



Welcome to the Autumn edition of the College Chambers newsletter. This publication features articles covering a wide range of legal issues all of which we hope you will find topical and of interest. Please contact us if you would like to discuss matters further or require advice.

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ROGER AND OUT!

On 31 July 2008, His Honour Judge Roger Shawcross retired from the Circuit Bench after 15 years' service. Local judges, barristers, solicitors and court staff attended a ceremony at Portsmouth Combined Court Centre. Many tributes were paid to Roger's judicial career in a well attended event.

Before his appointment as a judge, Roger was a barrister on the Western Circuit for many years. We at College Chambers remember him as our first Head of Chambers when there were only 7 of us. Since then we have grown out of all recognition and with our latest additions we are now 25 in number.

Those of us who remember him as a

friend and colleague in Chambers are grateful for the leadership he gave in the early years of Chambers from 1989 to 1993. All who have appeared before him will remember him as a wise and considerate judge, whose good humour never failed him despite being tested at times. I will always remember a particularly fraught care case in which I appeared for one of the parties and which lasted for many months. Roger's handling of the case was masterful and his judgment, even losing litigants have never questioned.

We wish him and his wife Sarah a long and happy retirement...

Robin Belben

DIARY OF EVENTS

- **Saturday 11 October 2008 - Charity Quiz & Curry**
£90 per team (max 6 per team) - Quiz, Curry & Disco
P.O.S.H. Restaurant, Southampton 7pm - Midnight
- **Thursday 6 November 2008 - Free - 2 Hr CPD Seminar
Experts In Personal Injury**
Three eminent experts in shoulder, hand & wrist and foot & ankle injuries
Royal Southampton Yacht Club, Admirals Room: 5.45pm - 8pm
A drinks reception and fork buffet will follow the seminar.
- **Thursday 4 December 2008 - Free - 2 Hr CPD Seminar
Experts In Family Law**
The role of the forensic accountant in ancillary relief
The role of a child and family psychiatrist in public law matters
Kingston Maurwood College, Dorchester: 5.45pm - 8pm
A drinks reception and finger buffet will follow the seminar.
- **Thursday 18 December 2008
Chambers' Christmas Drinks Reception**
College Chambers: 6pm - 9pm, Drinks & Buffet

For further details of any of these events, or to reserve your place, please contact
Beryl Harris on (023) 8023 0338

IS THE BOSS TO BLAME FOR SOMEONE ELSE'S CRIME?

Our client Mr. W was the construction manager at a building project regarded as a high risk for terrorist attack. Special arrangements had been made and a security company engaged, but this did not prevent him from being seriously assaulted by the drunken ex-employee of a subcontractor he'd caught fiddling expenses. Security had become lax and despite the guard being told to lock the entrance against the assailant, this was not done and he made his way back onto site after his dismissal to carry out the assault. In March this year, the Judge at Winchester County Court found for the claimant against the employers and security company. Both defendants appealed: The employers arguing that even if there was a breach of duty, it was not one for which they could be held liable as it was not their guard who had failed to secure the entrance. We will never know what the Court of Appeal would have said as a compromise agreement on damages was negotiated shortly thereafter.

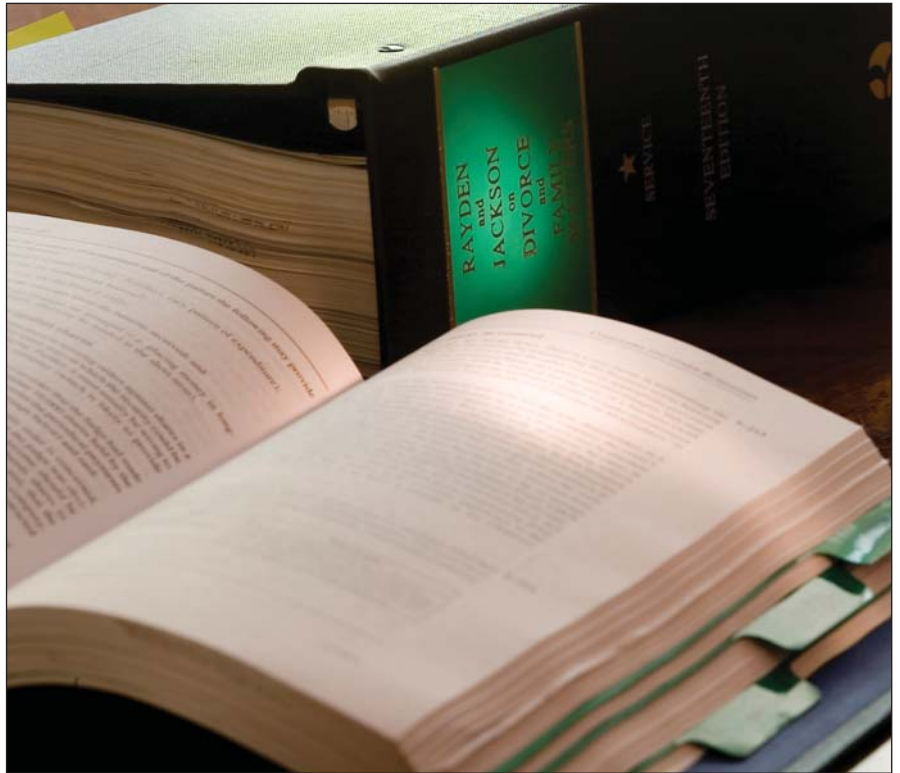
The case turned on the principles of *Home Office v Dorset Yacht Club*, *Smith v Littlewoods* and *Dickinson v Cornwall County Council* (a dreadful case in which a young girl on a school trip to France had been raped and murdered by a man who had forced his way into their youth hostel, the leaders of the expedition not having locked the doors). In each case the claimant had to prove not merely that the risk of injury was reasonably foreseeable but that it was 'highly probable' that a failure by the defendant to take certain steps was likely to lead to an injury being caused by the criminal intervention of a third party for whom the defendant was not directly responsible. Most claims of this kind are therefore likely to fail.

In *Y v London Borough of Hounslow* [2008] EWHC 1168 (decided after Mr. W's case), the claimants were vulnerable adults living in sheltered accommodation provided by the local authority who attracted the attention of youths who took advantage of them. Despite requests from social workers the Council did not re-house them, and eventually they were subjected to repeated attacks in which they were held prisoner in their own home. Maddison J., decided that reasonable foreseeability was established because it was not necessary for the claimants to prove the precise nature of the circumstances that might take place: *Hughes v Lord Advocate*.

Mr. W's case succeeded because the Judge agreed that although the employers and security staff would not have known exactly what a drunken trespasser might do if he breached security, it was highly probable that he would be intent on causing trouble of some kind. Both the employer and security company should have kept up their guard against this. On the authority of *X and Y* she was correct to have done so.

Derek Marshall

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THE COMPANY YOU KEEP... OR DON'T?

Ancillary relief case prediction is rarely an easy task, and with cases involving business interests, the potential outcomes multiply significantly. The necessary business valuation cannot be likened to those of property. However, tackled head on at an early stage, the issue of the business asset should certainly not be an impediment to settlement.

Usually there should be a single joint expert for valuation purposes. *P v P* [2005] reminds us of the problems in using valuers, as in that case, valuers used different, but justified, methods of calculating the business worth and came out with entirely different figures. We may have collated all the relevant evidence, as in the shopping list of *D v D & B (Ltd)* [2007] 2 FLR 653, we may have calculated the likely CGT liabilities and we may have our single joint expert's report, but, are we now ready to open the negotiation door?

Are we ready? The party who has the business interest more often than not will have their own accountant who usually gives the once over to the Court report, and the nod may be given, but what about the non-business party?

In considering the settlement options we must be creative, so as to achieve a fair redistribution

of wealth, but the practicalities involved in dividing up, or realising certain species of assets make the achievement of the *White* objective sometimes either impossible, or only achievable at an unacceptable family cost; therefore all potential commercial options need to be considered.

The use of "shadow" experts is becoming increasingly common in this field, and although a shadow may not be the answer, they are certainly a useful tool.

Stuart McGhee

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STOP PRESS:

Chambers will be hosting a Meet the Experts CPD conference on 4 December 2008: Guest speaker, Will Davies of Grant Thornton Forensic & Investigation Services will be discussing the role of shadow experts.

A BALANCING ACT

In the recent case of *Re B (Children) [2008] UKHL 35*, the children's guardian, with the local authority and the mother in support, appealed to the House of Lords in an attempt to contest the civil standard of proof raised in *Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563*, and overrule *Re M and R (Child Abuse: Evidence) [1996] 2 FLR 195*, for reasons that the current standard produces illogical results and that 'the artificiality of proceeding on the basis that such harm did not happen at all, when there is a real possibility that it did, is just as irresponsible and dangerous as proceeding on the basis that neither parent was the perpetrator'.

A Residence Order was made in favour of the father in 2006. Soon after, allegations of sexual abuse and assault were made against him, in relation to another child, leading to a 29 day fact finding hearing, whereupon the judge concluded that there was a 'real possibility' that the allegations were true as he was unable to conclude the contrary! Thus the guardian sought to assert that a 'real possibility test' should replace the current test (balance of probabilities) raising 'principle' as a justification, in that if harm had been done to another child then there was a 'real possibility' that the harm would also come to the child in question.

Considering *s.31(2) Children Act 1989*, the threshold must be crossed before the courts consider making any orders to intervene with the family composition. In her lengthy judgment at paragraph 70-71, in *Re B*, Baroness Hale sternly supported the test of balance of probabilities: "Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof... they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future." The threshold acts as a protective measure for both the child and the parent against any unwarranted interference, not forgetting the child's inherent right to respect for family life (*Art. 8*)!

So, the House of Lords has now made it very clear that the only standard of proof in such cases is the balance of probabilities. There is no longer any differentiation between whether an allegation is particularly serious or relatively trivial; they are all serious allegations if they have the possibilities of affecting the children.

If a court, or body, merely relies upon unproven allegations or mere and unsubstantiated suspicions to determine whether that child is at risk of harm then it would be difficult to justify the central importance of the child's welfare under *s.1(1)*. Why bother to find the facts if an unproven possibility of harm will suffice the hurdle of the threshold criteria?

Antonietta Grasso

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THE HOUSING CRUNCH



We are seeing a decline in house prices, indeed Rightmove have noted a 4.8% drop in average house prices compared to the same time last year. This is leading to many individuals having difficulty meeting their monthly outgoings. We are reaching the situation where supply is starting to outstrip demand in the housing market as individuals are having difficulties in meeting the ever more stringent borrowing conditions. These days a typical mortgage offer will be a 90% one, with the 100% mortgage being very rare indeed (although there are still some sub-prime lenders willing to offer this for a price).

What does this mean for us as lawyers? Possession hearings are on the increase, and that raises some unconsidered ramifications. For example, a tenant whose landlord has not been servicing the mortgage has little or no protection from the mortgagee taking possession (providing a notice to occupier has been sent to the property in accordance with *CPR PART 55*). The tenant will usually be relying on the Judges' discretion under *s.36 Administration of Justice Act 1970 (AJA) as amended by s.8 AJA*. The tenant's position is further weakened where

the Landlord has not disclosed to his/her mortgagee that the property is tenanted.

Another area where the 'credit crunch' is impacting is in ancillary relief proceedings. It is common to see neither party paying the mortgage during this period, and the mortgagee will almost always issue possession proceedings, despite them being informed of the situation. The parties will also be relying on the discretionary powers of the District Judge under *s.36 AJA*.

Cases such as *Mortgage Services Funding v Steele* are often quoted by the mortgagee, stating that where a mortgagor recognises that the property must be sold, the Court's general approach will not be to delay the mortgagee enforcing his/her remedies. Only where there is firm evidence a sale will be completed shortly should possession be delayed. However, in practice Judges will usually give the benefit of the doubt to the mortgagor...

Grant Carroll

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- Agency
- Boundary Disputes
- Building Disputes
- Clinical Negligence
- Commercial Law
- Company Law
- Consumer Credit
- Contractual Disputes
- Costs
- Criminal Law
- Detailed Assessments
- Employment Law
- Environmental Law
- Family Law
- Housing Law
- Immigration & Asylum
- Inheritance & Probate
- Insolvency
- Intellectual Property
- Landlord and Tenant
- Land Law & Real Property
- Licensing
- Mental Health Law
- Mediation
- Partnership
- Personal Injury & Death
- Planning Law
- Professional Negligence
- Sale and Supply of Goods
- Social Security Disputes
- Trust

NO MORE NO CASE!

In *Re R (A Child)* (2008), the Court of Appeal considered the appropriateness of submissions of no case to answer in private law cases. The case involved a *Re L* hearing in a residence and contact application by the father. The mother alleged domestic violence during the marriage by the father and others. The judge of first instance accepted a submission of no case to answer by Counsel for the father. He considered the mother's evidence damaged her credibility so much that he could not find any facts proved on the balance of probabilities.

The general rule in civil cases is that a judge should not entertain a submission of no case to answer unless the defendant elects to call no evidence, save for exceptional circumstances. Where the defendant elects not to give evidence the balance of probabilities prevails, but if the defendant is not put to an election then the test is whether there is a prima facie case to answer. These principles have been clearly set out in the cases of *Benham Ltd v Kythira Investments Ltd* [2003] as endorsed in *Graham v Chorley Borough Council* [2006]. In public law the cases of *Y and K (Children)* [2003] and *Re F (A Child)* [2007] both concerned allegations of sexual abuse. The Court of Appeal stated that a submission of no case to answer had little or no place in care proceedings.

In *Re R*, Jason Nickless appeared for the appellant and Carol Davies appeared for the respondent, both of College Chambers.

Thorpe LJ gave the leading judgment responding to Counsel's request for guidance as to the appropriate test that judges should adopt when conducting preliminary finding of fact hearings. His judgment was "...if I were formulating a general test I would be inclined to say that trial judges in preliminary finding of fact hearings involving serious allegations of domestic violence, should never terminate the case without hearing all the available evidence. It may be dangerous to say never... but [the judge's] obligation arises from his responsibility to the child.'

Wall LJ in his judgment stated "The enquiry is quasi-inquisitorial and is aimed to decide what is in the best interest of the child, and it is impossible, in my judgment, to make that decision without hearing all the evidence...'. Stanley Burnton LJ held "The child is in reality the subject of these proceedings and it is inconsistent that the decision should be made on partial evidence...'

The Court of Appeal have now given clear guidance on the role of a submission of no case to answer in family proceedings, whether that be public or private law matters. It is apparent that a judge of first instance must, no matter how flimsy he considers the evidence to be, hear all the evidence before he can make findings of fact.

Carol Davies & Gail McKecknie

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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?



Wayne Effeny
Senior Clerk

NEWS FROM THE CLERKS' ROOM...

The Clerks welcome feedback in relation to any aspect of work undertaken by College Chambers. It is essential as we strive to constantly improve the service we deliver to you. On a lighter note, the clerks are delighted to welcome our latest tenants, Matthew Curtis and Antonietta Grasso. Hopefully you will have seen both of them around the local magistrates and county courts during their pupillages. If you haven't come

across Matthew, it may be because he has been on secondment to Jersey for the last three months on the Haut De La Garenne case; if you would like any further information on either of our new tenants please do not hesitate to give us a call. If you have queries on any aspect of work undertaken by us, please contact us on: (023) 8023 0338 or: clerks@college-chambers.co.uk