



Welcome to the Summer 2010 edition of the College Chambers' newsletter. This publication contains articles on a wide range of legal issues, all of which we can advise upon further. We hope you find the content topical and interesting.

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A PLANNED APPROACH

With planning legislation becoming ever more complicated and frequent, representatives attending meetings of Statutory Planning Boards must always bear in mind the duties that planning officers have in their reports to councillors.

The Royal Town Planning Institute (RTPI) publishes guidance to its members as to preparation of reports. The report should provide all the material that councillors need to make an informed decision on the application in question. The decisions must of course be that of the councillors who are not a rubber stamp for the planning officer. 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 councillors of the relevant considerations.

Although the above may sound obvious, it should always be remembered that councillors 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 councillors.

Sometimes, the response is incorrect and councillors 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. Short opinions will suffice in most applications, but consultants should always consider obtaining a detailed advice in very complicated matters. 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 Statutory Planning Board councillor myself, I found cases where there were complex legal issues far easier to decide where the applicant (and sometimes also the local authority) had submitted Counsel's opinion with the application papers

Ian Newport

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DIARY OF EVENTS

Thursday, 15 July 2010 - Chambers Golf Evening Twilight Nine
From 6pm, Romsey Golf Course

Thursday, 16 September 2010 - Isle Of Wight Drinks' Reception
From 6pm, New Close County Cricket Ground, Isle of Wight

Saturday, 16 October 2010 – Charity Quiz
P.O.S.H. Restaurant, Southampton

Thursday, 16 December 2010 – Chambers' Christmas Drinks
From 6pm at College Chambers

For further details of any of these events, or to reserve your place, please contact us on (023)80 230338

A SIGH OF RELIEF OR A SAD FAREWELL TO THE STATUTORY DISMISSAL & GRIEVANCE PROCEDURE...

We have now reached the first anniversary of the repeal of the statutory disciplinary and grievance procedures: So the question I ask is, are we pleased to see the back of the old procedures? Many will agree that the old procedures could be a burden and a hindrance.

A review of the **Employment Act 2002** concluded that the mandatory nature of the statutory procedures had led to unforeseen consequences, in particular disputes becoming formalised, with lawyers often involved at an early stage. Most, will on first consideration, be pleased that the provisions have been repealed. I was in the position recently where I spent a day at a tribunal arguing over whether or not a redundancy procedure (or rather lack of it) adopted by the dismissing employer was fair. I was left frustrated by the fact that had the procedure commenced just six weeks earlier (and hence had a trigger event pre-6 April 2009) the procedure adopted would have been automatically unfair on several grounds. Hence, there we were spending a day in the tribunal (when the tribunal is already suffering a backlog) arguing over something that would not

have been necessary under the old procedure. It was then that I questioned whether the old provisions were so bad after all.

In this particular case not one stage of the old procedure was followed. There was no step one statement, no step two meeting as such and certainly no disclosure of any scores provided to the employee in question. I then asked myself what will happen now with cases such as *Alexander v Bridgen Enterprises Ltd* [2006] IRLR 422 and *GM Davies v Farnborough College of Technology* [2008] IRLR 14 where a lack of consultation over the scores given to a particular employee at stage two led to a finding of automatically unfair dismissal (notwithstanding any remedy on appeal). Of course, the answer is one has to turn back to the ordinary principles of unfair



dismissal under s98 of the **Employment Rights Act 1996** (the ACAS Code of Practice on Disciplinary and Grievance Procedures does not apply to redundancy situations).

Gemma Bower

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PRIVATE LAW PROGRAMME - ALL CHANGE?

The President of the Family Division has provided a new Practice Direction: A revised Private Law Programme ("PLP"), effective from 1 April 2010, which must be fully implemented by 4 October 2010. It is explicitly stated that the child's welfare remains paramount and the court must consider the overriding objective. Here is a brief summary of the new procedure but there is no substitute for in depth perusal of this substantial document.

Para 3.9 states that before the First Hearing Dispute Resolution Appointment ("FHDRA") CAFCASS are to identify safety issues only and must not discuss other matters with the parties. CAFCASS assisted mediation before first appointment is therefore vetoed although the parties themselves are encouraged to identify and narrow the issues. This would include the wishes and feelings of the child. If this Practice Direction is to assist with the early resolution of cases then surely it would be helpful to have this discussion as early as possible and not defer it to a court hearing? In practice, this rarely occurred in any event but now they are specifically prohibited from doing so. Para. 4.5 states that the CAFCASS officer shall speak separately to each party at court and before the hearing. It is not clear why this should be done separately when many of the successful mediations held under the old procedure were held jointly. It may be that the old procedure will simply continue where appropriate.

At the FHDRA the court should consider:-

- (a) Safeguarding, e.g. whether a fact finding hearing is necessary;
- (b) If there needs to be further dispute resolution – i.e. through a mediator, CAFCASS, Parenting Plan etc;
- (c) If there should be an Activity Order under s11, *Children Act 1989*;
- (d) If matters can be progressed by observed / supervised contact, Contact Monitoring Orders, etc;
- (e) Transferring the case to the FPC, pursuant to the Allocation of Proceedings Order 2008, unless one of the specific exceptions applies;
- (f) Whether any reports are necessary. Before the court orders a report it should consider whether any alternate way of working with the parents is appropriate, i.e. an order under s11. If a report is ordered it should not be general but directed specifically towards and limited to certain issues: Such specific issues are to be recorded on the Order;
- (g) If any expert evidence required;
- (h) If any issues can be agreed or need to be resolved;
- (i) If any interim order be made;
- (j) Directions to enable a timely final hearing;
- (k) List for final hearing and consider judicial continuity.

Save for (f) above, all these matters would have been considered in the first appointment and

will depend on how practice determines what issues should be recorded. It may be that the Order records the issue as contact / residence as per the old regime, or it may be drug use and domestic violence, for example, which would not have been defined previously. Detailed instructions should be obtained prior to the FHDRA as every issue is to be defined.

Para. 6 outlines matters that must be set out in the Order or recital. The parties must record issues that remain in dispute which may set the case 'in stone'. It is likely that the purpose of this is to focus minds, but it may also lead to clients wanting 'their day in court' to resolve issues / allegations that have been recorded in previous orders, which may prevent agreement. The matters that must be set out in the Order / recital are new: They appear to simply be explaining what has been done and why. The old procedure did not require this and in my experience did not lead to any delay or detriment.

A suggested template is set out in Sch 1 as a PLP 10 Form, which is not currently available online. However, should you require assistance, please contact Chambers and we will be happy to assist you.

Zoe Rudd

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FRAUD: FRESH PROCEEDINGS OR RE-TRIAL?

The recent case of *Noble v Owens* [2010] EWCA Civ 224 sets out how courts should deal with new evidence which comes to light after personal injury proceedings have been concluded, which suggests that the claimant (“C”) has obtained a favourable judgment by fraudulent means. C was injured when his motorcycle collided with a car driven by the Defendant (“D”). C sustained severe orthopaedic injuries and at trial the medical experts were agreed that C’s mobility was severely restricted, to the extent that he was dependant on crutches and a wheel chair and was likely to remain so. It was also thought that his injuries would prevent him from working again and that he was likely to require significant assistance with daily living. Liability was admitted and damages were assessed at trial, by Field J, in the sum of approximately £3.4m. D’s insurers did not appeal at the time.

In Autumn 2008, the insurers received information which suggested that C was not as seriously disabled as he had claimed. Between December 2008 and March 2009, the insurers arranged to have C under surveillance. During this period, C was filmed walking without any form of mobility aid, operating a dumper truck without difficulty, and lifting and bending for substantial periods of time. The insurers took the view that the new evidence showed that C had made a far better recovery than he had claimed and that he had deliberately misled the court as to the gravity of his continuing disabilities.

The insurers applied back to Field J for a freezing injunction and obtained permission to appeal the initial judgment. At the subsequent appeal, both parties accepted that the new video evidence of C should be admitted. The dispute then arose as to how the court should go on to deal with the new evidence.

It was argued on behalf of the insurers that where the three conditions of admissibility of new evidence as set down in *Ladd v Marshall* [1954] 1WLR 1489 are satisfied, the usual result will be that the court will order a retrial. It was submitted that the court did not have to find that the court below was deliberately misled; it is sufficient that the evidence shows a good prima facie case that it occurred.

C relied on the House of Lords decision in *Jonesco v Beard* [1930] AC 298 and argued that in a case where the allegation is that the court below was deliberately misled, there is a presumption of innocence and the burden of proving fraud falls upon he who alleges it, properly pleaded in a fresh action. The Court of Appeal held that there was an “irreconcilable conflict within the authorities” relied upon by the parties, and determined that:

‘...the true principle of law is derived from Jonesco and is that, where fresh evidence is adduced in the Court of Appeal tending to show that the judge at first instance was deliberately misled, the court will only allow the appeal and order a retrial where the fraud is either admitted or the evidence of it is incontrovertible. In any other case, the issue of fraud must be determined before the judgment of the court can be set aside.’

Accordingly, as the evidence was ‘sufficiently cogent’ but still ‘hotly contested’ it was deemed unfair to C for the award of damages to be set aside unless and until fraud had been proved.

Noble v Owens has clarified an area of law where previously the authorities were in conflict. It is now clear that where fraud is alleged, but is not admitted and the evidence on which the allegation is based is not incontrovertible, then the appropriate course of action is to proceed to determine the issue of fraud itself by remitting the case back to the original trial judge, before any retrial can take place. If, on considering the relevant new evidence, the judge rejects the allegation of fraud, then the original award will stand. It is only if the judge finds that fraud is proved, that he should make a reassessment of the damages.

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HILDEBRÄND DOCUMENTS A WARNING TO PRACTITIONERS...

The recent case of *White v Withers LLP and Dearle* [2009] EWCA 1122 heralds a warning to practitioners advising on Hildebrand documents.

It has long been the case that the family courts will allow the use of documents in ancillary relief proceedings. Practitioners have generally regarded themselves and their clients as safe from criticism so long as they have complied with the rules established in *Hildebrand* and *T v T* by returning original documents and disclosing the existence of copy documents in a timely manner, not using force or intercepting documents. Some doubt was cast upon this approach by the decision in *L v L* [2007] EWHC 140 (QB) in which the return of the Husband’s copied hard drive was ordered accompanied by stark warnings regarding civil and criminal wrongs. The position is now less clear still.

The recent High Court decisions in *Imerman v Imerman* [2009] EWHC 3486 (Fam) and *Imerman v Tchenguiz* [2009] EWHC 2902 (QB) demonstrate a tension between the approaches of the Family Division and the Queen’s Bench Division. In civil proceedings Eady J granted an injunction preventing the Wife’s brothers disclosing to any person information they had obtained from a computer server used by the Husband. However, the documents had already been disclosed to the Wife and her solicitors. In the ancillary relief proceedings Moylan J allowed the Wife to make use of the documents in her possession stating that ‘as a general proposition, relevant evidence is admissible regardless of how it may have been obtained’.

In *White* the Wife removed and intercepted a number of the Husband’s documents in clear contravention of the *Hildebrand* rules. The Husband sued the Wife’s solicitors for, amongst other wrongs, trespass to goods, wrongful interference with documents and conversion. The Husband’s claim was struck out. On his successful appeal against that decision there was disagreement, albeit obiter, between the Lord Justices as to whether tortious liability would attach to the obtaining of documents that were admissible in family proceedings, and importantly those obtained in compliance with *Hildebrand*. The trial of the Husband’s claim against the Wife’s solicitors is awaited.

The unfortunate position is that currently practitioners cannot be sure that they and their clients will be protected from civil liability by compliance with the *Hildebrand* rules. The conjoined family and civil appeals in *Imerman* were heard in May. Clear guidance is anticipated when the judgment is published. In the meantime, at the very least, the ‘rules’ should be followed to the letter (close attention to the relevant judgments is advisable) and consideration should be given to other, court sanctioned, means of obtaining disclosure.

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- Agency
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- Building Disputes
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- Company Law
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- Contractual Disputes
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- Family Law
- Housing Law
- Immigration & Asylum
- Inheritance & Probate
- Insolvency
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- Landlord and Tenant
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- Licensing
- Mental Health Law
- Mediation
- Partnership
- Personal Injury & Death
- Planning Law
- Professional Negligence
- Sale and Supply of Goods
- Social Security Disputes
- Trusts

SUPREMES STOP! IN THE NAME OF LOVE

By the time this article is published, the long awaited decision in *Radmacher v Granatino* [2009] EWCA Civ 649 may be scorching a hole in your desk as you try to get to grips with whether the Supremes have gone for Love over Gold or just Money Money Money? Will pre-nups bind parties to a marriage no matter how much their only thought at the time was that Nothing Compares To You? Or will the Ch-Ch-Changes of married life mean whatever was agreed at the outset, all of that was just Yesterday? And what of post-nups and separation agreements? Will judges find themselves Stuck In The Middle With You? There has been a Long and Winding Road to this point. Ancillary relief cases in the eighties and nineties were dominated by the choice between doing just about enough to look after the children, (the *Mesher* approach - Lets Stick Together) and asking the question, what does the wife need, and if there is anything left over, the husband should think himself lucky (the

Martin cases - Whatever You Want). In the noughties, we started to ask ourselves, let's work out what half is and then try to think of a good reason why that should not be the answer - not so much *White* but Black is Black. Come the early twenty-tens and a more nuanced approach is evident from *J v J*: Needs generously interpreted then fairness and sharing, having regard only to the way the parties had organised their lives. A sharing of the misery - Everybody Hurts. For my part, I doubt that we have reached the end of this Long Road To Eden. If pre-nups and post-nups are the end of the story then there wouldn't be much point in keeping the **Matrimonial Causes Act 1973**. I suspect that the Supremes will Do Right By Your Woman. But then what do I know - I am just Dazed and Confused!

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NEWS FROM THE CLERKS' ROOM



(Wayne Effeny - Senior Clerk)

We are delighted to announce that Siân Gough (formerly of 18 Carlton Crescent) and Sally Davidson have joined Chambers. However, on a sadder note we are sorry to say that Sarah -Jane Etheridge (Third Junior Clerk) has had to leave us on health grounds. Taking her place is Sophie Lanzoni who has settled in well and is already an integral part of the clerks' team.

In the meantime, not only have we had a complete make-over of our website (www.college-chambers.co.uk) but Chambers is proud to introduce its new ebrochure, which can be found at www.college-chambers.co.uk/ebrochure.

On a more serious note, College Chambers understands the pressures that solicitors are also facing with family fee changes and, despite these changes, we continue to be fully committed to representing both legal aid clients and private clients.

If you have queries on any aspect of our work, or in relation to the new fee changes, please do not hesitate to contact the clerks on either (023)80 230338 or clerks@college-chambers.co.uk.

WE WELCOME YOUR COMMENTS...

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- Are our records of your details correct?