Brendan McGurk

M.A. (Cantab), BCL (Oxon), D.Phil (Oxon)
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Summary

Brendan is a leading junior with a wealth of experience in Commercial, Public law and Regulatory disputes. He offers expertise across Chambers' core areas and he is in equal demand amongst public and private clients in EU, Competition, Procurement and Indirect Tax litigation. In addition, he regularly acts in Financial Services and Insurance disputes. His intellectual rigour, hard work and commercial common sense has resulted in a thriving advisory practice. Brendan is personable and persuasive and is regularly instructed in his own right as both a trial advocate and an appellate advocate. In addition, he has been an integral team member in several high-value commercial disputes. Brendan is on the Attorney-General's Panel. He is co-author of Professional Indemnity Insurance, published in March 2010 by Oxford University Press and has published several articles on Insurance and Competition law.
Brendan was recommended as a leading junior in the Legal 500 2012 and 2013 for Administrative and Public Law.

Specialist Areas

ADMINISTRATIVE LAW AND HUMAN RIGHTS

"The 'excellent' Brendan McGurk," is recommended as a leading Junior in Administrative & Public Law. ***Legal 500, 2013***

Brendan is currently involved in:

- *Kamoka & Ors v The Security Services and Ors*: acting for the Security Services in a claim brought by 14 Libyan nationals who are alleging complicity in extraordinary rendition
- *Victor Tchenguiz & Ors v Serious Fraud Office*: (acting for the SFO (civil claim by the Claimants arising from the SFO's execution of a search warrant over the Claimant's property in a high profile investigation of his financial activities following the collapse of the Icelandic Bank Kaupthing).
- *Carpenter v Ministry of Justice* (acting for the Ministry of Justice in a claim for declaration of incompatibility of the Gender Reassignment Act 2004 with the ECHR)

Recent work and significant cases include:

- *R (On application of Brown) v Commissioners* : successfully defended the Commissioners in a judicial review on the question of the appropriate jurisdiction in which decisions by HMRC to exempt certain supplies from VAT might be challenged.
- *Blackbay Ventures Limited v Secretary of State for Health* (acting for pharmacy chain in dispute over wholesale dealer licensing)
- *Gallaher Plc and Somerfield Stores Ltd v Office of Fair Trading*: (Counsel to OFT: advising in a challenge by the Claimants over the alleged failure of the OFT to extend the benefit of certain assurances given to one addressee of its Tobacco Cartel decision to other addressees of that decision, alleged to be in breach of its equal treatment obligations).
- *R (on the application of U) v Secretary of State for the Home Department*: acted for the Defendant on an application in SIAC by terror suspect 'U' to extend the boundaries of the zone to which he is confined when not

under curfew).

- *Alacakanat v General Medical Council*: Advised the General Medical Council on application of Directive 2004/58/EC and its relationship with the Ankara Agreement
- Advised Local Authorities on the applicability of the Electricity Act 1989's licensing regime in relation to renewable energy installations designed to avail of the Feed in Tariff scheme.
- *R (On the application of Tham Yong) v Ministry of Defence.* He acted for the Ministry of Defence and the Foreign and Commonwealth Office in a proposed claim for judicial review arising out of a call for a public inquiry to be held into the deaths of a number of people during the Malayan Emergency in 1948.
- *R (On the application of Mhango) v Secretary of State for the Home Department* [2010] EWHC 1321 (Admin) (claim under art. 8 to remain in the UK)
- *A B & Others v Ministry of Defence - The British Nuclear Test Veterans Litigation:* (acted for the Ministry of Defence in relation to the class action brought by former servicemen alleging improper exposure to radiation during the UK's nuclear test programme in the Pacific in the 1950s.
- *The Billy Wright Murder Inquiry:* (Brendan acted for the Northern Ireland Office and the Northern Ireland Prison Service in the public inquiry convened to consider the allegations of collusion surrounding the death of Billy Wright in HMP Maze).
- Brendan acted for the Foreign and Commonwealth Office in relation to the civil claims brought by a number of British citizens and residents as a result of being held in Guantanamo Bay.
- He is regularly instructed in immigration matters on behalf of the Secretary of State for the Home Department.

COMMERCIAL LAW

Brendan's has a very broad commercial practice within which he specialises in Financial Services, Insurance, Commercial Regulation, Professional Liability, and Civil Fraud

Brendan is currently involved in:

- *McManus Seddon Runhams v European Risk Insurance Company Hf*: acting for insured seeking declarations that valid notification of circumstances was made under a policy of professional indemnity insurance. The matter is currently in the Court of Appeal.
- *Financial Services Compensation Scheme v Independent Financial Advisers*: acting for Independent Financial Advisers insured alleged to have mis-sold bonds comprising Traded Life Policies;
- *Various Investors v McClay Murray & Spens*: acting for the defendant firm in claims by investors in Enterprise Zone tax Shelter Investment Schemes
- *Allardyce & Ors v ProAct Financial & Ors (Defending Independent Financial Advisors in the Little Wings Film Finance Tax Avoidance litigation)*
- *Floe Telecom Limited & Ors v Secretary of State for Culture, Olympics Media and Sport*: acting for DCMS in Francovich Damages claim by several commercial providers of GSM Gateway technology)

Recent work and significant cases include:

- *Brown & Ors v Innovator Plc and others (the Innovator litigation),* acting for a firm of solicitors in relation to a claim arising out of allegedly fraudulent tax efficient technology investment schemes established by their former client. Brendan was also instructed in sister litigation arising out of very similar technology tax avoidance schemes (the *Keydata* litigation).
- *Ellis & Co v ZL Insurance* (acceptance of notifications made under professional indemnity insurance policies.
- *Collyer Bristow & Ors v Streets Financial Services & Ors* (Part 20 proceedings subsequently commenced against a large number of Independent Financial Advisors in the Innovator litigation).
- *Givaudan Suisse SA v Chubb Insurance Company of Europe SE and other* :acting on behalf of Chubb Insurance in relation to the policy aspects of a mass-tort action brought by American Claimants in the Swiss Courts

- *Kingspan Environmental and Ors v Borealis A/S and another* [2012] EWHC 1147 (Comm) *(*a claim against Borealis A/S regarding the production of external oil tanks which, allegedly were not fit for purpose)
- *A.C. Ward & Sons Ltd v Catlin (Five) & Others* [2009] EWHC 3122 (Comm) (Protections Warranties in Commercial Contents Insurance policies)
- *Chemistree v Roche Products Ltd*: Counsel to the Claimant Pharmacy company in a dispute over the consequences of its having discontinued proceedings against Roche in which it had alleged constructive refusal to supply.
- *Blackbay Ventures Limited v Secretary of State for Health* (acting for pharmacy chain in dispute over wholesale dealer licensing)
- *BT v Ofcom* (acting for Ofcom against BT, Sky and TalkTalk's appeal against Ofcom's Local Loop Unbundling and Wholesale Line Rental Charge Control Review)
- *Ofgem v National Grid Gas Plc (*regulatory enforcement proceedings brought as a result of alleged irregularities in the reporting of pipe-replacement under the 30-30 mains replacement programme)
- *Environment Agency v Kirkwood*: Counsel to the Environment Agency, seeking recovery of waste management licence fees and seeking to resist a counterclaim for loss as a result of an alleged agreement between the parties as to the handling of contaminated clay.
- *Everything Everywhere Limited v Shebang Limited*: Counsel to Everything Everywhere (the owner of Orange and T-Mobile). Termination of Mobile Phone distribution agreements.
- Advised the Environment Agency in relation to claims for remediation (following the pollution of rivers), and has advised on the Agency's enforcement powers.
- Acted in a number of cases relating to the breach of conditions attached to Waste Management licences.
- Brendan regularly advises on issues relating to the scope of authority granted to financial advisers operating under authorised representative agreements or within financial services networks
- Advised on the impact of the Department for Energy and Climate Change's consultation on financial incentives for renewable energy which include a Feed in Tariff ("FIT") for small scale, low carbon electricity generation of capacity up to 5MW.
- *Durham v BAI (Run Off) Ltd :* Brendan was instructed as a research junior for the Zurich Insurance company in the Employer's Liability Policy Trigger litigation in the Court of Appeal in, led by Jeremy Stuart-Smith QC.
- *Re Falconara:* acted on behalf of insurers on a major commercial arbitration arising out of delay claims brought in respect of the construction of a power plant. The case considered the impact of the decision of Colman J in *Lumbermans Mutual Insurance Company v Bovis Lend Lease Limited*.
- Brendan has advised insurers on the potential liabilities of local authorities arising out of the major flood events of 2007.

Brendan is co-author of Professional Indemnity Insurance, published in March 2010 by Oxford University Press, the leading practitioners' text on the subject and has published several articles on insurance law.

EU, COMPETITION AND PROCUREMENT

Brendan is currently involved in:

- *Floe Telecom Limited & Ors v Secretary of State for Culture, Olympics Media and Sport*: Brendan is acting for DCMS in a Francovich Damages claim by several commercial providers of GSM Gateway technology.
- *Gallaher Plc and Somerfield Stores Ltd v Office of Fair Trading*: Counsel to OFT: Defending the OFT against an application permission to appeal out of time to challenge the OFT's Tobacco cartel decision in light of that decision being set aside as against other addressees to the decision who have since successfully appealed that decision.
- *Isle of Wight CC & Ors v HMRC*: acting for the Commissioners in relation to the determination of whether disapplication of the VAT Directive would lead to the distortion of competition between local authorities and private providers providing the same service in the same market. The Commissioners succeeded before the

Tribunal. The matter is currently under appeal

- *Case C-301/10 Commission v United Kingdom*: acted for the United Kingdom Government, instructed by the Department for the Environment, Food and Rural Affairs (DEFRA) in relation to the infraction proceedings brought by the European Commission over the UK's alleged non-compliance with the Urban Waste Water Directive
- *Buckinghamshire Hospitals NHS Trust v DRC Locums Limited*: acting for the NHS Trust in a dispute over the entitlement of locums providers to charge uplifted commission payments under a National Locums Framework Agreement.

Recent work and significant cases include:

- *BT v Ofcom; Sky / TalkTalk v Ofcom*: Counsel to Ofcom (led by Josh Holmes). BT, Sky and Talk Talk are challenging the price control review issued by Ofcom in relation to Wholesale Line Rental and Local Loop Unbundling services.
- Advised insurers on the impact on certain types of cover of the Environmental Liability Directive.
- *Law Enforcement International Limited v National Policing Improvement Agency*: Acting for the NPIA (led by Philip Moser QC). Civil claim arising out of the decision to use Single Tender Action (and thus forego the holding of a public procurement under the 2006 Regulations) on grounds of national security.
- *Carillion Plc v Bradford Metropolitan Borough Council*: acted for Carillion Plc in a claim for wasted bid costs as a result of the suspension and abandonment of a procurement process (led by Michael Bowsher QC).
- *Zablockyte v London Borough of Harrow* (CJEU): allocation of housing was allegedly discriminatory under EU Law).
- Brendan has advised on the potential application of the EU procurement rules in relation to a number of service proposals arising out of the Department for Energy and Climate Change's consultation on financial incentives for renewable energy and Feed in Tariffs in relation to small scale, low carbon electricity generation of capacity up to 5Mw.
- *Re Development of Poplar Baths and Dame Colet in Tower Hamlets*: advising on the procurement process relating to the refurbishment of Poplar Baths and the construction of affordable housing under a Competitive Dialogue procedure
- *Re Guildford College*: Counsel to the College in relation to various issues surrounding the tendering of works leading to a substantial redevelopment of its sporting and educational facilities.

Brendan has recently become an editor of Bellamy and Child's European Community Law of Competition.

Brendan's recent competition law publications include:

- 'Competition Law and Human Rights: The Privilege against Self-Incrimination and related rights in competition investigations', Competition Law Journal, Volume 12, Issue 3, 2013
- 'Off-Patent abuses in the Pharmaceutical Sector', Competition Law Journal, Volume 11, Issue 4, 2012

Brendan is also currently contributing to a new book on Procurement Law and, in particular, chapters on evaluating, selecting and excluding tenderers, defence procurement, and complaints to Commission and Infraction proceedings.

INDIRECT TAX

Brendan is currently involved in:

- *Isle of Wight & Ors v HMRC*: Counsel to HMRC in successfully showing that exempting local authorities from VAT in the provision of commercial (and taxable) services such as car parking would likely lead to a distortion of competition where private entities were offering the same services in the same market albeit without the benefit of the tax exemption. The matter is currently under appeal.
- *Birmingham Hippodrome Theatre Trust Ltd v HMRC*: Counsel to HMRC. Successfully resisted an appeal by the Theatre over its entitlement to recover overpaid tax without having to give credit for input tax received in different

periods albeit where both the overpayments and the deductions were made and received pursuant to the same failure by the UK to implement a VAT exemption for certain cultural activities. This case is on appeal to the Court of Appeal.

- *United Grand Lodge of England v HMRC*: Counsel to HMRC in an appeal by the Claimant against the Commissioners decisions that, to the extent that the Freemasons constitution does not have philanthropy is one of its aims, it cannot seek an exemption from VAT (and thus seek recovery of allegedly overpaid tax) on that basis.

Recent work and significant cases include:

- *R (On application of Brown) v Commissioners* : successfully defended the Commissioners in a judicial review on the question of the appropriate jurisdiction in which decisions by HMRC to exempt certain supplies from VAT might be challenged.
- *Prescription Eyewear Limited v HMRC*: Counsel to HMRC in an appeal as to the correct apportionment between the Claimant's standard-rated and exempt supplies.
- *Lighterlife Ltd v HMRC*: Counsel to HMRC in a second appeal by the Claimant as to the availability of VAT exemptions.
- *Tallington Lakes v HMRC*: acted for HMRC in an appeal on the tax treatment of non-permanent residential accommodation.
- *David Baxendale Limited v HMRC*: Counsel to HMRC in a claim for the return of overpaid tax on the basis that a Court of Appeal decision in the same proceedings was per incuriam the prior decision of the ECJ in RLRE Tellmer Case C-572/07. The appeal was dismissed, inter alia, on grounds of res judicata.
- *Dazmonda Ltd v HMRC*: Counsel to HMRC in an appeal by the Claimant as to its entitlement to recover VAT said to be wrongly assessed on commission payments made by table-dancers to the owners and operators of table-dancing clubs (relying on the exemption for the grant of licences to occupy land).

SPORTS LAW

Brendan is currently involved in:

- *Football Dataco & Ors v SportRadar*; advised Sportradar GmbH on prospects of appealing judgment of Court of Appeal to the Supreme Court;
- Brendan is currently advising on disputes that have arisen as a result of transfers in the January transfer window;

Recent work and significant cases include:

- *Paddy Power v LOCOG* (acted for Claimant in dispute over compatibility of billboard campaign with Olympics advertising regulations).
- *Winston Gordon & Ors v British Judo Federation*: Counsel to a number of Team GB 'Judokas' who contested the decision of the British Judo Federation not to select them for London 2012. As a result of the challenge, Mr Gordon was selected to represent Team GB, the only successful challenge to a selection decision in the run up to the London Games.
- *London Olympics 2012*: acted for a number of other Team GB Athletes who have sought to challenge the selection decisions of their governing bodies' Olympic Selection Panel
- *Big Star Creations*: Acting for agents in dispute over commission in transfer of Marlon Samuels to Pune Warriors
- *Joe Calvino v British Weight-Lifting (acted for Ms Calvino in seeking to challenge BWL's Olympics de-selection decision)*
- *Allardyce & Ors v ProAct Financial Limited & Ors* (claim by, amongst others, Sam Allardyce and Peter Reid in relation to film finance tax avoidance schemes)

- *Anthony McGann v Michael Bisping*: (dispute between sports agent seeking recovery of commission payments from his former client, a leading 'ultimate cage fighter' in the United States of America).
- *Brown & Ors v InnovatorOne Plc* (footballers and agents invested into failed tax efficient technology schemes).
- *Re Don Valley Sports Stadium*: (advising the local authority in a matter relating to whether additional securitisation of a sports stadium would be in breach of covenants given by the local authority owner to banks that had an existing security interest in the stadium).
- *Hougaard v World Artists Limited* (acted for Saracens and South African international in a commission and Image Rights dispute with former agent).
- *Costa v Welsh Karate* (acted for the Welsh Karate Governing Body in a dispute with a former affiliate member over voting rights and disqualification).
- Brendan acts for players in disciplinary contexts and takes instructions on a direct basis having obtained a direct access certificate
- Brendan advises on Fifa's Regulations on the Status and Transfer of Players
- Brendan regularly advises on all kinds of contractual disputes between players and clubs and clubs and associations.

Additional Information

ADDITIONAL INFORMATION

Brendan obtained First Class Honours as an Undergraduate at Cambridge and as a Postgraduate at Oxford. His D.Phil was supervised by Professor John Gardner and is entitled 'The Rule of Law in the Regulatory State'. He was short-listed for a Prize Fellowship at All Souls College, Oxford in 2003, won a Queen Mother's Major Scholarship in 2004 and a Bar European Group Scholarship in 2006. Before coming to the Bar, Brendan held a lectureship in Constitutional and Administrative Law at Wadham College in the University of Oxford.

What the directories say

Brendan McGurk is ranked as an up & coming Junior in Administrative & Public Law: Acts for a variety of regulators and central government departments. He demonstrates strength in cases concerning telecommunications, national security and discrimination. *"He is genuinely superb."* **Chambers UK, 2014**
"The '*excellent' Brendan McGurk*," is recommended as a leading Junior in Administrative & Public Law. **Legal 500, 2013**