COLLEGE CHAMBERS

SUMMER 2009
LEGAL UPDATE

Welcome to the Summer 2009 edition of the College Chamber's newsletter.
In this publication you can expect to find articles covering a wide range of legal issues all of which we are able to further advise upon should you wish. We hope you will find the content both topical and of interest.

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HARD TIMES

In these straitened times, the threat of redundancy is a very real one for individuals working across the spectrum. From an employer's perspective downsizing in this way is an unpleasant but necessary task if they are to survive. Dealing with the process should be a straightforward human resources matter yet time and again before the Employment Tribunal employers fall foul of basic procedural errors that end up costing them thousands of pounds. A few simple steps should enable those errors to be eradicated and money saved.

Firstly, is there a need for redundancy at all? Are there are other alternatives potentially available such as short-time working or an agreed salary cut. If there is a need for redundancies then would there be individuals who would volunteer? Before any process begins the employer should identify why the redundancies need to be made, the necessary cuts and whether there is an alternative way to achieve their aim.

Once a determination has been made that redundancies are necessary then it is vital that the employer observes the four pillars of a fair redundancy procedure: Warning, Consultation, Selection and Redeployment.

Any Tribunal would wish to ensure that each of the above steps have taken place before sanctioning any dismissal for redundancy as fair.

At the outset an employee must be warned that a redundancy process is taking place and they could be at risk. A period of consultation should follow which should be a two way process designed to see if there are alternatives to the way forward proposed and allowing the employee to be heard. There should be a pool for selection identified in most cases and a clear understanding of the likely numbers of staff to be made redundant. An objective criteria needs to be drawn up so that the pool for selection can be judged fairly and ultimately a decision made. Finally consideration needs to be give to whether the individuals selected can be redeployed elsewhere in the organisation.

A clear redundancy policy guides both managers and those affected. The above is a thumbnail sketch of the steps to be taken, but if followed should provide a solid basis upon which to build.

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DIARY OF EVENTS

- **THURSDAY, 25 JUNE 2009**
  CHARITY CRICKET MATCH
  In Aid of the Stroke Association Trojan's Rugby & Cricket Club, Eastleigh – 5.45pm onwards Complimentary Food and welcome drinks - Family and friends welcome
- **THURSDAY, 16 JULY 2009**
  DRINKS RECEPTION
  Queen's Hotel, Clarence Parade, Southsea, Portsmouth 5.30pm to 8pm

UPCOMING EVENTS

- Drinks receptions in Bournemouth and the Isle of Wight
- October 2009 – Curry & Quiz Night, Southampton

For further details of any of these events, or to reserve your place, please contact
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NEWSFLASH

Chambers is proud to announce that in excess of £11,000 was raised at the College Chambers' Charity Ball, held on 16 May 2009, at the De Vere Grand Habour, on behalf of the Anthony Nolan Trust and Ocean FM Help a Local Child. We are grateful to all those who attended, participated and / or donated gifts to these well-deserved causes.

EARLY PLANNING

With planning legislation becoming ever more complicated (and frequent), it is imperative that representatives attending meetings of Statutory Planning Boards do not lose sight of the duties planning officers have in their reports to members.

The quality of report will of course vary between councils. The Royal Town Planning Institute (RTPI) gives guidance to members as to how they should prepare reports. The purpose of a report is to provide all the material that members need to make an informed decision. It is implicit that members can make a choice rather than be given a brief explanation of what they should decide. Case law reminds us of the need for clear mindedness and clarity. Notwithstanding officers' reports are addressed to a knowledgeable readership, it is for the officer to decide on how much information should be included, the purpose of the report is not to decide the issue but to inform the members of the relevant considerations.

Although the above may sound obvious, it should always be remembered that members are (with the occasional exception) not experts in planning law or procedure. They will rely upon their officers' reports as being legally accurate and complying with the above requirements. This generally works well in practice, but can lead to complicated questions being raised by members. Sometimes, the response is incorrect and members are almost duty bound to follow the advice given.

It is very difficult for a representative to challenge the response if he or she is only allowed to address the Board before the officer, rather than after. Consultants are increasingly turning to Counsel for an opinion to submit to members along with their own documentation.

It is unfortunate that officers will often attempt to dismiss opinions as having little relevance. However, a council is under a duty to act reasonably. If an application is refused and a subsequent appeal highlights the fact that correct (and available) legal advice was effectively dismissed, then an applicant may be able to pursue an application for costs against the council.

As a former councillor and member myself, I am aware that fellow members found cases, with legal issues, easier to decide where the applicant (and sometimes the authority) had submitted Counsel's opinion. Act sooner rather than later.

Ian Newport

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A FOREIGN ADOPTION?

In care cases we know that the Local Authority has to consider assessing wider family members for long term placement, including adoption. With the rise in immigrant families in this jurisdiction and émigré families out of it, may lead Local Authorities having to consider placing the child with a family member out of this jurisdiction, so long as the specific process under **s84, Adoption and Children Act 2002**, is complied with.

In brief terms, **s84** requires that the relevant regulations (**Adoptions with a Foreign Element Regulations 2005 [SI 2005/392]**) have been complied with and that the child has lived for the 10 weeks prior to an application for removal being made with the prospective adopters.

There are numerous reports that have to be filed by the Local Authority but there is also a large amount of information required from the relevant foreign equivalent of social services department in the country in which it is intended to place the child for adoption, including clarifying, from the outset, any immigration issues relating to the child and its adoption in the foreign country. Given the amount of information required from the foreign social services it is also helpful to establish links as early as possible in the process for a free flow of information about local procedures and assessments of the family members.

Two recent cases have given some guidance on compliance with such process, particularly how to meet the requirement of the prospective adopters spending 10 weeks with the child. In **Re G (2008) 1 FLR 1497**, the Court of Appeal said that provided that there has been sufficient opportunity for the local authority to assess both prospective adopters within that 10 week period, one of them need not spend the full 10 weeks with the child. Ultimately, it will be a question of fact and degree in each case: In **Re G**, a period of three weeks was sufficient although it was stated obiter that a mere couple of days would be insufficient. In **Re A [2009] EWCA Civ 41**, the Court of Appeal held that the 10 week period need not be spent in this jurisdiction, but may be in the prospective adopters' home country.

Whilst those two cases have clarified those points, numerous others remain, for example, does the 10 week period have to be spent in one sitting, or could two or more periods amounting to 10 weeks in total satisfy the rules? It may be a problem in practical terms for either the child or the prospective adopters to make themselves available for a single sitting as in **Re G**.

It seems almost inevitable that there will be further references to the Court of Appeal to tie up such loose ends. The author of this article already has two outstanding cases: One with prospective family adopters in Australia and one in South Africa, which raise their own particular novel points of law.

Site visit to Australia or South Africa anyone?

Andrew Bond

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RELOCATION! RELOCATION! RELOCATION!

The issue of a mother's 'internal relocation' from London to Somerset, where she had obtained employment, was considered in the recent case of **Re L (Shared Residence: Relocation) [2009] EWCA Civ 20**. It was held that a shared residence order must not be seen as an automatic bar to relocation. Relocation may well be in a child's best interests notwithstanding the existence of an order. In this case, the mother did not seek to disturb a shared residence order, but rather to allow the child to spend longer periods with her father in London, during holidays as 'compensation'. The Judge dismissed the mother's application for permission to relocate and the father's application for a variation of the shared residence order, and the mother's appeal was refused in the Court of Appeal. Wall LJ, did not agree with the Judge's approach in a number of respects. The court found that the Judge had been wrong to distinguish this case from the authorities on the basis that they dealt with sole residence orders whereas he was dealing with a shared residence order and had also failed to consider the likely effect on the mother, of a refusal for permission to relocate. However, despite criticisms of the Judge's approach, he dismissed the mother's appeal as taking into account the facts of the case, in that the Judge had been entitled to conclude that relocation to Somerset was not in this child's best interests.

Wall LJ, considered in detail, the previous authorities on internal relocation. He was clear, that in his judgement a shared residence order was simply a 'species of residence order' under **s8, Children Act 1989**, and that it was wrong in principle to apply different criteria to the question of internal relocation simply because there was in existence a shared residence order. A shared residence order was plainly an important factor in the welfare equation', but it was not a trump card preventing relocation. It was held that the correct approach was for the court to look at the underlying factual matrix, and to decide in all the circumstances of the case whether or not it is in the child's best interest to relocate with the parent who wishes to move.

In a sobering postscript to the Judgement (which was fully endorsed by Aikens LJJ and Bennett J) Wall LJ, stated that if the parents retained their current hostility towards each other, they will undoubtedly cause the child serious emotional harm. He continued that neither parent should regard the outcome as a victory and that it was in reality a defeat for both parents as they had been unable to resolve their differences in respect of their child, by way of sensible agreement.

This is of course a message that is often echoed by Judges who are frequently dismayed by the fact that hostile parents are unable to reach sensible arrangements in respect of their children, and appear unaware as to the potential for emotional harm to be caused to their children.

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THE CREDIT CRUNCH
A DRAMATIC SUBSEQUENT EVENT?

Any ancillary relief practitioners who have any clients left of any substantial wealth in this economic climate may have pondered the conundrum of what might happen if the recession causes a marked fall in the fortunes of one party to a compromise agreement. Would this be a Barder event? **(Barder v Caluori [1988] AC 20 HL)**

Guidance was given last month by the Court of Appeal decision of **Myerson v Myerson [2009] EWCA Civ 282**, in which the Appellant Husband appealed the order giving effect to the compromise agreement. Husband was a successful fund manager of a quoted company and its executive chairman. At the FDR the assets stood at £25.8million (substantially in shares of the company). It was agreed that Wife would receive £11million (43%) in instalments and Husband, £14.5million (57%). Wife would receive £9.5million in cash and the balance by transfer of a property. The first instalment of £7million was duly paid. At the date of compromise, the Husband's shares were valued at £2.99p each – worth £15million to the Husband. A year later the shares were only worth 27.5p each. The global financial crisis and thus the fall in his share values led the Husband to appeal; arguing the fall in value was a dramatic subsequent event rendering the order unfair and unworkable. Due to the drop, the assets now stood at £12.7million and if implemented as compromised meant the Husband would now receive 14% and the Wife, 86%.

The Court of Appeal rejected the appeal. The natural processes of price fluctuation were deemed not to be a Barder event. The Husband had agreed an asset division choosing his assets to be in his shares; his decision could in effect have led to an increase in values, that it did not did not constitute his right to re-open the bargain.

Whilst we all know each case turns on its own facts this may be a salutary reminder to think creatively when drafting compromise agreements. If anyone has a similar case, one tip seems to emerge: Think of paying large lump sums by instalments, they are capable of variation via **s31(2)(d), Matrimonial Causes Act 1973**, and may be the only source of clawing something back by the Husband in the instant case!

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COLLEGE CHAMBERS

REPUTATION THROUGH COMMITMENT...

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

MEDIA & FAMILY PROCEEDINGS

Due to a change in the Family Proceedings Rules made by **The Family Proceedings (Amendment) (No2) Rules 2009** [**SI 2009 No857**] duly accredited media representatives are now permitted to be present during family proceedings from 27 April 2009, with the Court retaining a discretion to exclude them on specified grounds.

A card issued under the UK Press Card Authority is the expected form of identification to prove accreditation; however, a media representative without such identification may still be present at the Court's discretion.

There is an express exception to media attendance for hearings conducted for the purpose of judicially assisted conciliation or negotiation for example an FDR or First Appointment in private law Children Act cases, in **Rule 10.28(1)** (County Court and High Court) and **Rule 16A(2)** (Family Proceedings Courts).

The Court may use its discretion to exclude the media where necessary "for the orderly conduct of proceedings" including the practical considerations of the court layout. The media may also be excluded where justice will be impeded or prejudiced, for example, where a witness (who is not a party) gives a credible reason for refusing to give evidence in front of the media or there is a significant risk that their evidence will not be full and frank in the presence of the media.

If a media representative is present, they have a right to make representations upon an application to exclude them, but there is no provision for an adjournment for the media to make representations if they are not already present.

Importantly, the new rules do not entitle the media to receive or peruse court documents, even those referred to in the hearing unless the Court permits this or under the rules of disclosure to third parties.

The restriction on publication of information in private proceedings under **s12 Administration of Justice Act 1960**, continue to apply as does the prohibition on publishing material intended to or likely to identify a child as being involved in proceedings in **s97(2), Children Act 1989**. The Court should also be live to considering protection to extend beyond the end of the proceedings on child welfare grounds.

It is clear that this is the first step of the Government's planned programme. Jack Straw has announced that further primary legislation will follow to bring the rules in-line with those operating in the Youth Courts, in criminal proceedings.

Justine Gayford

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NEWS FROM THE CLERKS' ROOM...

Over the last few months a topical issue has arisen in respect of Counsel's success fees in CFA cases in relation to settlement at the doors of court (literally). In the next edition of this newsletter there will be a feature article on success fees in these circumstances, however, if you require any advice in this regard prior to that, then please do not hesitate to contact us and we can talk you through it.

Towards the end of July 2009, the Government interim changes to Counsel's Family Graduated fees are coming into force. The major change that we envisage is in relation to ancillary relief and we will keep solicitors informed of any changes that affect our Counsel.

As this is Chambers' 20th year we will be having numerous celebratory events throughout the year in Hampshire, Dorset and the Isle of Wight. We look forward to seeing you there.

Beryl Harris, our Chambers administrator is leaving us at the end of June and we wish her a very long and happy retirement.

If you have queries on any aspect of work undertaken by us, please feel free to contact the clerks on either (023)80 230338 or clerks@college-chambers.co.uk

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?

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