



Welcome to the Summer 2011 edition of the College Chambers newsletter, featuring articles on a variety of areas of legal practice. We hope you find this newsletter interesting and topical and please do not hesitate to contact us if we can advise further.

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RESTRICTED REPORTING A TOUGH GIG(GS)!

In the present climate of super injunctions, publicity, or the lack thereof, is very much in the headlines even if the names of wayward individuals are not. Cases at the Employment Tribunal receive attention from the press and considerations of the effect of negative publicity are often prevalent in the mind of both claimants and respondents alike.

Rule 50 of the Employment Tribunal Procedure Rules 2008, enables a judge to make a Restricted Reporting Order (RRO) in any cases involving allegations of sexual misconduct or in a disability case where evidence of a personal nature is likely to be heard by the Tribunal.

There are certain limitations to the effectiveness of such orders in the days of the World Wide Web as such an order prevents the publication of broadcast in Great Britain of those affected by the allegation of sexual misconduct or any other person named in the order but beware the offshore website determined to spill the beans.

In cases of alleged sexual misconduct the phrase "persons affected" has, in the past, been construed narrowly to include primarily victim and perpetrator and witnesses of the sexual misconduct although in a recent case dealt within Chambers the construction has been extended to the family of the alleged perpetrator.

Consideration focuses upon the delicate balance between the freedom of the press to report contemporaneously and the privacy rights of the individual both enshrined within the European

Convention on Human Rights. Whilst traditionally the focus in reported cases has been on whether the administration of justice would be adversely affected by publicity, increasing emphasis is being placed upon reputational issues as a possible bar to reporting. Developments are eagerly awaited through the appellate courts.

An RRO cannot be made to protect the reputation of a body corporate and such orders only last until both liability and remedy have been determined thus showing that the administration of justice would seem to be the primary motivation behind the legislation as opposed to reputational issues.

Little thought is often put into the tactical advantages of the imposition of an RRO upon either of the parties. Such orders should not be made simply because there is an allegation of sexual misconduct as such an allegation (along with disability as detailed above) is purely a gateway to be passed through before a full consideration of the merits of such an order can be made.

Will the Employment Tribunals follow the lead of the High Court and start to be more protective of the privacy of litigants. Only time will tell but a careful consideration of whether an RRO is the appropriate course is essential in any case with a sexual misconduct element.

Gary Self

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DIARY OF EVENTS

- **Portsmouth Drinks Reception - Thursday, 14 July 2011**
From 6pm - Royal Marine Museum, Portsmouth
- **Winchester Drinks Reception - Thursday, 8 September 2011**
From 6pm - Marwell Zoo, Winchester
- **Poole Drinks Reception - Thursday, 29 September 2011**
From 6pm - Poole's Centre for the Arts, Poole
- **Charity Quiz Night - Saturday, 15 October 2011**
From 7pm - P.O.S.H. Restaurant, Southampton
- **Chambers' Christmas Drinks - Thursday, 15 December 2011**
From 6pm - College Chambers, Southampton

For further details or to reserve your place, please contact Sophie Lanzoni on (023) 8023 0338 or email: slanzoni@college-chambers.co.uk

MESOTHELIOMA: THE DIE HAS BEEN INEXORABLY CAST

Sole defendants and their insurers in “low level” asbestos exposure cases now face full liability for damages, despite other potential causes.

In the conjoined appeal of *Sienkiewicz (Costello Deceased) v Greif (UK) Ltd; Willmore v Knowsley MBC* [2011] UKSC 10, a seven-judge bench of the Supreme Court decided that where culpable exposure to airborne asbestos fibres is proved, it will be rare for a defendant to be able to escape liability: Only if it can be shown that such culpable exposure was de minimis and irrelevant as regards the mesothelioma would there be a defence.

Sienkiewicz further relaxes the burden of proof upon the claimant, following on from the House of Lords decision in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. Before *Fairchild*, the conventional ‘but for’ test for causation applied and many claims failed because the Claimant was unable to establish which fibre or fibres triggered his mesothelioma.

The *Fairchild* exception, which was made in the context of claims against multiple employers, provides that defendants breaching their duty of care “materially increase the risk” of mesothelioma,

and should therefore be jointly and severally liable.

Fairchild was refined in *Barker v Corus* [2006] UKHL 20, to the effect that each party was only liable for the proportion of damages correlating to their contribution to the risk of the claimant.

However Section 3 of the Compensation Act 2006 (“Section 3”) which is specific to cases of mesothelioma, overturned the decision in *Barker*, and provides that a “responsible person” will be liable for the whole of the damages caused, and the liability will be joint and several with any other liable party.

As a consequence of the combined effect of *Fairchild*, *Barker* and Section 3, by the time their Lordships considered the appeal in *Sienkiewicz*, as Lord Brown said, “the die was inexorably cast”. The control measure provided by *Barker*, the principle of aliquot liability, had been removed by Section 3, restoring the principle that any tortfeasor is liable in full for an indivisible injury.

In *Sienkiewicz*, the claimant was employed by the defendants in the capacity of an office worker in a factory. Her duties took her to all areas of the factory, including areas that were, from time to time, contaminated by asbestos. The defendants

were found liable because their actions had caused an increase in risk of mesothelioma by 18%. This was found to be so despite the probable cause being background environmental exposure (24 cases per million as opposed to occupational exposure 4.39 cases per million).

As observed by Lady Hale, the result was the logical consequence of *Fairchild*. Speaking obiter of any attempt to reverse *Fairchild*, “even if we thought it right to do this, Parliament would soon reverse us.” The Supreme Court was also reluctant to allow the appeal however, due to the “rock of uncertainty” of the medical cause of mesothelioma. In this respect the court has left the way clear for reversion to the conventional causation test, should advancements in medical science enable clinicians to clearly distinguish the different causes of mesothelioma. In the meantime, unless it can be shown that a claimant has negligently contributed to their exposure, defendants’ should consider mesothelioma cases all but a lost cause.

David Pugh

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SEPARATION AGREEMENTS AFTER *RADMACHER*

Radmacher (formerly Granatino) v Granatino [2010] UKSC 42, was not about separation agreements (post-nuptial agreements) but about ante-nuptial agreements. *MacLeod v MacLeod* [2008] UKPC 64 had been about a post-nuptial agreement, but, further categorisation of agreements is needed:-

(1) Ante-nuptial agreements: Made before marriage;

(2) Post-nuptial agreements regulating the parties’ financial rights both during the marriage and on divorce, e.g. *MacLeod* and *NA v MA* [2006] EWHC 2900 (Fam) (these are quite rare);

(3) Separation agreements: Post-nuptial but made, not during the relationship as in (2), but at the point of, or after, separation;

(4) Agreements to compromise a claim for ancillary relief or “Xydhias agreements” after *Xydhias v Xydhias* [1999] 2 All ER 286.

Radmacher was only concerned with ante-nuptial agreements but that did not stop the majority of the Supreme Court saying: (i) there was no material distinction between ante-nuptial agreements and post-nuptial agreements [para 57] and (ii) “...the ancillary relief court should apply the same principles when considering ante-nuptial agreements as it applies to post-nuptial agreements.”

So, given that a separation agreement is a post-nuptial agreement it ought to be dealt with in ancillary relief on the same principles as apply to an ante-nuptial agreement. Unfortunately, it is not that simple. In *MacLeod* the Board had held that the correct approach to post-nuptial agreements

was the same approach as the court took with regard to variation of maintenance agreements in s35, MCA 1973.

However, the Supreme Court in *Radmacher* said [para 65]: “These tests [i.e. the Board’s tests] are appropriate for a separation agreement. They are not necessarily appropriate for all post-nuptial agreements.” [My emphasis]. So, there may be a subtle difference in approach depending on whether the post-nuptial agreement was made just after marriage or later in the marriage perhaps when it is rocky (*NA v MA* and *MacLeod*) or at the point of separation. For separation agreements, therefore the *MacLeod* test may still be important: Look for a significant change in circumstances to justify a departure from the terms of the agreement.

One thing is clear: A separation agreement will not carry full weight unless both parties entered into it of their own free will, without undue influence or pressure and informed of its implications. All the circumstances surrounding the agreement are relevant and must be considered.

The “Edgar principles” are still important. The court should take account of the standard vitiating factors, duress, unconscionable conduct, a party’s emotional state, pressures to sign, the parties’ maturity and whether they had been married before. Any of these findings may eliminate / reduce the weight to be attached to the agreement. Absent any of the above the court should give effect to the agreement “unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.” [para 75].

This is the acid test and it is bound to lead to argument. The Supreme Court gave guidance of factors which may render agreements unfair, but only aimed at ante-nuptial agreements, so are of limited application. A separation agreement that does not meet needs or address compensation is more likely to be unfair than one that does not apply the sharing principle as a court would have done on an ancillary relief application, so that if a party enters into a separation agreement that meets his / her needs and where there are no compensation issues it is almost certainly not going to be regarded as unfair simply because the division of capital does not accord with how the court would have applied the sharing principle to the capital.

The approach to challenging the terms of a separation agreement is unclear. The standard vitiating factors will reduce or eliminate its weight. If there are no vitiating factors and it was entered into freely with a full understanding of its implications then it will only be departed from if the circumstances prevailing mean it is unfair (to hold the parties to the agreement). This may depend on showing a change of circumstances (*MacLeod*) or a failure to meet need or compensation, but there is scope for many arguments to be run here. An unequal application of the sharing principle to the capital is very unlikely to be sufficient to persuade a court to depart from its terms.

Simon Lillington

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WRONGFUL REMOVAL: DON'T WAIT OR HESITATE

On 29 March 2011, I appeared before the Court of Appeal to represent the Appellant Father in *Re R (Children)* [2011] EWCA Civ 558. The case concerned three children referred to as, H, T and A. Until the parents separated in 2009, the family had always lived on the Isle of Wight. At some point in 2009, H and T came to live with the Father whilst A stayed with the Mother. The Father had no Parental Responsibility for H or T but he nonetheless became their primary carer. The Mother eventually moved from the Isle of Wight and went to live on the mainland. The Mother had enjoyed staying contact with H and T.

On 28 August 2010, the Father submitted an application for residence and parental responsibility for H and T at the Isle of Wight Family Court ("FPC"). His first CAFCASS appointment was listed for 6 October 2010. On 29 September 2010, the Mother attended H and T's school and removed T without and warning to the Father or to T. She took T to the mainland. The Father's solicitors wrote to the FPC asking that the first directions hearing be either expedited or extended in view of the removal of T. No response was received from the FPC.

On 6 October 2011, an application was made by the Mother for the case to be transferred to her local FPC. The matter was duly transferred on 13 October 2010. The Father issued an application for the immediate return of T, which was eventually heard on 28 November 2010. During the course of that hearing, the FPC were referred to *Re H (Children)* [2007] EWCA Civ 529, which states that where children have been wrongfully removed without the primary carer's consent then those children should be returned to their primary carer unless there are exceptional circumstances. Furthermore, in such circumstances it is incumbent upon the secondary carer to alert the authorities and make appropriate applications to the court. The FPC specifically found that the status quo for T was with the Father but distinguished *Re H* on the basis there had been a Residence Order in *Re H* but no Residence Order for the Father for T.

The Father appealed to the county court. On 14 February 2011, HHJ Bond dismissed the appeal and again distinguished *Re H* because there was no Residence Order in place for T. The Father appealed on the grounds that the Learned Judge had misdirected himself in law. It was advanced by the Father that *Re H* was intended to preserve the status quo and therefore should apply not just to cases where court orders have already been made, but also where there is a 'settled arrangement' clearly in place.

The Court of Appeal focussed upon the procedural elements of T's case. Despite the fact that there was an inter partes hearing listed only eight days after T's wrongful removal by the Mother, the Court of Appeal stated that the matter should have been brought before the court straight away on an ex parte basis either through an out of hours telephone hearing in the Family Division or before the county court the following working day. Therefore, legal representatives cannot be criticised for making an immediate application for return even when an inter partes hearing will be taking place very soon. In paragraph 22 of his judgment, Thorpe LJ explains that where weeks are allowed to pass then the ordinary rule in *Re H* is unlikely to be equally applicable. He did not expressly indicate that the rule in *Re H* applied in cases where there is no Court Order in place, however, in paragraph 22 Thorpe LJ says "the force of the decision of this court in *Re H* had undoubtedly to some extent dissipated between 29 September and the order of the [FPC] on 29 November". This certainly implies that *Re H* was applicable in a case where there is no court order.

The Court of Appeal suggested that the Father should have requested his case to be expedited, "the court should have sufficient flexibility to expedite cases that are manifestly deserving of expedition" (Thorpe LJ, paragraph 21). The necessity for courts to enable more deserving cases to be 'fast tracked' makes absolute sense; however, I doubt that *Re R* is going to make me very popular with the nation's county court Listing Officers!

Jason Nickless

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Black and White (with a little bit of grey?)

The issue of fact finding hearings is one that has found its way to the Court of Appeal on a number of occasions in recent years – however we as practitioners finally thought the law was settled. It is simple - a binary system – as per the House of Lords in *Re B (Children)* [2008] UKHL 35. It either happened or it did not, and crucially the standard of proof is the balance of probabilities, no matter how serious the allegation. Black and white.

So – has the case of *Re A (A Child) (Fact-Finding: Speculation)* [2011] EWCA Civ 12 taken us to a position where the court must consider shades of grey?

The child in this case was subject to wardship proceedings, with the local authority joined as an intervener. A lengthy fact finding hearing was held over some 20 days dealing with allegations of grave sexual misconduct within the marriage, domestic violence, child abduction, and threats of "honour based" violence.

The matter came before the Court of Appeal because in addition to making findings of fact, the judge also recorded his suspicions. The elementary position is clear and that is that all findings made must be founded on evidence, and that can include inferences that can be properly drawn from the evidence. Findings cannot be made on the basis of suspicion or speculation. Once a case moves to the disposal stage, again the court must, again act on facts and an unproven allegation remains just that.

However, the Court of Appeal also took the view that a fact finding judgment may contain observations that are part of a judge's thought process, even if they do not go to the fact finding hearing, but may be of relevance to the final stage of the proceedings. It will be important to bear this in mind when considering whether a transcript of a judgment is appropriate as such observations are not likely to be recorded on the face of the schedule. The Court of Appeal stated that a judge is entitled to explain his thought processes and reasoning in any way he deem appropriate. In a case where there is factual proof on some matters but suspicion and speculation in respect of others, it could be artificial and potentially misleading for the judge to suppress all reference to the latter while giving appropriate prominence to the former. Further, it was considered that it could be considered useful at disposal stage for the judge to record whether they were satisfied an alleged finding did not happen, or simply that there was insufficient evidence to find it proven despite ongoing suspicion.

Clearly, within the remit of this article I have simplified the case in hand. However, *Re A* makes interesting reading for all practitioners involved in fact finding hearings.

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FAMILY LAW

- *Private Children*
- *Public Law (Care & Adoption)*
- *Matrimonial Finance & Property*
- *Injunction*
- *Mediation*

CIVIL LAW

- *Property*
- *Housing, Landlord & Tenant*
- *Personal Injury*
- *Planning*
- *Licensing*
- *Mental Health & Community Care*
- *Education*
- *Insolvency*
- *Chancery, Company & Commercial*
- *Employment*
- *Wills / Probate / Inheritance*
- *Mediation*

CRIMINAL LAW

- *Crime & Regulatory*

CHARITY BLUE BALL | 14 MAY 2011

We are pleased to announce that our charity ball held on 14 May 2011, in aid of the Ellen MacArthur Cancer Trust (charity no. 1096491) and the Prostate Cancer Charity (charity no. 1005541) was a huge success. We would like to thank all those who supported this event by attending or donating prizes helping us raise over £16,000 for these very worthwhile causes. As always, the night was well attended and a good time was had by all.

COLLEGE CHAMBERS ANNUAL CHARITY TWENTY20 CRICKET MATCH



As this newsletter goes to press, we are very excited about our annual Charity Twenty20 Cricket Match, to be held on 30 June 2011, between Chambers and solicitors from the Isle of Wight. We are looking forward to a barbecue, drinks, raffle, a cake sale and of course some highly unorthodox cricketing manoeuvres. Watch this space in the next newsletter for a ball-by-ball account and to find out who was Player of the Match.

The beneficiary is the Red & White Appeal, a £2.2 million campaign by Southampton NHS Trust to raise enough for a specialist day unit for patients with leukaemia and other forms of blood cancer.

If you were not able to attend, don't panic - you can still support the Appeal by visiting our fundraising page at <http://uk.virginmoneygiving.com/team/collegechambers>.

We will also be hosting a charity quiz night on 15 October 2011 in aid of the Neonatal Unit at Princess Anne Hospital. The quiz will take place at P.O.S.H., Queensway, Southampton. We hope that you will join us for an evening of good food, games, dancing and serious intellectual challenge!

We remain committed to raising money for charity and hope that you will be able to join us for our forthcoming events.

For more information in relation to any of our events please contact Sophie Lanzoni on (023) 8023 0338 or by email at slanzoni@college-chambers.co.uk.

College Chambers Ball Committee & Marketing

WE WELCOME YOUR COMMENTS...

- Would you like us to give a lecture on a particular subject at your firm?
- Do you have any friends or colleagues you think should receive our newsletter?
- Are our records of your details correct?
- If you wish to receive our newsletter by email instead of a paper version, please do let us know.

NEWS FROM THE CLERKS' ROOM



(Wayne Effeny - Senior Clerk)

On 9 June 2011, College Chambers hosted its second annual "Twilight Nine" golf event at Romsey Golf Club. There was a fantastic turnout of 10 teams despite the rain earlier in the day. The winning team consisted of Daniel Cotterell (Knight Polson), Jonathan Coppen (Bernard Chill & Axtell), Keith Hayward (Hayward Baker) and our very own David Harby. A great time was had by all. We hope to see you at the cricket on 30 June 2011, and at our Portsmouth Drinks Reception at the Royal Marines Museum on 14 July 2011.

On a more serious note, we understand the pressures that solicitors are facing with family fee changes. Rest assured that we remain fully committed to representing both legal aid and private clients.

If you have queries on any aspect of work undertaken by us, or in relation to the new fee changes, please feel free to contact the clerks on either (023) 8023 0338 or clerks@college-chambers.co.uk.