Scotland) Act 2005 by introducing a new paragraph 6A (1) to Schedule 3, requiring that '*Alcohol must not be sold … at a price below its minimum price*'. The Scottish Ministers have prepared a draft order specifying a minimum price per unit of 50 pence but neither the 2012 Act nor the order have been brought into force pending these proceedings.

The Scotch Whisky Association (SWA) presented a petition for judicial review challenging the lawfulness of the 2012 Act. The remaining grounds of challenge are that minimum unit pricing is disproportionate as a matter of EU law, operating as a quantitative restriction on the free movement of goods and impacting on the proper functioning of the Common Agricultural Policy's Common Market Organisation on the production, marketing and sale of wine.

The SWA submit that alternative pricing measures exist which would be less disruptive of free trade and less distortive of competition across the EU single market, and would have at least an equivalent level of effectiveness in achieving the aim of the Scottish Government to improve public health.

What is the issue for the Supreme Court?
Whether the Alcohol (Minimum Pricing) (Scotland) Act 2012 is incompatible with European Union law and therefore unlawful under the Scotland Act 1998.

Who will hear the case?
Lord Neuberger PSC, Lady Hale DPSC, Lords Mance, Kerr, Sumption, Reed and Hodge JJSC

When it is listed for and for how long?
It is listed for 2 days on 24 and 25 July 2017.

What happened in the Court of Justice of the EU in Luxembourg?
On 23 December 2015 the 2nd Chamber of the CJEU (Judges Silva de Lapuerta, da Cruz Vilaça, Arabadjiev, Lycourgos and Bonichot) handed down their ruling endorsing the earlier opinion of Advocate General Bot. The CJEU ruled that:

- Regulation **(EU) No 1308/2013** had to be interpreted as not precluding a national measure which imposes a minimum price per unit of alcohol for the retail selling of wines, provided that that measure is in fact an appropriate means of securing the objective of the protection of human life and health and that, taking into consideration the objectives of the common agricultural policy and it does not go beyond what is necessary to attain that objective of the protection of human life and health,

- Articles 34 and 36 of the Treaty on the functioning of the EU had to be interpreted as precluding a Member State choosing the option of legislation which imposes a minimum price per unit of alcohol for the retail selling of alcoholic drinks and rejecting a measure such as increased excise duties that may be less restrictive of trade and competition within the European Union,
- Article 36 TFEU had to be interpreted as meaning that a national court is bound to examine objectively whether it may reasonably be concluded from the evidence submitted by the member state concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods and of the common organisation of agricultural markets, and
- Article 36 TFEU had to be interpreted as meaning that the review of proportionality of a national measure is not to be confined to examining only information, evidence or other material available to the national legislature when it adopted that measure.

www.bailii.org/eu/cases/EUECJ/2015/C33314.html

What happened in the Inner House of the Court of Session?
On 30 April 2014 an Extra Division of the Inner House (Lords Eassie, Menzies and Brodie) hearing the SWA's appeal made a preliminary reference to the Court of Justice of the EU.
www.bailii.org/scot/cases/ScotCS/2014/2014CSIH38.html

Following that ruling from the CJEU, on the 21 October 2016 the First Division of the Inner House (Lord Carloway, Lord President and Lords Brodie and Menzies) refused the SWA's appeal.
www.bailii.org/scot/cases/ScotCS/2016/[2016]CSIH77.html

What happened in the lower courts?
On 3 May 2013, Lord Doherty sitting in the Outer House of the Court of Session rejected the SWA's claim for judicial review.
www.bailii.org/scot/cases/ScotCS/2013/2013CSOH70.html

What could be the implications of its ruling?
The issue of minimum pricing for alcohol remains a political hot potato. At least when the Supreme Court hears this, the general election will be out of the way. The arguments in relation to free movement had been over-egged in some ways. After Brexit, these sorts of arguments could fall away anyway. It is telling that a 7 judge panel has been convened for this. It will be tempting for the Supreme Court to craft a ruling that gives the SWA something for its challenge.

28 May 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.