

The Digest

BRICK COURT
CHAMBERS
BARRISTERS

A quarterly round up of cases and news from Brick Court Chambers

Welcome to 'The Digest'

In this quarterly publication we will bring together a round up of recent judgments, an outline of forthcoming judgments and longer articles on cases of particular interest involving barristers from Brick Court Chambers. The Digest will also include Chambers news and details of forthcoming seminars and conferences. Though much of this information is available on an on-going basis on our website, The Digest provides you with an easy reference document with further explanation on some areas.

New Silk on the block

Neil Calver has been appointed QC in this year's Silk competition. Called in 1987, Neil's practice is General Commercial / Public law with a particular emphasis on insurance, reinsurance, EC and sports law. He is recommended by Legal 500 and Chambers and Partners guides and was shortlisted as Junior of the Year (Insurance) at this year's Chambers & Partners Bar Awards.



Recent judgment round up

In this section we have collected together brief summaries of the most interesting or notable of the recent judgments in which members of Brick Court Chambers were involved.

Hammonds defeats largest solicitors' professional negligence claim in recent years. The Football League has failed in its claim for c.£150 m from edge ellison (now a part of Hammonds). The claim was an attempt to make the League's former solicitors liable for the fact that the League had sold the TV rights to ONdigital (subsequently renamed ITVDigital) in 2000 without taking guarantees from ONdigital's parents (Carlton and Granada). Of the £150 million claim, Hammonds must pay only £4 in nominal damages for two minor breaches of duty. Hammonds was represented by solicitors Barlow Lyde & Gilbert and **Jonathan Sumption QC** leading **Tom Adam** from Brick Court Chambers.

Yaqoob & Anor v Royal Insurance (UK) Ltd. (2006). A trial judge's failure to deal with issues of a claimant's credibility vitiated the judge's decision that the claimant had

proved on the balance of probabilities that a fire that damaged his business premises was not set by him or at his connivance. The appeal was allowed. **Tim Lord** was counsel for the appellant instructed by Beachcroft Wansbroughs.

Adidas has won its High Court challenge against the dress rules of the International Tennis Federation, the Lawn Tennis Association, the All England Lawn Tennis and Croquet Club, Tennis Australia, the Fédération Française de Tennis and the US Tennis Association. Counsel for Adidas included **Kelyn Bacon**, **Charles Hollander QC**, **Nicholas Green QC**, **Daniel Jowell**, **David Scannell** and **Victoria Wakefield** were among counsel instructed for the defendants, joined by **David Anderson QC** as the case settled.

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Recent judgment round up cont.

Sibir Energy Plc v Roman Abramovich, Sibneft & ors. On 18 September 2006, the Court of Appeal of the Eastern Caribbean gave judgment dismissing the claims brought by Sibir against, amongst others, Mr Roman Abramovich and Sibneft (the oil and gas company now owned by the Russian state oil company, Gazprom). Sibir, the AIM listed company, had brought a claim for in excess of £1 billion in relation to the alleged misappropriation of "shares" in a Russian based subsidiary. **Mark Howard QC** and **Daniel Jowell** instructed by solicitors Skadden Arps represented Mr Abramovich and Sibneft.

Rail firm **GNER** lost its bid to prevent the Office of Rail Regulation (ORR) allowing two rival firms to operate on one of its routes. **Aidan Robertson** (instructed by White & Case LLP) represented Grand Central who

successfully intervened in support of the ORR.

"Undertaking" defined in competition law Case C-205/03 P, FENIN v Commission supported by the United Kingdom, Judgment 11 July 2006

In this long-awaited judgment the Court of Justice (Grand Chamber) confirmed that in Community competition law the definition of an "undertaking" covers any entity engaged in an economic activity, regardless of its legal status or method of financing, and that it is the activity of offering goods and services in a market that is the characteristic feature of an economic activity. The United Kingdom, which supported the Commission in its successful opposition to FENIN's appeal, was represented by **Gerald Barling QC** of Brick Court Chambers.

Forthcoming judgments

R (Animal Defenders International) v Secretary of State for Culture, Media and Sport. Is the ban on political advertising compatible with the right to freedom of expression? (**Martin Chamberlain** is standing in for **Jemima Stratford** as junior counsel for the Government in this test case on the scope of Article 10 ECHR. Judgment is expected from the Divisional Court soon.)

R (Elias) v Secretary of State for Defence. Was the Government's scheme to compensate prisoners held captive by the Japanese during the Second World War racially discriminatory? **Martin Chamberlain** was junior counsel for the Government. Judgment is expected from the Court of Appeal imminently.

Norris v US Government and Others is an appeal against an extradition order made by the Bow Street Magistrates Court. It comes in the wake of the extradition of the Nat West Three which led to public disquiet over the way their family lives were shattered and the way they have been treated by the US Courts thus far. The case has wider implications for human rights law. Norris will be seen as a test of the new Extradition Treaty which was brought in to speed up extradition processes with the USA in order to combat terrorism. Whether or not it was ever intended to catch CEOs of major international companies is open to doubt, but with the aggressive territorial reach of the US

Courts it is now being used for precisely that purpose. **Richard Gordon QC** and **Martin Chamberlain** are instructed by White & Case on behalf of Norris. **David Vaughan QC** and **Sarah Ford** are instructed by Jones Day for Goldshield, to intervene in support of Norris on the question of whether participation in a price fixing cartel amounts to conspiracy to defraud. **James Flynn QC** is instructed by the Serious Fraud Office to intervene in support of the US Government with regard the Goldshield intervention above.

Spain v UK – Are Member States allowed to confer the franchise in European Parliament elections on non-nationals? **Derrick Wyatt QC** and **Martin Chamberlain** acted with the Attorney General for the Government in this inter-state action before the ECJ. Judgment is expected soon.

Foulser v MacDougall (HM Inspector of Taxes) [2006] STC 311 - an appeal to the Court of Appeal, concerning freedom of establishment under the EC Treaty in the context of a scheme to avoid payment of Capital Gains Tax. **Jemima Stratford** was instructed by the Inland Revenue.

Attheraces v The British Horseracing Board (Court of Appeal) in which **Charles Hollander QC** and **Daniel Jowell** acted for the Claimants and **Maya Lester** for the Defendant.

The Lawyer Awards 2006

Members of Brick Court Chambers were on the winning teams in two categories of award at The Lawyer Awards 2006.

Together with Barlow Lyde & Gilbert, Ernst & Young and 7 King's Bench Walk, Brick Court Chambers were awarded **Litigation team of the Year** for the defence of E & Y in a claim worth £2.6bn brought by Equitable Life. Mark Hapgood QC (bottom) was a member of this team.

Sir Sydney Kentridge QC (top) was lead counsel in the winning Freshfields Bruckhaus Deringer team that won the award for **Pro Bono Activity of the Year**

with their work intervening in the landmark House of Lords case on evidence gained through torture. The case was: *A Ors v. Secretary of State for the Home Department* [2005] UKHL 71 (8 December 2005).

It was not just as members of a team that Brick Court barristers were in the spotlight. **Nicholas Green QC** was runner up **Barrister of the Year**.



Case focus

Republic of Ecuador and Occidental Petroleum

Important ground-breaking litigation between the Republic of Ecuador and Occidental Petroleum has so far seen two hearings in the Commercial Court and one in the Court of Appeal, with a further appeal scheduled for early 2007.

Under the terms of a Bilateral Investment Treaty ('BIT') between Ecuador and the USA, and a parallel investment agreement between Petroecuador (a commercial entity of Ecuador) and Occidental, an UNCITRAL arbitration tribunal seated in London found that Ecuador had wrongly withheld VAT refunds on the export of oil, and made an award to Occidental of \$75m. Ecuador challenged the award on the ground that Article X of the Treaty specifically excluded "matters of taxation" from its ambit, and thus from the jurisdiction of the tribunal. Occidental claimed that the dispute concerned "*the observance and enforcement of terms of an investment agreement*", which is one of three exceptions to the general exclusion of tax matters under Article X.

International arbitrations under BITs have become an important means of resolving disputes between investors and the commercial entities of host states. There are now over 2,300 BITs in force throughout the world, many of which exclude tax matters from their ambit, often subject to limited exceptions such as those in the Ecuador/US BIT. The present litigation is the first time that issues under a BIT have come before the English courts, and is also the first time that the scope of the standard

exclusion of tax matters from the ambit of a BIT, and the nature of the limited exceptions to that exclusion, have been considered by any court worldwide. The decisions of the English courts in this case are accordingly being studied closely by commercial lawyers worldwide.

Occidental's first line of defence to Ecuador's jurisdiction challenge (under s.67 of the Arbitration Act 1996) was that the challenge was non-justiciable before English courts. It relied on the wide non-justiciability principles espoused in *Buttes Gas v Hammer*, and also contended that the decision of the House of Lords in the *Tin Council* litigation fatally limited the regard that an English court can have to a treaty which has not been incorporated into English law. Both Aikens J ([2006] 1 Lloyd's Rep 773) and the Court of Appeal ([2006] QB 432) found against Occidental on these preliminary issues.

Ecuador's main s.67 application was subsequently dismissed by Mr Justice Aikens in March 2006, applying a very broad construction to the words of the exception relied on by Occidental. Aikens J gave permission to appeal against this decision, and the appeal will be heard early next year.

Ecuador has been represented throughout by **Mark Cran QC** and **Simon Birt** of Brick Court Chambers (instructed by Weil, Gotshal & Manges). At the preliminary issue hearings dealing with the justiciability of a non-incorporated treaty, David (now Mr Justice) Lloyd Jones QC, also of Brick Court Chambers, led for Ecuador.

**'Important
ground-breaking
litigation'**

Case focus

Brick Court assist in Rosneft IPO court action

'The judgment represents a clear endorsement of the traditional approach to "act of state" where what is being alleged involves a foreign government.'

In July, Rosneft, the Russian state oil company, floated its securities on the London market in an IPO worth over \$10 billion. The IPO went ahead after Mr Justice Charles, sitting in the Administrative Court, refused Yukos, the troubled oil company formerly owned by Mikhail Khordokhovsy, permission to seek judicial review of the decisions to admit Rosneft's securities to listing and trading. The claim is an example of the increasing number of commercial judicial review claims against financial regulators.

Yukos alleged that Rosneft had misappropriated its main asset in a conspiracy to which the Russian authorities were party and that the dispersal of ownership in Rosneft would make it more difficult for it to obtain restitution. Yukos's main argument was that the listing of Rosneft's securities would amount to laundering the proceeds of crime contrary to the Proceeds of Crime Act 2002 (POCA). The FSA, the LSE and Rosneft argued that Yukos's allegations could not be investigated either by the regulators or by the courts because of the "act of state"

doctrine, which prevents English courts from impugning the actions of friendly foreign governments. Mr Justice Charles agreed and, after two days of argument, refused permission and interim relief on the eve of the IPO.

The judgment represents a clear endorsement of the traditional approach to "act of state" where what is being alleged involves a foreign government. But where the wrongdoing alleged does not involve a government or its officials, the judgment leaves a large number of unanswered questions about the implications of POCA for those offering securities for listing and their underwriters and advisors, as well as for the City regulators.

Two Brick Court teams were involved – **Richard Gordon QC** and **Tom Adam**, instructed by Freshfields for the London Stock Exchange, and **Mark Howard QC**, **Martin Chamberlain** and **Simon Birt**, instructed by Cleary Gottlieb Steen & Hamilton (with Travers Smith as agent) for Rosneft.

Brick Court welcomes new door tenant



After recently completing a pupillage in Brick Court Chambers, Professor Jonathan Harris joined at the beginning of September as a door tenant.

Called to the Bar in March 2006, Professor Harris is an expert in Private International Law and is currently Professor of International Commercial Law and Deputy Head of the School of Law at Birmingham University.

As well as teaching extensively in Private International Law, Professor Harris is the author of eight chapters of the recently published leading work **Dicey, Morris and Collins, *The Conflict of Laws*, 14th edition**, including chapters on important emerging areas such as the Law of Restitution. He is the co-editor and co-founder of the '*Journal of Private International Law*', author of *The Hague Trusts Convention* and co-author of *International Sale of Goods in the Conflict of Laws*. He has advised in numerous

cases and has recently provided expert evidence for three different US law firms on issues relating to the enforcement of US judgments in England.

Professor Harris played a leading role in formulating and drafting the conflict of laws provisions of the British Virgin Islands' Trustee Act 2003 on jurisdiction and choice of law. He is regularly asked to advise the Department of Constitutional Affairs on key legislative proposals in the field of private international law and he is a member of the Advisory Council of the British Institute of International and Comparative Law, chaired by Lord Bingham.

On top of all this, Professor Harris regularly speaks on key developments in private international law at conferences and seminars around the country.

Professor Jonathan Harris will be presenting a seminar on International Private Law on Tuesday 28th November 2006. Please email lucy.adam@brickcourt.co.uk for further information.

The Chambers Bar Awards 2006

At a splendid Chambers Bar Awards ceremony in The Grosvenor House Hotel on Thursday 27th September, Brick Court Chambers was awarded '**Competition/EU Set of the Year**'.

Sir Sydney Kentridge QC (near right) was presented a 'Lifetime Achievement Award'.

Jonathan Sumption QC (far right) was awarded 'Silk of the Year' in the professional negligence category.



Case focus

Inntrepreneur

On the 19th July 2006, the House of Lords ruled that the High Court (Mr Justice Park) had been right to come to its own view of the legality under EC competition law of the beer ties contained in Inntrepreneur's pub leases. The judge was therefore entitled to conclude that they did not run counter to the EC Treaty and that no damages were payable.

The House overruled the Court of Appeal which had held that High Court was bound to follow the different approach taken by the EC Commission in a series of decisions involving not Inntrepreneur itself, but the then major UK brewers Whitbread, Bass and Scottish & Newcastle. The House of Lords held that that approach would have deprived Inntrepreneur of a fair trial. In fact, the Commission had written to tenants, including Mr Crehan, to say that the matter should be considered by the English court and therefore the judge was doing as the

Commission expected. In any event, it would have been inconsistent with his judicial oath for the judge to have followed the Commission's view if persuaded by the evidence that it was wrong.

The ruling marks the last stage in a long fought-out battle between Inntrepreneur and Mr Bernard Crehan, the lead case of several hundred.

No fewer than seven Brick Court barristers were involved: **Nicholas Green QC** and **James Flynn QC** (instructed by Sprecher Grier Halberstam) were responsible for the EC competition law arguments on behalf of Inntrepreneur, **David Vaughan QC** and **Mark Brealey QC** led **Marie Demetriou** and **Michael Bools** (instructed by Maitland-Walker) for Mr Crehan, and **Helen Davies** was amongst those instructed (by Freshfields) to represent Visa which, with the Office of Fair Trading, intervened before the House of Lords.

'The ruling marks the last stage in a long fought-out battle between Inntrepreneur and Mr Bernard Crehan'

Maya Lester

Maya Lester has recently returned from a three-month Pegasus Scholarship at the Supreme Court of Israel where she worked as a Foreign Law Clerk to Chief Justice Aharon Barak and Justice Dorit Beinisch, who took over from Barak as Chief Justice in September 2006.

Maya described Aharon Barak as "a wonderful judge and legal scholar who is widely recognised as having led a constitutional revolution in Israel." She reports that the Supreme Court (which hears almost all judicial reviews as well as appeals) makes wide use of comparative law, through a team of Foreign Law Clerks who assist the judges and their clerks. While she was there the Court

considered a series of fascinating cases such as whether security concerns justify prohibiting Israeli and Palestinian married couples from living together in Israel, whether the constitution (set out in a series of Basic Laws) allows prisons to be privatised, and whether the route of the Security Fence dividing the West Bank from Israel is lawful. Maya found that the Court was particularly interested in learning from the English system on issues such as judicial appointments, coping with vexatious litigants, and costs in public interest cases.

Maya specialises in public law, human rights, European and competition law.



Brick Court Seminar Directory

Enhancing the service we offer clients



'The directory will be revised on an on-going basis with topics being added or removed as appropriate'

Barristers at Brick Court Chambers have for many years been presenting seminars and conferences, whether in Chambers, by invitation at client's premises or in one of the many conference venues around the country. We have now assembled topics that we think are relevant and interesting into a seminar directory. These topics may be presented in the following ways:

- we hold a seminar in chambers, inviting those to whom the seminar is appropriate
- by arrangement/invitation, barristers take a seminar to client's premises
- the topic is discussed in an informal manner, including a short presentation, to a smaller audience pre- and during dinner.

The directory will be revised on an on-going basis with topics being added or removed as appropriate. In addition, we are happy to present seminars on topics that you might identify that are not on the list. To discuss further please do not hesitate to contact Lucy Adam, Marketing Manager at lucy.adam@brickcourt.co.uk.

At present the following dates have been set to hold seminars in Chambers:

- **Non-Disclosure and Fair Presentation of Risk - what does it mean in 2006?**

21st November 2006 – 6.30 p.m. to 8 p.m.
followed by refreshments **1.5cpd hours**
See back page for more details.

- **Important recent developments in Private International Law**

28th November 2006— 6.30 p.m. to 8 p.m.
followed by refreshments **1.5 cpd hours**

Part 1 - new edition Dicey, Morris and Collins, *The Conflict of Laws*, 14th ed, 2006.

Professor Jonathan Harris (see page 4 for brief profile) will speak on certain key developments in private international law, with reference, in particular, to changes made in the new edition of *Dicey, Morris and Collins*.

Part 2 - the Rome I Regulation

Professor Harris will also discuss some of the key developments in relation to the proposed Rome I Regulation on choice of law in contract.

Part 3 - the Rome II Regulation

Fergus Randolph, barrister at Brick Court Chambers, member of Law Reform Committee of the Bar Council, will outline the present position with regard to the proposed Rome II Regulation on choice of law for non-contractual obligations.

Each part of the seminar will include time for a short discussion on the issues raised.

Other topics for seminars/discussion available:

- **The modern law of tort in a commercial context.** Considering to what extent the common law will impose a duty of care on parties in a commercial context, even though the parties have chosen not to contract with one another and instead have chosen to contract with someone else.
- **Legal professional (and other types of) privilege.** The comparison between English and EC privilege rules in the light of *Akzo* and the House of Lords in the *Three Rivers* case.
- **Litigating competition law in the English courts.** Focusing on the tactics, issues and challenges of litigating competition law in the English High Court.
- **Recent developments in contract law**
The talk will focus on developments in contract law in the last 5-10 years.
- **European jurisdiction, evidence and service issues, including recent developments.** A description of the European Judgments Regulation (dealing with issues of jurisdiction and enforcement of judgments), the Taking of Evidence Regulation and the Service of Proceedings Regulation and discussion of issues and recent developments arising from those pieces of legislation. It is an interactive seminar including problem workshops.
- **Recent developments in sports disciplinary proceedings and competition**

For further information on these topics please email lucy.adam@brickcourt.co.uk or telephone 020 7520 9920 (Tues/Weds only). To book to attend an in-house seminar please email seminars@brickcourt.co.uk.

Mediators far and wide

Brick Court Chambers have a growing number of Independent Mediators including Stephen Ruttle QC, Bill Wood QC, Richard Lord QC, Hilary Heilbron QC, and last but not least, Tony Willis who joined Chambers in 2004. Between them, they have mediated a large number and variety of commercial cases in recent months in venues as far apart as London, New York, Dubai, the Channel Islands, Scotland, Hong Kong and Athens.

Mediations are confidential and so it is not normally possible to discuss them in the public domain but occasionally their work emerges into the sunlight in statements by parties to Stock Exchanges, Regulators and the Courts.

It is not all about settling disputes, or even about big business. Stephen Ruttle QC recently went to Hong Kong to provide training for judges and he is involved in a pilot community mediation initiative as a



Left to right: Tony Willis, William Wood QC and Stephen Ruttle QC were all recommended in The Legal 500 2006/7

way of settling local disputes in Wandsworth. Tony Willis is concerned with the LawWorks Mediation Scheme, a joint venture between the Bar pro Bono Unit, the Solicitors pro bono Group (which he founded nearly 10 years ago now called LawWorks) and the Law Centres Federation to provide mediators and mediation advocates for parties who could not otherwise afford to participate in a mediation and who do not qualify for public funding.

If you would like to discuss mediation or would like more information about our mediators please contact Deborah Anderson by telephone on 020 7379-3550 (Switchboard) or email deborah.anderson@brickcourt.co.uk.

'a large number and variety of commercial cases in recent months in venues as far apart as London, New York, Dubai, the Channel Islands and Scotland, Hong Kong and Athens.'

New faces

On 1st September 2006, Brick Court Chambers invited Gerard Rothschild (pictured bottom right) and Jonathan Dawid (pictured top right) to become tenants of Chambers.

Both Gerard and Jonathan were called to the Bar in 2005. They undertook their pupillage at Brick Court, gaining experience across the commercial, European and public law practice areas within Brick Court.

With high achieving academic backgrounds, Jonathan and Gerard have applied themselves rigorously to their legal careers. Jonathan spent the summer of

2005 working as a Stagiaire in the ECJ (Court of First Instance) in Luxembourg and Gerard is a Lecturer in Law at Magdalen College, Oxford.

Now, after only one month as tenants, Jonathan and Gerard have their feet firmly under the Brick Court table. So far, Gerard has been involved in competition law, banking and insurance cases and Jonathan is presently working on a £500 million professional negligence case.



The Legal 500 2006/7

Along with the arrival of autumn, September heralds the new edition of that weighty tome 'The Legal 500'.

This year we were happy to see that once again over 75% of members of chambers have been recommended in their fields and Brick Court Chambers was recommended as one of the top three leading commercial sets and one of the leading sets in:

- Administrative and Public law
- Aviation

- Banking and Finance
- Civil Liberties and Human Rights
- Commercial Arbitration
- Commercial Litigation
- European and Competition
- Energy
- Civil Fraud
- Insurance and Reinsurance
- Professional Negligence
- Public Inquiries
- Shipping

'Over 75% of members of Brick Court Chambers have been recommended'

Autumn 2006

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Conference

Damages actions and the private enforcement of Competition law

A one day conference presented by Brick Court Chambers — 6 CPD hours. Tuesday 14th November 2006 at The Savoy Hotel, The Strand, London

Sessions include:

- Legal basis for damages in competition law - rights and remedies
- Issues of jurisdiction in relation to international cartels
- Substantive issues in the English courts
- Competition Appeal Tribunal or High Court?
- Procedural issues in the English courts
- Inter-relationship with criminal investigations/proceedings
- Lessons from the past and thoughts for the future

The conference fee is £150 + VAT (£176.25) per delegate. To book, or for further information, please email lucy.adam@brickcourt.co.uk.

Seminar

Non-Disclosure and Fair Presentation of Risk - what does it mean in 2006?

at Brick Court Chambers on Tuesday 21st November 2006 at 6.00 p.m. to 7.30 p.m. - 1.5 CPD hours

This free seminar will give an up to date look at the issue of non-disclosure and fair presentation of risk, in general insurance, marine insurance and reinsurance contexts, in the light of recent case law, including coverage of:

- what is "material"
- what is the insurer presumed to know
- inducement and causation
- waiver and affirmation
- the effect of proposal forms and warranties
- the role of the broker

Speakers:

Richard Lord QC (left)
Neil Calver QC



To request an invitation please email: seminars@brickcourt.co.uk

Seminar

Important recent developments in Private International Law

at Brick Court Chambers on Tuesday 28th November 2006 at 6.00 p.m. to 7.30 p.m. - 1.5 CPD hours

- Part 1 - new edition Dicey, Morris and Collins, *The Conflict of Laws*, 14th ed, 2006.
- Part 2 - *the Rome I Regulation*
- Part 3 - *the Rome II Regulation*

Further details can be seen on page 6

To request an invitation please email: seminars@brickcourt.co.uk

Speakers:

Fergus Randolph (left)
Professor Jonathan Harris

