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Introduction

This is the second Civil Law Newsletter produced by 4 KBW. Please feel free to forward it on to your colleagues. If you wish to be added to the mailing list, please send an email to clerks@4kbw.co.uk.

In this Newsletter, Richard Moss writes about the use of criminal convictions to secure possession of assured shorthold tenancies by landlords, David Sawtell revisits the extension of time limits to present claims under the Employment Act 2002, and Andrea Vasili writes about the legality of rolled-up holiday pay. John Brown also sums up case law highlights of the previous few months, including two important cases on the Judge's discretion under Part 44 when awarding costs.

Chambers News

John Brown and Andrea Vasili are coming to the end of their first six months as pupils, and will be on their feet and ready to take instructions in April 2008.

David Sawtell has also written an article on the new Employment Bill which is currently proceeding through Parliament. It promises to make big changes to workplace dismissal and grievance procedures, as well as heralding a new 'fast track' system for money claims. His article can be found [/here/](#) (link).

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Simon Heptonstall Called (1999)



Practice Profile

I practise principally in crime and personal injury with elements of contract, commercial, landlord & tenant and general common law. Following a commercial career involving analysis, training and marketing I converted to the Bar; I was the leading student in my BVC year.

My civil practice is mainly fast-track and multi-track trials in the County Court and High Court litigation, together with the advisory and drafting work required for such proceedings. I deal with personal injuries arising out of simple road accidents to actions brought after prosecution for serious criminal offences. I have experience of low velocity impact cases and credit hire claims.

I have acted in professional disciplinary proceedings, medical and police, including accepting instructions under the licensed access scheme.

I have been a regular adviser to a local authority licensing committee and have advisory and advocacy experience under the new licensing regime.

I regularly appear for the Crown and appellants in the Court of Appeal.

In all areas I enjoy cases that require analysis of detailed technical and financial information.

Reported Cases

Court v Mahadik & others [2006], Cambridge County Court

Multi-track trial (3 days) for Claimant against 3 Defendants: householders, builders & local authority. Claimant relied on negligence, failure to comply with building regulations and occupiers' liability. Particular issues as to the application of the building regulations, a lacuna in those regulations and the factual matrix as works had subsequently been removed.

Whittaker v Sedge [2006], Medway County Court

Contested possession claim for the Defendant, the disabled son of the Claimant. Reliance by Defendant on oral contract and unperfected assignment of residential tenancy from a housing association. Pleading the defence included issues of trusts, surrender and estoppel.



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Using criminal convictions to obtain a possession order

Introduction

Raglan Housing Association Ltd v Fairclough [2007] EWCA Civ 1087 involved a housing association seeking possession under section 7 of the Housing Act 1988 and ground 14 of Schedule 2 Part II of the Act, the latter reading as follows:

'The tenant or a person residing in or visiting the dwelling house –

(a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality, or...

(b) has been convicted of –

(i) using the dwelling-house or allowing it to be used for immoral or illegal purposes, or
(ii) an indictable offence committed in, or in the locality of, the dwelling-house.'

The issue for the Court of Appeal to decide was where a person committed an indictable offence before taking up an assured tenancy and was convicted of that offence during the currency of the tenancy, whether or not a landlord could seek a possession order under the aforementioned ground.

Summary of facts

On 6th May 2004 Mr. Fairclough was arrested on suspicion of offences under the Protection of Children Act 1978. He was released on bail and not charged until 20th January 2006. Meanwhile on 24th January 2005 he had transferred his assured tenancy from 1 Banks Cottages to 5 Banks Cottages. He had lived at number 1 with his mother and sister for a number of years, succeeding to the tenancy following his mother's death and after his sister left for university. On 17th March 2006 Mr. Fairclough pleaded guilty to fifteen counts of making indecent photographs of children by downloading from the internet and four counts of possessing indecent photographs. The offences were committed between 1st May 2001 and 6th May 2004. He received an extended sentence of imprisonment of four years consisting of twelve months custody and three years extended licence. Following a newspaper article on 21st April 2006 the Housing Association became aware of Mr. Fairclough's convictions and served a notice seeking possession on 31st July 2006.

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Decision

Their lordships held that ground 14 (b) (ii) did not solely relate to convictions for offences committed during the currency of the tenancy agreement of the dwelling-house in question. It did extend to convictions for offences committed before the tenancy began.

Once that hurdle, i.e. an indictable conviction for an offence committed in the locality or dwelling-house, was satisfied a judge would have to consider whether it was reasonable to grant the possession order having regard to all the circumstances in the case, in accordance with section 7 (4) of the Act.

Analysis of reasons

Since ground 14 extends to persons other than the tenant, Moore-Bick LJ stated that the ground could not be restricted to use whilst the tenant was in occupation of the relevant premises. His Lordship acknowledged that such an interpretation ran contrary to the natural meaning of 'use' during a tenancy agreement. It appears that the Lordship has applied a correct interpretation to the statutory language, as otherwise ground 14 would have a dual time liability for tenants being caught during their tenancy and other 'persons' being caught at any time. His Lordship also noted the fact that assured tenancies were frequently transferred between family members. Therefore somebody resident at a dwelling-house could have used the premises for an illegal or immoral purpose before becoming a tenant, as was the case in the current appeal.

It did not have to be decided whether ground 14 (b) (i) was limited to offences committed during the currency of the tenancy. Moore-Bick LJ, however, held that even if it was so limited that would have no bearing on ground 14 (b) (ii), as the wording was broader covering behaviour in the locality 'in general'. His Lordship looked to the mischief the Act sought to prevent, which he identified as at paragraph 19 as:

'the presence within the locality of persons who have demonstrated by their previous behaviour that they are likely to annoy, intimidate or otherwise make themselves a serious nuisance to other residents'

His Lordship identified the example of a burglar who steals from a number of houses in a locality prior to obtaining a tenancy. If ground 14 (b) (ii) was limited as suggested by the Appellant, then the burglar could avoid eviction. This would surely run contrary to the mischief identified above and furthermore to Parliament's intention. As his Lordship stated further at paragraph 19:

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A tenant who is convicted of supplying illegal drugs or of burgling his neighbours' houses poses no less of a continuing threat if the offences were committed before he became a tenant than he would if they had been committed afterwards.'

The Appellant sought to persuade the court that having regard to statements at Committee stage in the House of Commons there should be a limitation as discussed above. Their Lordships rejected the need to consult Parliamentary materials as the *Pepper v Hart* [1993] AC 594 conditions were not satisfied. The reasons being that ground 14 (b) (ii) is not ambiguous and if read literally does not lead to absurdity.

***Obiter* discussion: Must the conviction occur during the currency of the tenancy?**

Moore-Bick LJ stated *obiter*, at paragraph 17, that the conviction itself, under either ground 14 (b) (i) or (ii) had to occur during the currency of the tenancy, even if the offences did not. Chadwick LJ disagreed, asserting that it was unnecessary for the conviction itself to have occurred during the currency of the tenancy. It is submitted that Chadwick LJ's reasoning appears logically correct. The policy reasons given by Moore-Bick LJ of protecting the residents of a locality from the continuing menace or nuisance of an individual convicted of an offence within that locality leads one to the conclusion that the conviction could have occurred at any point in time if the commission of the offences could. It is clear that the wording of ground 14 contains no explicit time restrictions. The only restriction appears to be that there must be a conviction and not just a charge.

A logical reading of a statute, however, does not always lead to a just one. If ground 14 is completely without time restriction, then in my submission it becomes an extremely draconian device. To provide just one example it could be used to evict a person who had been convicted of an indictable offence in a locality, then left that locality for a large number of years. Upon their return to an area they could be evicted once their past misconduct has been discovered, no matter how long ago the offences were and notwithstanding any changes in their character as an individual. Ground 14 could effectively operate as a permanent bar to certain individuals living in certain areas, which could have implications under Article 8 of the European Convention of Human Rights. Indeed its effect could be seriously damaging on those who only had personal and family ties to a certain area, but could be prevented from residing there.

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Consequently there may be significant policy reasons for applying a restriction as suggested by Moore-Bick LJ in order to avoid the creation (or restrict the operation) of a harsh draconian mechanism. Ground 14 operating without any time restriction could lead to permanent punishment for those who have served the sentence that was deemed appropriate by the sentencing court. Any draconian use of ground 14, however, could be mitigated by the operation of the 'reasonableness' discretion in granting possession orders under section 7 of the Housing Act 1988. It is submitted that were the issue to come before a court of whether or not ground 14 could operate when neither the offences were committed nor the tenant convicted during the currency of the tenancy, then it would be essential to have recourse to Parliamentary materials in order to determine how wide Parliament intended the scope of ground 14 to be.

Conclusion

Their lordships appear to have applied a correct statutory interpretation to ground 14 (b) (ii) in holding that it is not limited to offences committed during the currency of a tenancy. The outcome may have a harsh effect, but the provision is there to protect the community as a whole and the literal reading of ground 14 (b) (ii) is clear. There remains a fundamental outstanding issue under ground 14, namely whether or not the conviction should occur during the course of the tenancy. Logic says no, but justice appears to demand a time restriction of some form. If this issue does come before a court then it will be essential to have recourse to Parliamentary materials, as a literal reading could lead to an absurdity and is certainly not clear.

Richard Moss



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Extension of time limits to present a claim and the Employment Act 2002: A Rough Guide

It is well recognised that the Employment Act 2002 ('EA 2002') and the Employment Act 2002 (Dispute Resolution) Regulations 2004 ('Dispute Resolution Regs') are complicated pieces of legislation. In particular, the statutory dispute resolution procedures are technical and difficult to follow. At the same time, time limits in employment law are strictly enforced and short. It is therefore no surprise that one of the most vexing issues in employment law is how following the dispute resolution procedures can extend time limits for presenting claims. This article will attempt to set out the ways in which time limits are extended under the EA 2002 and the Dispute Resolution Regs in as straightforward a way as possible.

Regulation 15 Dispute Resolution Regs: extending the time limits

The EA 2002 introduced time limit extensions with the aim of settling disputes through the statutory dispute resolution procedures before they were litigated. Therefore, the extensions only apply where the statutory dispute resolution procedures are engaged. The list of tribunal jurisdictions to which reg 15 apply is set out in schedules 3 and 4 to the EA 2002; they include the main forms of discrimination and unfair dismissal and redundancy payments.

Time limits are extended for three months beginning with the day after the day on which it would otherwise have expired under the 'normal time limits', if the conditions set out in regulation 15 are met. These conditions are different whether the dismissal and disciplinary procedures or the grievance procedures apply. This is considered below.

The normal time limit is defined as the usual period within which a claim should be presented, without the Tribunal having to extend the usual time limit, for example, where it was not reasonably practicable to present it within the usual time limit.

The practitioner's rule of thumb that the time for presentation of a claim is three months less a day after the relevant event means that when an extension of time is given under reg 15, the time limit is six months less a day. For example, where a claimant resigns on 21 February, the primary time limit for presenting a claim for racial discrimination by way of less favourable treatment expires on 20 May; if reg 15 is engaged, the time limit expires on 20 August. This interpretation was handed down by the EAT in

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Chandrika Joshi v Manchester City Council (EAT/0235/07/DA) on 30 January 2008. Although an earlier EAT decision in Singh (t/a Rainbow International) v Taylor (EAT/0183/06/MAA: 27 June 2006) reached a different conclusion, it has been widely criticised; the EAT in Joshi felt bound by Court of Appeal case law that was not cited in Singh, and it is the later decision in Joshi that is more authoritative .

The difference between the dismissal and disciplinary procedures and the grievance procedures

Unfortunately, the legislation is drafted in such a way that there is no easy way in certain circumstances to decide which procedures should be followed, and hence which set of time extension rules should be looked at. Consequently the EAT has been very busy handing down decisions giving guidance on this matter, most of which fall outside the scope of this article. The difference between 'standard' and 'modified' procedures will also not be considered here.

At the most basic level, the dismissal and disciplinary procedures apply where the employer contemplates dismissing or taking disciplinary action against an employee, or has already dismissed him or her. However, dismissal has the meaning given to it in section 95(1)(a) (employer terminating a contract) and section 95(1)(b) (limited term contract not being renewed) of the Employment Rights Act 1996, and not section 95(1)(c) (constructive dismissal). It follows that the grievance procedures apply in cases of constructive dismissal (*BUPA Care Homes v Cann* [2006] IRLR 248, para 28.).

The application of the grievance procedures is governed by reg 6 Dispute Resolution Regs. Reg 6(1) states that the grievance procedures apply in relation to any grievance about action by the employer that could form the basis of a complaint by an employee to an employment tribunal (within the list of jurisdictions in Schedule 3 or 4 EA 2002), or could do so if the action took place. This is subject to a number of caveats, the most important of which is reg 6(5), that "neither of the grievance procedures applies where the grievance is that the employer has been dismissed or is contemplating dismissing the employee". It was clarified in *Lawrence v HM Prison Service* [2007] IRLR 468 that a complaint of unlawful discrimination in respect of a dismissal is covered by the reg 6(5) exception, and therefore no separate grievance is required. Reg 6(6) similarly excludes a grievance that the employer is contemplating taking relevant disciplinary action against the employee.

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There are other exceptions and deemed compliance and disapplication provisions in the Regulations. However, it is important to note the difference between the dismissal and disciplinary procedures and the grievance procedures. As can be seen below, it is in many ways easier to extend time limits where the grievance procedures apply.

Reg 15(2): the conditions for extending time limits for dismissal and disciplinary procedure claims

This is relatively straightforward. Here, the time limits are extended where: the employee presents a claim to the tribunal after the expiry of the normal time limits, he or she had reasonable grounds for believing that, when the normal time limits expired, a dismissal or disciplinary procedure was being followed, and this procedure was being followed in respect of matters that consisted of or included the substance of the tribunal complaint. The procedure need not be the statutory procedure laid down in the Act.

Reg 15(3): the conditions for extending time limits for grievance procedure claims

The wording of reg 15(3) is convoluted and cross-refers to other regulations and the EA 2002. There are two different ways in which time limits can be extended.

(a) A complaint is presented to the Tribunal within the normal time limit, but in circumstances in which section 32(2) or 32(3) of the EA 2002 does not permit him to do so

For this condition to be engaged, the complaint should be lodged with the tribunal within the normal time limits. However, the claimant has done so without either sending a letter of grievance (section 32(2) – see below) or leaving 28 clear days after sending it (section 32(3) – see below) before lodging his complaint. Instead, because section 32 engages, the complaint is rejected but the claimant is given more time to comply (but note section 32(4) EA 2002, considered below).

(b) A complaint is lodged with the tribunal after the expiry of the normal time limit for presenting the claim, where the claimant has complied with paragraph 6 or 9 of Schedule 2 in relation to his grievance within that normal time limit

To meet this condition, the claimant must have lodged his grievance in writing with the employer before the normal time limits expire. Once he has done this, the 3 month extension is engaged.

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There are other provisions in reg 15 which govern the situation where the parties are 'deemed' to have complied with the grievance procedure (reg 7(2)), a representative raises the written grievance (reg 9) or where there is a collective agreement that provides for employees to raise grievances (reg 10).

Section 32 EA 2002: special rules where the grievance procedure applies

Section 32 EA 2002 prevents the tribunal from hearing claims under certain circumstances where the grievance procedures apply. The first issue, of course, is to ask whether the grievance procedures do apply to the claim.

If a claim falls foul of section 32, the tribunal simply does not have jurisdiction to hear the claim. There is no mechanism for extending time limits or applying the interests of justice if section 32 is not complied with.

Section 32(2): it is necessary to send a suitable letter of grievance

Firstly, in order to hear a claim where the grievance procedures apply, the claimant must have complied with paragraph 6 or 9 of Schedule 2 of the EA 2002, namely that they have set out the grievance in writing and sent it to the employer.

If the 'modified procedure' applies, for example, where the claimant has already left his employment, then the statement of grievance needs to contain more detail than if he was still in the respondent's employment. He must set out in writing the basis for the grievance as well.

Section 32(3): the need to leave 28 clear days from compliance with section 32(2), and presenting a claim

A claimant must leave 28 clear days. These can be thought of as 'book ends', i.e. if he presents his letter on 1 October, then must wait until 30 October before presenting the ET1. The 1 October and the 30 October are the bookends, between which there are 28 clear days. (*The Basingstoke Press Ltd (In Administration) v Clarke* (EAT/0375/06CEA and 0376/06/CEA: 9 January 2007))

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Section 32(4): it is necessary to comply with section 32(2) within a month after the end of the original time Limit for making a complaint

The original time limit refers back to the time limit before it has been extended by the Dispute Resolution Regs. So, for example, in a case of constructive dismissal, the letter of grievance must be lodged within a month of the original expiry date for presenting such a claim, which is 3 months from the effective date of termination. The original time limit, however, includes any power to extend that time limit under the relevant legislation (*Spillett v Tesco Stores Ltd* [2006] IRLR 248, ET. This, of course, is different to the definition of 'normal time limit' in reg 15 Dispute Resolution Regs above: *BUPA v Cann*).

Section 32(6): the employment tribunal must find out about the non-compliance either from information provided by the employee, such as in the ET1, or if the employer raises the issue

Unfortunately, there is now competing EAT case law as to whether non-compliance needs to be pleaded in the Response (ET3), or if it can be raised in the Case Management Discussion. *Holc-Gale v Makers UK Ltd* [2006] ICR 462 preferred the latter as the matter went to jurisdiction and no point was taken in proceedings in the ET that it was not pleaded at the CMD. The better practice, therefore, would be to plead the issue in the ET3 (*Petia Chickerova v Holovachuk* (EAT/0016/07/ZT: 21 February 2007), and for the Claimant, if the point is raised for the first time at the CMD, to argue that it has not been pleaded and that there is no application to amend and that an application to amend within the CMD would be out of time.

Conclusion

Having worked through the rules for extending time limits under the EA 2002, it is immediately clear that the whole process is over-technical. It is also apparent that the EAT has had to paper over the cracks in the legislation by making frequent rulings. The best advice to give to practitioners is to take care when trying to work out the time limits and to highlight potential issues in advance so that they can be dealt with before it is too late.

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"Rolled up" holiday pay : revisiting *Robinson Steele v RD Retail Services Ltd and others* [2006] I.R.L.R. 386

The lawfulness of operating a system of "rolled-up" holiday pay has been the subject of recent European Court of Justice (ECJ) decisions and has left the situation somewhat unclear; what the ECJ prohibited with one hand, it permitted with the other.

The case of *Robinson Steele v RD Retail Services Ltd and others* [2006] I.R.L.R. 386 and subsequent cases concerned the lawfulness of employers operating a system of "rolled up" holiday pay (RHP) whereby holiday pay is included as a percentage of the basic hourly rate or daily remuneration.

The Working Time Directive (WTD) 93/104 article 7, transposed into domestic law by regulation 13 of the Working Time Regulations (WTRs) 1998/1833, entitles every worker to paid annual leave of at least four weeks, which cannot be replaced by a payment in lieu except where the employment relationship is terminated.

In *Robinson Steele* the court of appeal made a reference to the ECJ concerning the compatibility of the practice of operating a "rolled up" holiday pay system with the entitlement conferred by article 7 of the WTD.

In a preliminary ruling the ECJ emphasised that the universal entitlement to paid leave was a particularly important principle of Community law from which there could be no derogations. The holiday pay required by article 7(1) was intended to enable the worker actually to take the leave to which he or she was entitled. The entitlement to annual leave and to a payment on that account are two aspects of a single right. The term "paid annual leave" means that remuneration has to be maintained for the duration of annual leave, so that workers receive their normal remuneration for that period of rest. The point at which the payment for annual leave is made has to be fixed in such a way that, during that leave, the worker is put in a position comparable to periods of work as regards remuneration.

A system whereby payments for minimum annual leave are staggered over the corresponding annual period of work and paid together with the remuneration for work done may lead to situations in which the minimum leave period was effectively replaced by an allowance in lieu.

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Moreover, article 7 could not be derogated from, whether by Member States or employers and employees. Accordingly, the system of "rolled-up" holiday pay was contrary to the Working Time Directive; article 7 precludes holiday pay being paid in the form of part payments staggered over the corresponding annual period of work and being paid together with the remuneration for work done.

However, it went on to say that where holiday payments had already been made under a RHP regime contrary to the WTD, these payments could be off set against the entitlement to payment for a specific period, so long as they had been made "transparently and comprehensibly".

This last part of the judgment appeared to permit what it had previously precluded, the only difference being that payments must have been made transparently and comprehensibly. This, without further clarification or elaboration, appeared to be another example of the ECJ not putting its money where its mouth was, so to speak.

As to whether this was exception was meant to only have retrospective affect or continue to be a permissible form of RHP, the ECJ was silent.

In the recent case of *Lyddon v Englefield Brickwork Ltd* [2007] WL 3001935 the Employment Appeal Tribunal considered the permissibility of RHP further. It reiterated the guidance given in case of *Smith v J Morrisroes & Sons Ltd* [2005] ICR 596 on when the criteria of transparency and clarity are met, which reformulated the guidelines set out in *Marshall's Clay Products Ltd v Caulfield* [2004] ICR 436. It stated (at para 5) that:

There must be mutual agreement for genuine payment for holidays, representing a true addition to the contractual rate of pay for time worked. The best way of evidencing this is for;

a) the provision for rolled-up holiday pay to be clearly incorporated into the contract of employment;

b) the percentage or amount allocated to holiday pay (or particulars sufficient to enable it to be calculated) to be identified in the contract, and preferably also in the payslip;

(c) records to be kept of holidays taken (or of absences from work when holidays can be taken) and for reasonably practicable steps to be taken to ensure that workers take their holidays before the end of the relevant holiday year.

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Mr Justice Elias who chaired the EAT emphasised that the essential question is whether there is a true agreement providing a genuine and identifiable payment for holidays.

The most recent guidance by the Department for Business Enterprise & Regulatory Reform (BERR, formerly DTI) on the WTRs gives some assistance on the nature of the ECJ's judgment on which the decision in the *Smith* case was based. It states that RHP is considered unlawful; payment for statutory annual leave should be made at a time when leave is taken. However, they go on to say that:

employers should have taken steps to renegotiate contracts involving RHP to eliminate this practice. Any payments in respect of annual leave, additional to wages or salary, made during this transitional period in a transparent and comprehensible manner, may be offset against any future liability to make payment in respect of annual leave, to avoid any overpayment of holiday pay.

Therefore there is no doubt, at least as far as the UK is concerned, that the last part of the ECJ's judgment was only intended to apply for the transitional period. However, the issue is not entirely resolved. As to the duration of the "transitional period", BERR is silent. However from the unequivocal nature of the first paragraph, it is submitted that it can be inferred that such a period has now elapsed. In effect therefore, the *Smith* decision is only applicable to previous RHP, and not such payments that continue to be made. The latter, it would seem, are unlawful.

So apart from the ambiguous nature of the "transitional period" is the situation resolved? Well not quite. A worker's only remedy for non-payment of holiday pay where the employer purports to have paid it as RHP, is an order for that payment to be made (i.e. no other general damages are available) under regulation 30(1)(b) of the WTRs. Notwithstanding the absence of effective or appropriate sanctions available to non-compliant employers, litigation is never an attractive potential outcome and nor is the bad publicity it could create. Even where no adverse consequences are foreseen on the part of the employer, I would advise employers to follow the guidelines given by BERR and avoid RHP where possible.

Andrea Vasili



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Case Law Highlights

Lexi Holdings PLC v Shaid Luqman and Ors

Service under CPR6.5(6) on persons constituting a partnership and meaning of last known residence for persons serving a substantial term of imprisonment

The Claimants were involved in litigation with a number of defendants, one of which was a partnership. This partnership was between Mr Luqman and Mr Bhatti. Postal service of proceedings on Mr Luqman took place at two of his former residences. The Claimant alleged that this was good service on the partnership, despite knowing that at the time of the alleged service Mr Luqman was in prison for a substantial term. Indeed the Claimants were aware of this as they had actually applied for his committal. The Claimants also alleged that since the partnership was not a separate legal person, this meant that it was good service on both Mr Luqman and Mr Bhatti. The court ruled that CPR r.6.5(6) is to be interpreted so that where one partner who is sued in the name of the firm has the proceedings sent to his usual or last known residence, that is good service on the firm and therefore upon his co-partners. Further the court ruled that the last known residence of a long-term prisoner is the prison and not his former home address. In the circumstances the court concluded that service was not effected on the partnership by service on Mr Luqman's house when he was, to the knowledge of the claimant, serving a substantial term of imprisonment.

Aspin v Metric Group Ltd [2007] EWCA Civ 922

The principles to be applied in the exercise of the court's discretion as to costs orders under CPR r.44.3

The appellant claimed damages arising out of the termination of his employment. Following a successful trial on liability the appellant's damages were to be assessed if not agreed. They were not agreed and at final trial the appellant recovered damages which exceeded a payment into court. However, the judge refused to order costs in the appellant's favour other than from the date of judgment, the reason being that the appellant had recovered damages greater than the payment into court but his most valuable heads of claim had been dismissed. On appeal it was held that the order was a global one which had deprived the appellant of any costs because he had obtained so much less by way of damages than had originally been claimed. The judge had however failed to explain why he

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had not adopted a conventional issue based approach and in those circumstances the exercise of his discretion had been flawed. The judge had not approached the award of costs in accordance with the principles laid out in CPR r.44.3 and explained in subsequent decisions of the Court of Appeal. The order for costs was therefore set aside and substituted by an order that the appellant have 50% of his costs up to the conclusion of the trial of liability and all his costs thereafter. This order reflected that, in effect, the appellant had succeeded on one issue and lost on another.

Hall and Ors v Stone [2007] EWCA Civ 1354

Exercise of the court's discretion as to costs under CPR r.44.3(4) and the relevant considerations to be taken into account

The appellants claimed for personal injury arising out of a road traffic accident. The respondent initially made offers which were rejected as the appellants had yet to obtain medico-legal advice. The respondent then alleged the claims were dishonest and purposely inflated as the impact was so slight that it was impossible for the appellants to have sustained any physical injuries. The appellants duly brought proceedings claiming sums greater than those offered. At trial any allegations of fraud or dishonesty were dismissed and damages were awarded to the appellants, although at a lower value than the sums claimed. The judge went on to exercise his discretion under CPR r.44.3(4) and awarded the appellants 60% of their costs. This was to reflect the totality of the case, the offers made and conduct during the course of the case. On appeal it was held that the judge had taken into account conduct without specifying the conduct or explaining what effect it had had on proceedings. He could not reduce the costs of the appellants under CPR r.44.3(4) merely because they had not done as well as they had hoped. There was no conduct on the part of the appellants which was of such consequence as to warrant any reduction in their entitlement to costs, including the initial exaggeration of the claims which had no real effect on the costs of the action. The respondent also did not enjoy any partial success to entitle her to a reduction in the appellant's award for costs. It was held that the judge was also wrong to reduce the appellants' order for costs on account of their attitude to the early offers as they had been made at too early a stage and had not been held open until after the appellants had obtained medico-legal advice. The appellants were therefore awarded their costs in full.

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Contex Drouzhba Ltd v Wiseman and Another [2007] EWCA Civ 1201

Director's signature on a document containing fraudulent representation made by him was sufficient evidence in writing for an action in deceit

The appellant was the director of a company and had signed an agreement with the respondent containing a promise that the company would pay for goods to be ordered in the future. In proceedings brought by the respondent it was held that in so doing the appellant had impliedly represented that the company had the capacity to pay for goods ordered but that the representation was made fraudulently as he knew that the company was insolvent. On that basis it was held that the appellant was liable in damages for deceit. The judge found that the representation had been made in writing, signed by the party to be charged, namely the appellant, and that therefore s.6 of the Statute of Frauds Amendment Act 1828 provided no defence. On appeal it was held that where the director was effectively the mind of the company, as the appellant was, and where the document he signed made a fraudulent representation to his knowledge, even if the company would be liable, the director had a personal liability for his own fraud. Furthermore, if a document contained a fraudulent representation made by a director, for which he would otherwise be held personally liable, his signature on the document would comply with s.6 of the Act. That section applied to representations implied by the terms of a document rather than an express term and further, whether express or implied, it was required that the representation be in writing and as such a representation by conduct alone would not suffice. It was stated that while not every contract signed by a director would contain implied representations by him, by promising terms of payment the appellant had clearly made an implied representation that the company had the capacity to meet payment terms, something he knew to be untrue. Therefore the judge had been entitled to hold that the appellant made a fraudulent representation in writing and that the document had been signed by him as the party to be charged.

Case Law Highlights by John Brown