By **Abdul Shakoor** specialising in Criminal Law

Victimless Prosecutions and Res Gestae Evidence

The familiar scenario of a reluctant domestic violence victim refusing to cooperate with the prosecution remains a recurrent theme in the criminal courts. The recent case of Barnaby v Director of Public Prosecutions [2015] EWHC 232 (Admin) raises important considerations concerning the use of the res gestae principle in "victimless prosecutions".

The case of Barnaby concerned an appeal by way of case stated against a conviction for assault by beating from the Bodmin Magistrates' Court. The case had proceeded "victimless" as Glenda Gibb refused to cooperate with any prosecution of her boyfriend, Lee Barnaby. The Crown's case relied largely on the accounts given by Ms Gibb in a series of 999 calls and a verbal account to the first attending officers. It was the Crown's case that the 999 calls and the account to the officers fell under the res gestae exception to the rule against hearsay. The defence argued that the calls and the account to the officers were inadmissible hearsay.

The circumstances of the case as summarised in the judgment were as follows. During the early hours of 11th April 2014, Glenda Gibb made three 999 calls. In the first call, at 6.33am, she whispered "I can't really talk; I've just been attacked by my boyfriend." During the second call she said "Um my boyfriend's just strangled me; I can't really talk". She told the operator that she was at her home address. She indicated that the appellant had just strangled her and was about to leave the property. She refused to give her name, saying "I'm just so scared because he's just strangled me". She named the person responsible as Lee Barnaby.

Ms Gibb made a third 999 call at 6.49am. She was audibly upset during the call. She repeated that her boyfriend had just left the premises and that he had assaulted her. She expressed concern that the police should not tell the appellant she had reported the incident. Importantly, she gave her name during this last call.

The police arrived at the premises about 6 minutes after the last call. Ms Gibb was agitated and upset, and became angry when she was told the appellant had not been apprehended. The attending officers noted reddening that extended round the front of her throat. There was also a crescent shaped mark on her cheek. **(continued...)**

Contents

SEMINAR'S 2015 SEE PAGE 12

broadway quarterly
The Newsletter for Broadway House Chambers
REGULATION & JUDICIAL REVIEW
IMMIGRATION LAW
CIVIL LAW
EMPLOYMENT LAW
FAMILY LAW
CRIMINAL LAW

www.broadwayhouse.co.uk

By **Abdul Shakoor** specialising in Criminal Law

Victimless Prosecutions and Res Gestae Evidence

(continued...)

Her account at this stage was that although the appellant had been sleeping downstairs on the sofa in the lounge she "woke up and found him strangling me. Bit my cheek whilst strangling me and called me bitch and cunt… he strangle me with his hands". She gave the name of Lee Barnaby as the person responsible. She refused to give a statement or to sign an entry in an officer's pocket notebook because she said he "beat me up" on the last occasion she provided a statement.

PS Ross described Ms Gibb's state as follows:

"Throughout Ms Gibbs was agitated and upset, anxious that we arrest Barnaby and fearful of what he would do if we didn't arrest him and he returned to the address but equally fearful of what Barnaby would do if we did arrest him and he was released from police custody and he discovered she had called the police. Her fear was clearly causing her confusion and agitation and she was genuinely anxious about her safety and the possibility that Barnaby might seriously harm or even kill her and re-stated her reluctance to give a statement as she was concerned this might increase the risk of harm to herself and her son in the future."

The appellant declined to answer any questions in interview. At trial, he denied that he had slept overnight at Ms Gibb's home and he denied the allegation of assault. He said that he had simply gone to her address to collect his belongings and that they had argued.

The prosecution relied on section 118(1)(4)(a), Criminal Justice Act 2003 relating to res gestae to admit the 999 calls and account to the officers. The section permits hearsay when "the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded".

The guiding authority on res gestae remains the case of R v Andrews (D) [1987] AC 281. Lord Ackner gave the leading judgment and set out the approach to be taken by a trial judge in determining whether the possibility of concoction or distortion can be disregarded. He said that:

"the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection."

He went on to say that in order for the statement to be sufficiently spontaneous it must be so closely associated with the event that the mind of the declarant was still dominated by it. In addition to the time factor Lord Ackner stated that there might be special features to the case that relate to the possibility of concoction or distortion – for example, a motive to fabricate or concoct on the part of the statement maker. Finally the possibility of error by the statement maker should be considered.

In the case of Barnaby Lord Justice Fulford concluded in his judgment that the evidence of the 999 calls and the subsequent account to the officers fell within the res gestae principle. His reasons were that the first two 999 calls were made when the appellant was still at the house – due to Ms Gibb whispering and saying that the appellant had "just" tried to strangle her.

In the third call she indicated that the appellant had recently left the property. She was upset and repeatedly rang the emergency number. The police arrived within 6 minutes of the last call. The judge reasoned that the account to the officers was thus a continuation of what had been said to the 999 operators. She was still agitated, upset and emotional when the officers attended. The marks from the alleged assault were visible on her neck.

The argument for the admission of the 999 calls as res gestae was strong. The events had only just occurred with the appellant still in the house, Ms Gibb was whispering and audibly upset. However the admission of the account to the officers is more controversial. By the time the officers arrived, approximately 22 minutes had elapsed since the first call had been made at 6.33am. It is difficult to see how there was "no real opportunity for reasoned reflection" at some point in those 22 minutes. There was also a gap of 6 minutes between the last call and the officers arriving. There was no evidence concerning what Ms Gibb did in those 6 minutes. It is not unrealistic to consider that she may have spoken to somebody in that period of time – perhaps a friend, family member or a neighbour – and this could have had some influence on her and her subsequent account to the officers.

Notwithstanding these concerns, the judgment of the court in the case of Barnaby provides prosecutors with an important example of a case where res gestae evidence has been deemed admissible. The fact that the court concluded that Ms Gibb's account to the officers given 22 minutes after the alleged assault amounted to res gestae provides prosecutors with important ammunition in their daily legal battles to adduce similar evidence in victimless prosecutions.

> "...in order for the statement to be sufficiently spontaneous it must be so closely associated with the event that the mind of the declarant was still dominated by it."

However from a practical perspective the use of 999 calls in victimless prosecutions tends to be problematic for prosecutors. Frequently there is no transcript of the call(s), particularly in magistrates' court cases. In light of these calls inevitably being made by "emotionally overpowered" complainants understanding what is being said can be impossible without a transcript. In addition it is often the case that the parties involved are not fully identified in the call. It can be noted for example that Ms Gibb did not give her name in the first two of her calls. Thus proving the defendant assaulted the complainant named in the charge and/or that the complainant was referring to the defendant in her call when he is not fully named in it can be difficult.

Defence practitioners on the other hand should be aware of the importance of a section 78 application to exclude evidence on the grounds of unfairness as noted by Lord Justice Fulford in his judgment. Although the res gestae criteria might be met, thus making the evidence prima facie admissible, there are often important implications for the defendant's right to a fair trial. There should always be close scrutiny of the reasons the prosecution are neither calling the complainant nor tendering her.

Lord Ackner in his judgment in Andrews strongly deprecated any attempt by the prosecution to use the res gestae doctrine as a device to avoid calling the maker of the statement when they are available. Although in the case of Barnaby there were clear reasons for the prosecution not calling Ms Gibb in light of the possibility of future harm, often this is not the case. Frequently the maker of the statement is not being called because they simply no longer support the prosecution, or they want to move on with their life, or they want the defendant back because they need help looking after the children. These are all situations where it could properly be argued that there is no good reason for the complainant not being called and the prosecution are using the res gestae doctrine to avoid calling the maker of the statement.

In conclusion, the case of Barnaby provides an important illustration of the use of res gestae evidence in domestic violence cases. However both prosecutors and defence practitioners should be aware of the particular aspects of the case which can be used to their advantage when faced with their own similar cases.

By **Rae Cohen** specialising in Family, Civil & Commercial Law

Wyatt v Vince

The Ongoing Saga Continues...

Dale Vince

The Supreme Court recently allowed the appeal in the ongoing saga of Ms Wyatt and Mr Vince, Wyatt v Vince [2015] UKSC 14, and the Court's judgment – in the form of the Speech of Lord Wilson with whom the other members of the Court concurred – was greeted by the press with a startling effect.

"Ex-wife of hippy turned wind farm tycoon who became a millionaire AFTER they split wins right to fight for £2million divorce payout" announced the Daily Mail. Whilst the Guardian's stance, perhaps not surprisingly, was that "Finally divorced women who bring up the children have some legal value". Whilst the case has created great excitement amongst those with little or no knowledge of Matrimonial Law the question that must be asked is, 'what is there to learn from the case for those who practice in this field'?

The background

The parties had met in early 1981 when he was 19 and she was 21 and married in December 1981 at which time they had no assets and were living on state benefits. In May 1983 the wife had given birth to a son. She already had a daughter from a previous relationship. They separated in 1984. The husband spent a considerable time as what was then known as a "New Age Traveller" before founding a successful business in the wind turbine sector that now has an estimated worth of £57M. Ms Wyatt had two further children but never remarried. She is now 55 and lives in an ex-council house subject to a mortgage which is in a poor state of repair.

The Application

In 2011 Ms Wyatt issued an application for financial relief. Mr Vince countered by issuing an application to strike out Ms Wyatt's application under rule 4.4 of the Family Proceeding Rules 2010 which provides that the court may strike out a statement of case if it appears to the court that (a) the statement of case discloses no reasonable grounds for bringing or defending the case; or (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings.

Nicholas Francis QC sitting as a deputy Judge of the High Court dismissed Mr Vince's application in December 2012. Mr Vince appealed that decision and the Court of Appeal, in June 2013 allowed the appeal and struck out the wife's substantive application. Ms Wyatt appealed to the Supreme Court.

The Decision of the Supreme Court

The issue for the Supreme Court was the extent of the jurisdiction to strike out a spouse's application for a financial order under r.4.4 of the FPR 2010.
It is important to understand the factual basis upon which Mr Vince relied in support of his application as referred to in the speech of Lord Wilson. Ms. Wyatt had issued a petition for divorce in early 1992 which resulted in a Decree Absolute dated 26th October 1992. As Lord Wilson notes at paragraph 14 of his speech:

"Did she include in her petition applications for a full range of financial orders for the benefit of herself?"

That question could not be answered definitively as the divorce file had been lost by the Court and neither Mr Vince nor Ms Wyatt retained any documents pertaining to the divorce. Lord Wilson, however, was prepared to make "an educated guess" that Ms Wyatt had made such claims as "Such was the usual practice". Assuming such applications were made in the petition, Lord Wilson then considered "what orders, if any, were then made upon them". Mr Vince asserted "a clear recollection that following the transfer of the proceedings to the Cheltenham and Gloucester County Court it ordered that [he] did not have to pay [the wife] any money". Lord Wilson identified three hypotheses which Mr Vince's recollection was consistent with:

(a) that the court made only a nominal order for the husband to make periodical payments to the wife;

(b) that its order on her applications was "no order" or (which amounts to the same thing) that it never addressed it; or

(c) that it dismissed all the wife's applications; in that event it would not be open to her to bring the present proceedings.

The Court of Appeal had considered it likely that no order was sought or made and Lord Wilson agreed. Accordingly there was an acceptance by the court that Ms Wyatt had sought financial provision in her Petition but that her claims had not been determined by the court.

Lord Wilson then turned his attention to rule 4.4. Jackson LJ had suggested in the Court of Appeal that rule 4.4 (1)(b) could be used to strike out an application which had no real prospect of success as an abuse of the court process. Lord Wilson rejected that approach:

"The objection to a grant of summary judgment upon an application by an ex-spouse for a financial order in favour of herself is not just that its determination is discretionary but that by virtue of s25 (1) of the 1973 Act, it is the duty of the Court in determining it to have regard to all the circumstances, and in particular, to the eight matters set out in sub-s (2). The determination of an application by a court which has failed to have regard to them is unlawful".

Citing Livesey v Jenkins [1985] AC 424, the test is not an assessment of the merits of the wife's claim but whether the claim which the wife pursues is "legally recognisable".

It followed that Ms. Wyatt's appeal against the strike out must succeed. However, whilst her substantive application can proceed, Lord Wilson noted that it was "essential at this stage to conduct a provisional evaluation of the issues by reason of rule 1.4 (1) of the Family Rules as the Court must further the overriding objective by actively case managing the case" and "in the light of the analysis of the issues to which I now turn, it may be suited to tight directions".

That analysis begins with the words "The Wife's application faces formidable difficulties" Lord Wilson lists these as:

(a) The marital cohabitation subsisted for scarcely more than 2 years;

(b) It broke down 31 years ago;

(c) The standard of living enjoyed by the parties prior to the breakdown could not have been lower;

(d) The husband did not begin to create his current wealth until 13 years after the breakdown;

(e) The wife has made no contribution, direct or indirect, to its creation.

(f) The wife's delay in bringing the application appears to be inordinate.

Lord Wilson then posed the question, "Confronted by these difficulties . . . what might the wife assert so as to carry her application forward to possible success?" He noted that the wife "asserts needs, both for a better home for herself and her family and, in the light of the severe limitations on her earning capacity, for a fund out of which to maintain herself for the rest of her life". In what is a clear "shot across the bows" Lord Wilson refers to the Wife's stated quantification of her needs:

"These, with questionable forensic wisdom, she quantifies at £0.55m for the home and £1.35m for the fund, and thus at a total of £1.9m. Even at this stage one can say that, in the light of the negatives, an award approaching that size is out of the question. It is a dangerous fallacy, albeit currently propounded by those who favour reform along the lines of the Divorce (Financial Provision) Bill currently before the House of Lords, that the current law always requires rich men to meet the reasonable needs of their ex-wives. As Thorpe LJ said in North v North [2007] EWCA Civ 760, [2008] 1 FLR 158, at para 32, "… it does not follow that the respondent is inevitably responsible financially for any established needs… [h]e is not an insurer against all hazards…" In order to sustain a case of need, at any rate if made after many years of separation, a wife must show not only that the need exists but that it has been generated by her relationship with her husband: see Miller v Miller, McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618, para 138 (Lady Hale)."

Directing a "swift referral" to FDR Lord Wilson observed that the "two magnetic factors" appear to be "the wife's delay on the one hand and the disparate contributions to the care of the children on the other". Lord Wilson's assessment of Ms Wyatt's entitlement can clearly be seen in his comment that:

"Had it been relevant, as Jackson LJ considered, to ask whether the wife's application had a real prospect of success, my opinion would have been that it had real prospect of a comparatively modest success, perhaps of an order which would enable her...to purchase a somewhat more comfortable, and mortgage free, home for herself and her remaining dependants."

It will be interesting to learn the final outcome of Mrs Wyatt's application. Against the outcome which Lord Wilson suggested it must be remembered that Ms Wyatt had secured from Mr Vince a Costs Allowance (her application being prior to the implementation of s22ZA of the 1973 Act on 1st April 2013) of £125,000 before the issue of Mr Vince's appeal to the Court of Appeal. Whatever the current costs for the parties now stand at, it seems likely that they will be disproportionate to the final award. The lesson to be learnt by practitioners must be that the only way to ensure that an ex-spouse doesn't turn up to pursue an old claim is to ensure that any claims are dealt with at the time of the divorce.

By **Alexander Modgill** specialising in Family, Civil & Employment Law

Collective Redundancies and the Duty to Consult

On 30 April 2015 the Court of Justice of the European Union (CJEU) delivered its judgment in the case of USDAW and Another v VW Realisation 1 Ltd and Others [C-80/14].

The ruling in effect overturned the earlier and somewhat controversial decision of the Employment Appeal Tribunal (for further analysis of which, please see Issue 22 of the Broadway Quarterly, October 2013), and will have come as a relief to employers and the UK Government regarding the extent of an employer's obligations to consult unions and employees during collective redundancy exercises.

By way of a brief recap, the EAT's decision was that whenever an employer is proposing to dismiss as redundant 20 or more employees within a period of 90 days or less, the prior consultation obligations contained within the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) must be complied with, regardless of the particular establishments at which they work. In other words, where there is a chain of stores at which employees are to be dismissed as redundant, for the purposes of the consultation obligations triggered by the employee threshold numbers, an employer must aggregate the dismissals across all of the stores/establishments.

In this recent judgment the CJEU confirmed that an'establishment' for the purposes of the EU Collective Redundancies Directive (No 98/59) means the entity to which the worker is assigned. This is not necessarily the same as the whole of an employer's undertaking. Therefore, under the provisions of the TULCRA where an undertaking comprising several entities (in this case a company operating a chain of high street stores) is proposing to dismiss 20 or more employees within 90 days or less, the obligation for collective consultation is only required at those establishments where it is proposed to dismiss 20 or more employees. There is no requirement for dismissals at all establishments to be aggregated for the purpose of this threshold, and so no requirement for consultation at those smaller establishments where less than 20 employees are to be dismissed.

Facts of the Present Case

Woolworths and Ethel Austin were well known companies who operated chains of high street stores throughout the UK. Both companies became insolvent and went into administration which, in turn, caused the dismissal of thousands of employees across the UK on the grounds of redundancy.

The Union of Shop, Distributive and Allied Workers (USDAW) and Mrs Wilson, an ex-employee of Woolworths and also a USDAW representative, (the applicants) brought claims before the Liverpool Employment Tribunal and the London Central Employment Tribunal against both companies on behalf of thousands of union members who were former employees and who had been dismissed on grounds of redundancy.

The applicants sought protective awards against the employers in favour of the dismissed employees on the basis that, prior to the adoption of the redundancy programmes, the consultation procedure provided for in the TULCRA had not been followed.

If the tribunals made protective awards and the employers were not in a position to satisfy them, the applicants and the employees required the Secretary of State for Business to make the payments from the National Insurance Fund, pursuant to the statutory obligations of the ERA.

"...for the purposes of the consultation obligations triggered by the employee threshold numbers, an employer must aggregate the dismissals across all of the stores/establishments."

By decisions of 2 November 2011 and 18 January 2012 respectively the employment tribunals made protective awards in favour of a number of employees, but not all of them. The claims were dismissed for approximately 4,500 employees on the basis that they had worked at stores with fewer than 20 employees and therefore each store was to be regarded as a separate establishment. The effect of this was, the tribunals held, that the consultation procedure was not required to be followed and so there had been no failure on the employer's part.

The applicants appealed to the Employment Appeal Tribunal, by whose judgment on 30 May 2013 allowed the appeals. The EAT held that the consultation obligation applies whenever an employer is proposing to dismiss as redundant 20 or more employees within a period of 90 days or less regardless of the particular establishments at which they work.

The Secretary of State for Business appealed to the Court of Appeal which, in turn, referred the matter to the CJEU for a preliminary ruling on the meaning of the term, 'establishment'.

Judgment of the CJEU

The CJEU in effect overturned the decision of the EAT. It held that the term 'establishment' is a term of EU law and cannot be defined by reference to the laws of the Member States: see paragraph 45 of the judgment. The CJEU relied on its decisions in Rockfon (C-449/93, EU:C:1995:420) and Botzen and Others (186/83, EU:C:1985:58) that an employment relationship is essentially characterized by the link existing between the worker and the part of the undertaking or business to which he is assigned to carry out his duties.

Relying on Rockfon, the CJEU said that the term 'establishment' must be interpreted as designating, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties. It is not essential in order for there to be an 'establishment' that the unit in question is endowed with a management that can independently effect collective redundancies: see paragraph 47.

At paragraph 49 of the judgment the CJEU, quoting its previous judgment in Athinaiki Chartopoiia (C-270/05, EU:C:2007:101), said that an 'establishment' for the purposes of Directive 98/59 and in the context of an undertaking may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organizational structure allowing for the accomplishment of those tasks.

Finally, at paragraph 51, the CJEU held that the entity in question need not have any legal, economic, financial, administrative or technological autonomy in order to be regarded as an 'establishment'. Consequently, where an 'undertaking' comprises several entities meeting the criteria in paragraphs 47, 49 and 51 of the judgment, the establishment for the purposes of the Directive 98/59 means the entity to which the workers made redundant are assigned to carry out their duties: see paragraph 52 of the judgment.

The End of the Matter?

Whilst not conclusively determining the case the CJEU said that the employment tribunals at first instance took the view that the stores to which the employees affected by the dismissals were assigned were separate establishments. It clearly had sympathy for this view and the judgment suggests it was a permissible approach for the tribunals to take.

However, given that this was a preliminary ruling the matter has been remitted to the Court of Appeal to establish whether those findings were correct in light of the specific circumstances of the dispute in the main proceedings and in light of the CJEU's ruling on the meaning of an 'establishment'.

The practical effect of the judgment is that where an employer operates from a number of establishments, the threshold which triggers the collective redundancy obligations should be the dismissal by redundancy of at least 20 employees within a period of 90 days from a particular establishment, not 20 employees across the whole employer.

By **Jake Ellis** specialising in Family & Employment Law

Post Denton: Do merits impact relief?

Introduction

The aim of this article is to consider the climate post Denton v TH White Limited & Another; Decadent Vapours Ltd v Bevan and Others; Utilise TDS Ltd v Davies and Others [2014] EWCA Civ 906, [2014] All ER (D) 53 ("Denton") and whether the underlying merits of a case should lead to greater leniency when considering an application for relief from sanctions.

Denton Test

Following criticism of the Court's approach to applications for relief from sanctions in the case of Mitchell v News Group Newspapers [2013] EWCA Civ 1537, [2014] 2 All ER 430 ("Mitchell") the Court of Appeal established the three stage "Denton" test:

1. Was the breach serious or significant;
2. Why did the breach occur;
3. The Court will then consider all the circumstances of the case, particularly, the two factors at CPR r 3.9;
   a) the need for litigation to be conducted efficiently and at proportionate cost;
   b) the need to enforce compliance with rules, practice directions and orders

In establishing this test, the Court of Appeal recognised the difficulty with the use of the word 'trivial', as used in Mitchell, and, in its guidance, exchanged it for the use of "serious/seriousness" or "significant/significance".

Importantly, the Court of Appeal also clarified that the two factors listed in CPR r 3.9 are not "of paramount importance", as outlined in Mitchell, but that they "…should be given particular weight at the third stage **when all the circumstances are considered**".

As a result, a great deal of practitioner criticism has relaxed but questions have arisen as to what circumstances the Court ought to take into account when considering "all the circumstances…" of the case.

The Influence of Merit

One such question is whether the Court should consider the underlying merits of an applicant's case as posed in HRH Prince Abdulaziz Bin Mishyal Bin Abdulaziz Al Saud v Apex Global Management Ltd & another [2014] UKSC 64, [2014] All ER (D) 278 ("Apex").

Background

In this case, Apex Global Management Ltd and Global Torch Ltd were principal shareholders in a telecommunications company, Fi Call Ltd. Both parties issued a petition under s 994 of the Companies Act 2006, naming the Prince as a respondent, seeking an order that he pay $6 million plus interest.

Ultimately, an unless order was made by Mr Justice Norris requiring the Prince to personally sign his witness statements, giving a full account of his email addresses, and electronic devices on account of allegations made that a number of key emails, amongst other documents, had been forged.

The order was made despite the Prince arguing that a protocol applying to the Saudi Royal family prevented him from personally signing witness statements.

The Prince, having failed to comply with the unless order, was subsequently debarred from defending the claims, resulting in judgment against him.

Consequently, the Prince applied for relief from sanctions in addition to the setting aside of the judgment and an order permitting his advisor to sign his witness statement on his behalf.

The application was refused and appeal dismissed by the Court of Appeal, [2014] EWCA Civ 1106, [2014] All ER (D) 87.

Appeal to Supreme Court

The Prince then appealed to the Supreme Court, heard by Lord Neuberger P, Lord Clarke, Lord Sumption, Lord Hughes, and Lord Hodge SCJJ with Lord Neuberger giving the lead judgment.

One of the issues before the Court was whether the underlying merits of the Prince's defence was a factor the Court ought to bear in mind when considering his application for relief.
In addressing this issue, Lord Neuberger, in his judgment, stated that the *"strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues…". His concern was that an investigation into the merits "would lead to such applications costing much more and taking up much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms".*

Clearly, Lord Neuberger was desirous of avoiding applications for relief from sanctions escalating into satellite litigation but he recognised that without doing so *"…claimants [may] obtain judgment for relief to which it may subsequently be shown that they were not entitled."*

No doubt in light of that acknowledgement Lord Neuberger accepted that there may be instances where justice required the merits of the case should be taken into consideration, by stating: *"one possible exception could be where a party has a case whose strength would entitle him to summary judgment… Accordingly, there is force in the argument that a party who has a strong enough case to obtain summary judgment should, as an exception to the general rule, be entitled to rely on that fact in relation to case management decisions"*

Lord Clarke, in his dissenting judgment, went further than Lord Neuberger stating:

"…I am of the opinion that each case depends upon its own facts and that it is almost always wrong in principle to disregard the underlying merits altogether as irrelevant…Lord Neuberger expresses the view that the merits will be relevant where a

party has a case whose strength would entitle him to summary judgment. Although I entirely agree that the court should not conduct a trial of the issues, I would not limit the relevance of the merits to such a case."

Clearly, in both the judgments of Lord Neuberger and Lord Clarke, there is an acceptance that consideration of the underlying merits is justified when hearing an application for relief. Both Lord Neuberger and Lord Clarke note the necessity of balancing consideration of the merits and doing justice against the obvious desire to avoid satellite litigation and a trial of the issues in addition to greater costs and Court time and resources, as per CPR r 1.1.

Commentary

As stated by Bowen LJ, "The Courts do not exist for the sake of discipline…" and this statement is as true today as it has ever been despite the post Woolf and Jackson climate. It is clear from Davis LJ's judgment, when he considered an application for relief, in the case of Chartwell Estate Agents Ltd v Fergies Properties SA [2014] EWCA Civ 506, [2014] 3 Costs LR 588, that:

"…the courts in considering applications under CPR 3.9 do not have and should not have as their sole objective a display of judicial musculature".

Notwithstanding Lord Neuberger being at pains to stress that nothing in his judgment in Apex affects the decision and analysis of the Court of Appeal in Denton, he recognised that without consideration of the underlying merits justice may not be done. Flowing from this recognition, Lord Neuberger undoubtedly took the initial steps in endorsing the consideration of the underlying merits of a party's claim where the Court is concerned with an application for relief from sanctions.

However, in my view, Lord Neuberger does not go far enough and, to this end, I favour Lord Clarke's dissenting judgment that the relevance of the merits are not limited solely to cases where summary judgment would be likely. If the Court is to achieve justice and is to have "all the circumstances" of a case in mind then, in my view, the Court must consider the underlying merits of a party's claim. This would then manifest itself through the Court showing greater leniency in applications for relief from sanctions.

In practice, following the guidance and lead judgment of Lord Neuberger in Apex, it is clear that, whilst merits may be considered if meeting the standard for summary judgment, the Court will not entertain exhaustive argument on the strength of a party's case when considering an application for relief. In addressing the Court's administrative burden whilst dealing with cases proportionately a balance between consideration of the circumstances of the case, including the underlying merits, must be struck against the obvious desire to avoid satellite litigation. A party falling foul of this sentiment will likely incur the Court's wrath in the form of costs consequences.

Therefore, unless the strengths of the case are so obvious or very clearly weighted in the party seeking relief's favour it would be unwise to focus an application for relief upon this basis.

By **The Editor**

Goodbye Mr Bridge, Hello Sir

Chambers is sorry to say goodbye to Giles Bridge, who has recently left us.

His good humour, helpful nature and determination to fight for his lay client will be missed both by the Bar, solicitors and the judiciary.

Giles has chosen to embark on a 3rd career as a secondary school teacher. By September he will be teaching History at South Shore Academy in Blackpool, whilst studying for a Post Graduate Certificate in Education with Teach First.

Giles states *"I've always had an interest in education and training, having been a trainer with West Yorkshire Police and then delivering CPD events from joining Chambers in 2000. I've been into schools and youth groups throughout my time as a barrister talking about the criminal justice system. I have always found that the sessions which I lead on the purpose of criminal sentencing have given me a real fillip."*

The charity Teach First scheme aims to reduce the inequalities in education by placing keen top flight graduates and career changers in schools where social disadvantage is highest. Giles has spent time in a range of schools and found that schools set in challenging circumstances, inner city London and post industrial east Lancashire, were the ones where he felt that there was a real buzz of enthusiasm and creativity from both students and staff.

Giles says *"I am really looking forward to the challenge of teaching and making a difference to the lives of my students. However I would like to thank everyone who has instructed me and worked with me over the last ten years from solicitors, court staff, fellow advocates, clerks and the judiciary."*

Michelle Colborne QC said "I would like to thank Giles for the support and work he has contributed to Chambers over the years. We will miss his easy going nature, hard work and authoritative views not just on the law but on the benefits of real ale and the nearest brewery!. We wish him all the best in his new career where his talents will doubtlessly improve the prospects of those with whom he comes into contact."

For more details about the work of Teach First please have a look their website; **www.teachfirst.org.uk**

By **Emily Ward** specialising in Family & Employment Law

The Funding Saga Continues…
Re K and H - Revisited

In the January newsletter I considered the decision in Re K and H (Children: unrepresented father: cross-examination of child) [2015] EWFC 1.

At first instance His Honour Judge Bellamy ('HHJ Bellamy') ordered that HMCTS should bear the costs of father's legal representation, having first determined that it was not appropriate for the father to cross-examine the child and that it was not appropriate for the judge to test the allegations levied against the father. Given the issues involved HHJ Bellamy gave permission to the Lord Chancellor to appeal.

The two grounds considered on appeal were as follows:

(1) The court had no power to require the Lord Chancellor (via HMCTS or otherwise) to provide funding for legal representation outside the LASPO scheme; and

(2) The judge had erred in concluding that, absent public funding, the Convention rights of the father and the children (K & H) would be breached.

After hearing detailed argument and submissions from the Mother, Interveners and the Lord Chancellor the Court of Appeal preferred the arguments of the Lord Chancellor and allowed the appeal on the first ground.

In short the appeal was granted due to the following:

a) Quoting Credit Suisse v Waltham First LBC [1997] QB 362 the Master of the Rolls determined that the starting point is that it is a clear principle of statutory interpretation that a general power or duty cannot be used to circumvent a clear and detailed statutory code;

b) The argument at (a) withstood the passing of the Human Rights Act 1998 as the interpretive function of section 3 of the Human Rights Act 1998 has limits and does not permit the court to assign a meaning to legislation that was inconsistent with the fundamental features of it;

c) LASPO provided a detailed, comprehensive funding scheme. Neither section 1 of the 2003 Act nor section 31G(6) of the 1984 Act (as relied upon by HHJ Bellamy) gave the court power to require the Lord Chancellor to provide funding outside that scheme.

d) The provision of legal services did not fall within the duty to ensure the existence of an effective court system;

e) HHJ Bellamy had erred in concluding that the funding by HMCTS of interpreters and intermediaries and of preparation of court bundles was considered as aspects of 'representation' for the purpose section 42 of LASPO. The Master of the Rolls determined that intermediaries and interpreters were not representatives;

f)In relation to section 31G(6) of the 1984 Act the method by which courts had previously 'caused' questions to be put on behalf of an unrepresented party was via the justices' clerk. Following the implementation of the Family Court this function can be undertaken at any level.

The Court of Appeal held that HHJ Bellamy had no power to make the order that he did and therefore allowed the appeal.

The Master of the Rolls addressed the fourth ground of appeal, namely that without the order made by HHJ Bellamy relating to funding of a legal representative the article 6 and 8 rights of the father and children would be violated. The Court of Appeal rejected this argument holding that there were other options, including questioning by the judge or by a justice's clerk or through the appointment of a guardian for the children. The Master of the Rolls noted that questioning by a judge of a witness in any circumstances can be a difficult task that 'calls for sensitive handling' but, nevertheless, it can be done. The Court of Appeal determined that in a straightforward case, such as this case, questioning by the judge should be the preferred option.

The Court of Appeal did however acknowledge that there may be cases where the position is different, for example in circumstances where there is complex medical or other expert evidence, or in circumstances where there is to be complex and/or confused factual evidence from a vulnerable witness. It may be that in such cases, none of the options referred to by the Court of Appeal can make up for the absence of a legal representative able to conduct the cross-examination. The Court of Appeal acknowledge that this may result in the proceedings not being conducted in compliance with article 6 or 8 of the Convention. In order to avoid the risk of a breach of the Convention, the Court of Appeal noted that consideration should be given to the enactment of a statutory provision for (i) the appointment of a legal representative to conduct the cross-examination and (ii) the payment out of central funds of such sums as appear to be reasonably necessary to cover the cost of the legal representative, i.e. a provision in civil proceedings analogous to section 38(4) of the Youth Justice and Criminal Evidence Act 1999 and section 19(3)(e) of the Prosecution of Offenders Act 1985.

And so, the funding saga continues…

The Editor's Column

Get to know the Clerks!

Essential for the smooth running of chambers, requiring patience (in dealing with barristers); excellent memory (linking cases and solicitors) and a sense of humour (when listing the editor in two cases in different cities at 10.00am)...!

David Rhodes

Worst day as a clerk (without naming any barrister!)? Being summoned over to Bradford Crown Court by Judge....., I had to explain why a member of Chambers was running between Courts. I was placed in the witness box and cross examined. Happy days!

Most satisfying day as a clerk?
Going to the House of Lords to witness various Members of Chambers being appointed as silks or becoming Circuit Judges.

When clerking is taken over by technology I would like to become?
25 years ago I would have said a footballer, now I would like to be a film director.

If you were a barrister which area of law would you practice?
Private Ancillary Divorce work but only for the celebrities.

What famous living person would you like to have as a dinner guest and why?
Steven Spielberg, I would like to ask him what inspired him to make Star Wars.

Which event in history would you like to have witnessed and why?
1966 World Cup Final & and the 1911 FAC Final, don't really need to say why.

Quick questions:

Favorite outdoor activity? Watching Bradford City with my son.

Most enjoyable book?
Don't have one, I love reading autobiographies.

Curry / Chinese or ?
As I am a Bradford lad it has to be a Curry, but when deciding at home it's always 3 to 1 in favour of a Chinese.

Favorite comedian?
Gregg Davies.

Robin Slade

Worst day as a clerk (without naming any barrister!)?
There have been a few - to name one would be tricky. Getting stuck in the lift with a member of Chambers is something I am not keen to remember.

Most satisfying day as a clerk?
Likewise - it can be a really satisfying job. I went to the House of Lords with a former member of Chambers. That was something special.

When clerking is taken over by technology I would like to become?
Tennis instructor (to wealthy bored wives) in the summer and a ski instructor (to wealthy bored wives) in the winter.....

If you were a barrister which area of law would you practice?
Knowing what I know now, I can happily safely say that this will never happen, but if I had to say, it would have to be something involving travel - but not disputes with airlines!

What famous living person would you like to have as a dinner guest and why?
Roger Federer. Because he is a living legend - the best of the best. Mrs Slade will be annoyed I have not said Rafael Nadal!

Which event in history would you like to have witnessed and why?
The creation of the universe - from a safe distance with safety goggles of course. Why? Can you imagine a better firework display? In default of that, I`d like to have been on that grassy knoll in Texas on 22nd Nov 1963, with a HD video camera.

Quick questions:

Favorite outdoor activity? Skiing. Closely followed by relaxing on the piste followed by more skiing. No question.

Most enjoyable book?
Any Jack Reacher novel by Lee Child. Brilliant books. Tom Cruise playing the film role was a joke - Reacher is supposed to be six foot four!

Curry / Chinese or ?
Curry - every time. Indian curry though - not Chinese curry!

Favorite comedian?
Peter Kay ...I think.

Seminars

Criminal Law Seminar

Tuesday 6th October, 5pm
At the Bradford Club.
Criminal practitioners will be very familiar with reports served by the prosecution in cannabis 'farm' cases, suggesting extraordinary levels of yield from the current and future crops.

On the 6th October 2015 Broadway House Chambers' criminal team member Stephen Wood will be hosting a seminar together with former Home Office Forensic Scientist **Julian Dunnill** who will explain why such assertions should be treated with great caution and invariably challenged.

Shortly we will be able to add something to the magazine which when rubbed will emit the appropriate odour....!

Family Law Seminar

Thursday 17th September, 9am - 5pm
Crown Plaza Hotel / 6CPD Points.

We are pleased to announce that the 6th Broadway House Annual Family Law Conference will take place on Thursday the 17th September 2015.

In common with the last 5 years, the event will take place at the Crowne Plaza Hotel in Leeds and once again delegates will be provided will breakfast snacks on arrival and a hot buffet lunch together with snacks and drinks throughout the day.

Topics to be covered this year include;

- Domestic violence
- Vulnerable witnesses
- Inheritance and Trustees Powers Act 2014
- Developments in children's law practice
- Periodical payments
- The future of matrimonial finance
- Trusts of Land and Appointment of Trustees Act 1996 applications

As ever, we invite suggestions and ideas for the topics that you, our clients, would like to see on the schedule. Please do contact us with your ideas.

In a change to previous years, this year's conference will revolve around a case study of one family who will be followed through the trials and tribulations of litigation. Using both large group lectures and smaller symposium style workshops, where delegates can chose to attend tailored presentations relevant to their practice, we aim to look at complex family litigation from a holistic angle as well as look at family law from the cradle to the grave.

Cost

Prices are £75 for the full day and £40 for a half day including refreshments.

Reserve your place

This is almost fully booked.
Please contact Val Verity on;
vverity@broadwayhouse.co.uk
as soon as possible.
There will be a waiting list.

More information

Ian Miller is the conference organizer and can be contacted on;
irm@broadwayhouse.co.uk
if you have any queries.

We look forward to seeing you in September.

Video Conferencing facilities are available for use in our Bradford chambers. The use of video conferencing can save much time and money. If you would like to book the facility please contact Mrs Verity at: vverity@broadwayhouse.co.uk

Contact

Broadway House
9 Bank Street
BRADFORD
West Yorkshire
BD1 1TW
Tel: **01274 722560**
Fax: 01274 370708
DX: 729860 Bradford 22

Broadway House
1 City Square
LEEDS
West Yorkshire
LS1 2ES
Tel: **0113 246 2600**
Fax: 0113 246 2609
DX: 26403 Leeds Park Square

Email: **clerks@broadwayhouse.co.uk**
Web: **www.broadwayhouse.co.uk**

Senior Civil Clerk
Robin Slade

Senior Criminal Clerk
David Rhodes

Director of Marketing & Administration
Helen Craven

Members of Chambers

Michelle Colborne QC
Tahir Khan QC
Rodney Ferm
Martin Wood
John Topham
Paul Isaacs
Andrew Kershaw
Rae Cohen
Gordon Shelton
David McGonigal
Ian Howard
Nicholas Askins
Paul Wilson
Sophie Drake
Robert Cole
Stephen Wood
Benjamin Crosland
Gerald Hendron
Rebecca Young
Jonathan Walker-Kane
Matthew Rudd
Jayne Beckett
Nicola Peers
Camille Morland
Tasaddat Hussain
Ian Miller
Matthew Parkinson
Helen Williams
Ken Green
Imran Khan
Emma Downing
Semaab Shaikh
Peter Hampton
Chris Brown
Alexander Modgill
Nicholas Power
Sharn Samra
Nigel Hamilton
Rachel Mellor
Kirandeep Dhillon
Claire Larton
Afshan Hashmi
Abigail Langford
Christian Durham Hall
Clare Benson
Paul Smith
Niall Carlin
Abdul Latif Shakoor
Emily Ward
Ben Smith
Adam Willoughby
Kerry Barker
Mark Brookes
Laura McBride
Nigel Jamieson

Door Tenants:
Gillian Irving QC
Jamie Hill QC
Alex Verdan QC
Matthew Stott
Georgina Clark
Syan Venton
Jason Galbraith-Marten QC
Damiel Sills