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

Non-Disclosure Within Financial Remedy Proceedings

In two recent cases of Sharland v Sharland [2015] UKSC 60 and Gohil v Gohil [2015] UKSC 61 the Supreme Court considered the effect of one party's failure to provide full and frank disclosure about his or her resources on an order for financial remedy.

It held that the impact differs according to whether the non-disclosure was intentional or not, and the principles referable to admissibility of fresh evidence on appeal (the Ladd v Marshall [1954] 3 ALL ER 745, CA principles) have no relevance to an application to set aside a financial order in divorce proceedings on the ground of fraudulent non-disclosure.

Sharland v Sharland

The husband and wife separated in 2010 after 17 years of marriage. The financial remedy proceedings were heard in the High Court in July 2012.

The husband had developed a very successful computer software business, AppSense Holdings Ltd. In the 2012 financial remedy proceedings the main dispute was the value and manner of distribution of the shareholding in this company. Each party had instructed a valuation expert and both experts approached it on the basis that there had been no plans for an Initial Public Offering ('IPO').
At the hearing in July 2012 the husband's evidence was that there were no plans for an IPO, but that this might happen within three, five or seven years.

After the parties had given evidence, but before the valuers had given theirs, they reached an agreement that the wife would receive over £10m of the £17m of liquid assets plus 30% of the net proceeds of sale of the AppSense shares whenever that might take place. There was also agreement as to financial provision for the children.

The judge approved the agreement. A draft consent order was drawn up but, before it was sealed, reports appeared in the press that in contradiction to the husband's evidence AppSense was being actively prepared for an IPO, which was expecting to value the company at between US$750m and US$1,000m. The wife immediately invited the judge not to seal the order and applied for the hearing to be resumed. The husband objected and applied for the wife to show cause why the order reflecting the agreement should not be sealed.

High Court and Court of Appeal

At the hearing of the cross applications the judge found that the husband had knowingly misled both experts and his own evidence had been false and seriously misleading about AppSense to the point that it was categorised as dishonest. Had the judge known the true facts it was inconceivable that he would not have regarded them as relevant. (continued...)

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

Non-Disclosure Within Financial Remedy Proceedings

(continued...)

Nevertheless, the judge acceded to the husband's application that the order should be perfected because no IPO had in fact taken place and the wife had not challenged the husband's evidence that an IPO was not contemplated at that time. Thus the judge was compelled to accept that an IPO was not in prospect. The judge applied the decision in Livesey v Jenkins [1985] 1 All ER 106 and said that the order he was invited to uphold would not have been substantially different from that which would have been made had there been full disclosure at the outset. In that sense the non-disclosure was not material.

The Court of Appeal, by a majority, dismissed the wife's appeal. It held that the wife had the burden of satisfying the judge that the order should be set aside, and that in coming to his decision the judge had been right in law to apply the test in Livesey.

Supreme Court

The Supreme Court unanimously allowed the wife's appeal. Giving the sole judgment, Lady Hale said in carrying out its statutory exercise of independently assessing the parties' agreement, the court will be heavily influenced by what the parties have agreed but this does not in any way inhibit its powers to make further inquiries or suggest amendments [20]. Allied to the court's responsibility and role as independent assessor is the parties' duty to make full and frank disclosure of all relevant information to one another and to the court.

As explained in Livesey, not every failure of full and frank disclosure would justify a court setting aside an order. In cases of innocent or negligent failures an applicant would have to show that the disclosure would have made a substantial difference to the order, which the court would have approved [24-25]. Livesey was not, however, a case of fraud: there was neither a misrepresentation nor deliberate non-disclosure. It thus differed from Sharland's case [26].

Matrimonial cases are different to ordinary civil cases in that the binding effect of a settlement embodied in a matrimonial consent order stems from the court's order and not from the parties' prior agreement. The parties' agreement is an essential ingredient of a consent order: the court cannot make such an order without the valid consent of the parties [29]. If there is a reason which vitiates a party's consent then there may also be good reason to set aside the consent order [29].

A party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny the materiality of the deception [32]. The general principle that 'fraud unravels all' justifies the setting aside of an order where a party's fraud had been material to the agreement and consent order and had undermined the basis on which they had been made. The only exception is where the court is satisfied that, at the time when it made the consent order, (i) the fraud would not have influenced a reasonable person to agree to it, and (ii) had it known then what it knows now, the court would not have made a significantly different order, whether or not the parties had agreed to it. The burden of proving both elements lies with the perpetrator of the fraud [33].

The husband's misrepresentation and non-disclosure coloured both valuers' approach to the valuation of the shareholding, which in turn coloured the wife's approach to the settlement agreement. It was sufficient that the judge found he would not have made the order he did had the truth been known [34]. The order should therefore be set aside. There had been no need for the wife's counsel to cross-examine the husband because the documents he latterly disclosed revealed that he had deceived the court [35].

Per Curiam

Lady Hale said that in cases of fraudulent misrepresentation or fraudulent non-disclosure the principles of setting aside apply whether or not the order had been perfected or sealed [37].

An application to challenge a final order of the court in family proceedings can be made either by way of (i) a fresh action to set aside the order; or (ii) an appeal; or (iii) an application to a first instance judge [38]. There remain difficult issues as to how such an application should be made, whether within or without the original proceedings, and it would be appropriate for the rules or a practice direction to assist [42].

The fact that there has been misrepresentation or non-disclosure justifying the setting aside of an order does not mean that the financial remedy proceedings must necessarily start again from scratch – it may be possible to isolate the issues to which the misrepresentation or non-disclosure relates and deal only with those [43].

Gohil v Gohil

This appeal was heard at the same time as Sharland, yet the judgments by Lords Wilson and Neuberger were given separately to Sharland albeit on the same day.

Facts

The parties were married in 1990 and separated in 2002. In the financial remedy proceedings the husband, a former solicitor, asserted that all of his apparent wealth represented assets held by him on behalf of clients and the true position was that he had a net deficit of c. £311,500. The parties settled the financial proceedings in June 2004. The order provided for a lump sum to be paid to the wife plus maintenance on a joint-lives basis. The order also recited that the wife believed that the husband had not provided full and frank disclosure of his financial circumstances, that this was disputed by the husband, but that the parties were compromising the claims to achieve finality.

In 2007 the wife applied within the divorce proceedings for an order setting aside the original order on the basis of the husband's fraudulent non-disclosure of his resources in 2004. The substantive hearing of that application began in February 2012, the delay having been caused by the husband's arrest on suspicion of money laundering offences in respect of which he was then prosecuted, convicted and imprisoned.

High Court and Court of Appeal

In 2012 Moylan J upheld the wife's application on two separate grounds: (i) there had been material non-disclosure by the husband in the original proceedings in 2004; and (ii) the evidence adduced by the wife satisfied the test for the admissibility of fresh evidence in Ladd v Marshall. The 2004 order was set aside.

In the course of the 2012 hearing Moylan J made orders for disclosure against the CPS in respect of documents that it had obtained for the purpose of the criminal proceedings against the husband. The CPS successfully appealed against the order for disclosure on the grounds that the evidence had been obtained for a specific purpose and that did not include use in matrimonial proceedings. The judge had therefore taken into account inadmissible evidence in coming to his decision in 2012 to set aside the 2004 order.

The Court of Appeal allowed the husband's appeal and set aside the 2012 order and dismissed the wife's application to set aside the 2004 order. It accepted that the judge's use of the Ladd criteria was misconceived but agreed that (i) the wife had to prove that the husband had been guilty of material non-disclosure, and (ii) the evidence which it had been open to the wife to adduce before the judge in that respect had been limited to evidence which satisfied those criteria because the evidence would have been so limited if she had chosen to appeal out of time to the Court of Appeal.

Supreme Court

The Supreme Court unanimously allowed the wife's appeal. It held that a spouse had a duty to the court to make full and frank disclosure of his resources, without which the court was disabled from discharging its duty under the MCA 1973 s. 25(2) and any order, by consent or otherwise, which the court made in such circumstances was to that extent flawed. One spouse could not exonerate the other from complying with his or her duty to the court [22].

In the context of a financial order in divorce proceedings, a form of words such as those in the recital had no legal effect so as to disable the wife from complaining of non-disclosure [22], [43].

The Ladd principles had no relevance to the determination of an application to set aside a financial order on the ground of fraudulent non-disclosure because they presupposed that there had already been a trial when in fact the evidence adduced by the wife in 2012 was her first, not second, opportunity to rely on it. Moreover an application of the principles would lose sight of the fact that it was the husband's obligation (and not the wife's) to provide full and frank disclosure of his resources [31].

Although the judge heard some inadmissible evidence, there was sufficient admissible evidence upon which he would still properly have found that the husband had been guilty of material non-disclosure in 2004. Accordingly, the judge's 2012 order would be reinstated and the wife's claim for further capital provision should proceed [34], [42], [43], [56]-[61].

Per curiam

At [18] Lord Wilson said there should be definitive confirmation of the apparent power of the High Court and the family court to set aside its own orders on the ground of non-disclosure (see MFPA 1984 s. 31F(6) and FPR 2010 r 4.1(6)), and that application should be made to the level of judge that made the original order.

Observations

Distilling the above:

- the first question is whether there has been non-disclosure in the original proceedings. If there has been,
- the next question is whether this was either (a) intentional (i.e. fraudulent) or (b) accidental or negligent.
- If the non-disclosure was accidental or negligent the applicant bears the burden of showing that the non-disclosure was material in that the original order was substantially different from that which would have been made (or agreed) if the other party had provided proper disclosure.
- If, however, the non-disclosure was intentional (fraudulent) then the effect differs: the order should be set aside unless the defaulting party can satisfy the court that the original order would have been (a) agreed to and (b) made in any event.
- In an application to set aside an order based on fraudulent non-disclosure (a) recitals about one party's scepticism of the other's disclosure do not curtail his/her right to make that application, and (b) the Ladd principles do not apply.
- There does not necessarily have to be a complete rehearing of everything from scratch. If the non-disclosure issues and resources can be isolated from the remainder of the original order it may be possible to deal only with those.

By **Jon Gregg** specialising in Criminal Law

Character directions in the Crown Court and R. v Hunter

Jon Gregg analyses the recently reported case of R. v Hunter (and four others) [2015] 2 Cr.App.R. 9, where the Court of Appeal conducted a thorough review of the law in relation to character directions in the Crown Court.

The court considered when such directions might be available, and how both defence and prosecution advocates should approach the issue. Importantly, the court also indicated the steps that should be taken before a defence advocate adduced character evidence.

On the 16th April, 2015, a specially constituted five-judge court of the Court of Appeal, Criminal Division, headed by the Lord Chief Justice, considered the case of R. v David Hunter (and other appeals). Judgment was given by Lady Justice Hallet D.B.E., Vice President of the Court of Appeal Criminal Division.

The five otherwise unrelated appeals were heard together because each raised the same issue: namely the nature and extent of the good character direction. The issue had become a significant problem for the Crown Court and the Court of Appeal.

The court considered firstly the law and practice in relation to character evidence over the years, before moving on to consider the case law, culminating with the decisions in Vye and others[1993] 1 WLR 471; [1993] 3 All ER 241; [1993] Cr.App.R.134 and R. v Aziz [1996] AC 41.

The principles in relation to character evidence changed significantly with the introduction of the Criminal Justice Act 2003. Section 98 defines "bad character" evidence as evidence of or of a disposition to misconduct on a defendant's part other than evidence "to do with the alleged facts of the offence charged" or evidence of misconduct in "connection with the investigation or prosecution of that offence". It is admissible if it meets one of the criteria in section 101(a) to (g) ("the gateways").

In each of the five appeals in Hunter the cases concerned evidence of the defendant's bad character which had been adduced by the defendant himself under s101(b), rather than the prosecution. This is a common tactic in the crown court, enabling the defence advocate to address the jury on the likelihood of the defendant having committed the offence charged. Such a tactic is often adopted with a view to persuading the trial judge to give a modified good character direction, endorsing the advocate's argument.

In its review of the case law, the court stated, at para 66, that it was concerned that the principles in Vye and Aziz have now been extended to the point where defendants with bad criminal records, or who have no right to claim a good character, are claiming an entitlement to a good character direction. The underlying principle was not, as some have assumed, that a defendant who had no previous convictions could never receive a fair trial unless he benefited from a good character direction. The court expressly stated "fairness does not require a judge to give a good character direction to a man whose claim to good character is spurious".

At para 72 the court stated, "It may sound like a statement of the obvious but only defendants with a good character or deemed to be of effective good character are entitled to a good character direction.

A defendant who has a record of previous convictions or has a bad character of some other kind is not entitled as of right to a good character direction; it matters not who has adduced the evidence and whether the bad character evidence is relied upon as probative of guilt. It does not follow

from the fact that the bad character is not considered probative of guilt that a defendant is entitled to be treated as if he had a good character. Once evidence of bad character is admitted, a judge cannot ignore it and give directions to a jury which would make no sense.....Where a defendant has a bad character, a judge is not obliged to give a good character direction, the judge has a discretion.

Para 72 is clearly of relevance to prosecution counsel, should they be tempted to simply acquiesce to a defence request for a good character direction in those circumstances.

The court noted that the law has moved on of late. The concept of good and bad character in the law has changed. Good character now means far more than not having previous convictions. A defendant who has no previous convictions may nevertheless have a bad character under s98 of the C.J.A. 2003. It is important to remember that evidence of bad character may only be adduced, even by the defence, under s101. Convictions, cautions and reprehensible conduct may not be dismissed as insignificant, irrelevant or mere "blemishes" in the way that they once were.

The court considered each of the main categories of character evidence in order to provide as much guidance as possible and in the hope (yet again) of promoting consistency of approach in the crown court.

Absolute good character:
where a defendant has no previous convictions, cautions or any other reprehensible conduct alleged, admitted or proven, they are entitled to both limbs of the good character direction. The law is settled.

Effective good character:
where a defendant has previous convictions or cautions which are old,

minor and have no relevance to the charge, the trial judge must make a judgment as to whether or not to treat the defendant as a person of effective good character. It does not follow that if the defendant has convictions/cautions which are old or irrelevant to the charge that a judge is obliged to treat him as a person of good character. In fairness to all, the trial judge should be vigilant to ensure that only those defendants who merit "an effective good character" are afforded one. It is for the judge to make a judgment, by assessing all the circumstances of the offence/s and the offender, to the extent known, and then deciding what fairness to all dictates.

If the judge decides to treat a defendant as a person of effective good character, the judge does not have a discretion whether to give the direction. The judge must give both limbs of the direction, suitably modified as necessary to reflect the other matters and ensure the jury is not mislead.

Previous convictions/cautions adduced under s101 by the defence:
defendants frequently adduce previous convictions/cautions under s101(1)(b) which are not in the same category as the offence alleged, in the hope of obtaining a good character direction on propensity. The court decided that such a defendant has no entitlement to either limb of the good character direction. It is a matter for the judge's discretion. Fairness may well suggest that a direction would be appropriate but not necessarily. Where a judge has declined to give a modified good character direction to a defendant in this category, the Court of Appeal should have proper regard to the exercise of discretion by the judge who has presided over the trial. It is clear from the judgment that the Court of Appeal is seeking to discourage appeals on the question of character directions in trials.

Bad character adduced under s101 relied on by the prosecution:
where a defendant has no previous convictions or cautions, but evidence is admitted and relied upon by the crown of other misconduct, the judge is obliged to give a bad character direction. The judge may consider that as a matter of fairness they should weave into their remarks a modified good character direction. This too is a broad discretion. As above, where a judge declines to give a direction, or has given a modified good character direction to a defendant in this category, the Court of Appeal will be slow to interfere.

The court were critical of advocates, feeling that too often the details of the bad character were "sprung" on the trial court, without notice to either the court or prosecution. They felt that to adduce such evidence without prior notice is potentially in breach of Part 35 of the Criminal Procedure Rules. The court said that, in future, as a matter of good practice, if not a rule, defendants should put the court on notice as early as possible that character and character directions are an issue that may need to be resolved. The judge can then decide whether a good character direction would be given and, if so, the precise terms. This decision should take place before the evidence is adduced.

The court expressed the view that to proceed in this way would have advantages for the court and the parties: the defence will be better informed before the decision is made whether to adduce the evidence, the crown can conduct any necessary checks and the judge will have the fullest possible information on which to rule.

The judgment concluded with the statement that the court had deliberately conducted a very thorough review of the case law so that it will be unnecessary in future for other courts to do the same. Reliance on this judgment, Vye and Aziz should suffice.

By **Rachael Mellor** specialising in Employment, Civil and Family Law

Fixed Costs versus Part 36

BROADHURST v TAN [2016] EWCA Civ 94

What happens when costs fall to be assessed in a low value RTA claim where a claimant beats her Part 36 offer?

In Broadhurst v Tan and ano [2016] EWCA Civ 94 the Court of Appeal were concerned with the apparent tension between the rules fixing costs under section IIIA of Part 45 and the provision in Part 36 for a claimant to recover costs on an indemnity basis when judgment is at least as advantageous as her offer under Part 36 .

Broadhurst was a combined appeal against two judgments in claims for personal injuries arising from road traffic accidents that fell out of the Pre Action Portal. In both cases the claimants made Part 36 offers and in both cases the claimants obtained judgments more advantageous than those offers. The cases differed in the approach taken by the trial judges as to costs.

In the case of Mrs Broadhurst, HHJ Robinson held that rule 36.14(3) applied in a section IIIA case, but he said there was no difference between profit costs assessed on an indemnity basis and those prescribed by rule 45.29C.

In the case of Ms Smith, HHJ Freedman also held that rule 36.14(3) applied in a section IIIA case, but he did not equate indemnity costs with fixed costs.

So who was right?

The Court of Appeal found that HHJ Freedman was right and that when a claimant makes a successful Part 36 offer she is entitled to costs assessed on the indemnity basis. This is because:

- if rule 45.29B stood alone then the only costs allowable to a claimant following judgment in his favour would be (a) fixed costs in rule 45.29C and (b) disbursements in accordance with rule 45.29I. However rule 45.29B does not stand alone;
- the draftsmen took account of Part 36 offers, as is clear from rule 36. 14A "costs consequences following judgment where section IIIA of Part 45 applies;
- Rule 45.29F (8) provides that where a Part 36 offer is accepted in a section IIIA case "rule 36.10A will apply instead of this rule";
- Rule 45.29F(9) provides that where in such a case upon judgment being entered the claimant fails to obtain a more advantageous offer then rule 36.14A will apply instead of this rule. It is does not provide for a claimant making a successful Part 36 offer;
- the effect of rules 36.14 and 36.14A when read together is that where a claimant makes a successful Part 36 offer he is entitled to costs on an indemnity basis as rule 36.14(3) has not been modified, so it continues to have full force and effect.

The tension between rule 45.29B and 36.14A must therefore be resolved in favour of rule 36.14A.

"...surprising conclusion..."

With regards to Judge Robinson's view that indemnity costs and fixed costs were the same, the Master of the Rolls found that they are conceptually different and he could not find favour with or justify the 'surprising conclusion' that fixed costs are to be equated with assessed costs.

This decision should encourage claimants to make sensible Part 36 offers at an early stage. It might be less comforting to defendants who would otherwise, arguably, have benefited from the fixed costs protection.

The Editor's Column

Getting to know your counsel

An small insight into the life and thoughts of David McGonigal.

1. What was your worse day as a lawyer?
Telling Stephen Wood I would eat my wig if the defendant I was prosecuting was acquitted and then promptly seeing the defendant being discharged from the dock following Stephen's defence speech.

"Salt & Pepper Sir?"

2. Apart from family who has been most influential in your legal life?
Other than the bank manager telling me I can't retire and the doctor telling me I should retire, probably those in the Court of Appeal who provide the assurance that sometimes the most unlikely arguments occasionally get home – so its always worth trying.

3. If not law as a career what would you have chosen?
I was interested in antiques and made enquires about joining auctioneers to learn more. Unfortunately they wanted me to be able to speak another language, which was and remains an impossible task for me.
I suspect it was the forlorn hope of finding that hidden Rembrandt which was the attraction.

4. What book (non legal!) are you presently reading?
"Winter is coming" by Garry Kasparov – warning us all that appeasement of Vladimir Putin will lead to disaster for the free world (or what is left of the free world). Thought provoking and worrying for us and our children.

5. Where do you see the legal profession in ten years?
Being virtually taken over by technology. Most pre-trial hearings being done by email or where necessary by video link (Judge and counsel in their respective work places) and courts used for trials only. Eventually even trials, I suspect, will be done over a video link. Juries will be abolished. The skills of oral persuasion, whether of a court or jury, will be lost to the cost cutting financiers of the Ministry of Justice.

6. Which film have you most enjoyed?

Casablanca:
Humphrey, Ingrid (to her friends!) the humour –
- Yvonne "Where were you last night?"
- Rick "That's so long ago, I don't remember."
- Yvonne "Will I see you tonight?"
- Rick "I don't make plans that far ahead."

7. If you could live anywhere, where would it be?

Probably in the west of Ireland where I could watch the sea, walk on the beach, go to the pub anytime of day, chat to those I pass and not worry how virtual reality encroaches on our system of justice.

8. What is the worst nose-ender you have heard in court?
In a sex grooming case counsel crossing examining a victim asked "and what were you doing out on the streets at 2.15am in the morning?" Answer:
"I was being groomed."

9. Tell us two things you must do before you leave this world.
Continue to enjoy the Bar for as long as possible and then buy a house on the west coast of Ireland.

By **Semaab Shaikh** specialising in Family and Immigration Law

Victims of Domestic Violence and Legal Aid- Change Ahead?

This article considers the recent case in the Court of Appeal of R (Rights of Women) v Secretary of State for Justice [2016] EWCA Civ 91.

The case concerned the changes introduced under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LAPSO") and the Civil Legal Aid (Procedure) Regulations 2012 ("2012 Regulations") affecting victims of domestic violence in accessing family legal aid.

In April 2013, changes were implemented by the government that would have a significant impact on victims of domestic violence seeking to obtain legal advice and representation in private family law cases.

Practitioners in this field will have experienced the consequences of these changes first hand, notably the increase in litigants in person, which in turn increases the pressures facing the courts. But perhaps of greater concern are those cases involving a victim of domestic violence, who having suffered serious abuse, elects to avoid the court process and the necessary and much needed judicial intervention on the basis that they do not satisfy the requirements for family legal aid and do not have the funds to pay privately for legal representation.

The concerns expressed by family lawyers about access to justice as a result of the changes under LAPSO have been reinforced by research undertaken by the organization Rights of Women in conjunction with Women's Aid and Welsh Women's Aid since the changes were introduced. According to their research for the period between 1st April 2013 and 31st August 2013, 61% of women who had experienced or were experiencing domestic abuse took no action in the family courts because they were unable to apply for legal aid; 28% paid for their legal representation privately and 16% represented themselves. The most recent survey conducted by Rights of Women at the time of writing this article indicates that more than 50% of the women participating stated that they took no legal action as a direct result of not being eligible for legal aid.

The changes introduced from 1st April 2013 had the effect of removing family legal aid in the majority of private family law cases. Under section 9 of LAPSO the categories for which civil legal aid was available were specified. Paragraph 12 of Schedule 1 of Part 1 of LAPSO entitled "Victims of domestic violence and family matters" set out the following:

"(1) Civil legal services provided to an adult ("A") in relation to a matter arising out of a family relationship between A and another individual ("B") where—

(a) there has been, or is a risk of, domestic violence between A and B, and

(b) A was, or is at risk of being, the victim of that domestic violence…

(7) For the purposes of this paragraph—

(a) there is a family relationship between two people if they are associated with each other, and

(b) "associated" has the same meaning as in Part 4 of the Family Law Act 1996 (see section 62 of that Act)…"

Under paragraph 12(8)(a), the statute defined a "matter arising out of a family relationship" as including "matters arising under a family enactment". A "family enactment" was further defined under paragraph 12(9)(a)-(o) and in summary encompasses:

- advice and representation in relation to divorce and financial relief and enforcement;
- advice and representation on application for transfers of tenancies;
- disputes in relation to children, including child arrangement orders, prohibited steps orders to prohibit abduction and harmful contact with a parent, child maintenance and financial orders.

Section 12 of LAPSO gave provision for regulations to be made to further detail the requirements for entitlement to family legal aid. It is under this statutory provision that the 2012 Regulations were made. Regulation 33 of the 2012 Regulations sets out the specified evidence of domestic violence, which was required in support of an application for legal aid and included the following:

- a relevant police caution for a domestic violence offence;
- a relevant protective injunction;
- an undertaking;
- a letter from MARAC;
- a copy of a finding of fact;
- a letter from a health professional;
- a letter from social services;
- a letter from a domestic violence support agency confirming a victim being admitted to a refuge or refusing admission;
- a domestic violence protection notice;
- a court order binding over the perpetrator in connection with a domestic violence offence;

However under the regulation the above forms of supporting documentary evidence must be provided within the 24 month period before any application for legal aid is made. In effect although there was provision for legal aid to be made available to victims of domestic violence, this was on the basis that onerous requirements to provide prescribed forms of evidence had to be met first. An additional barrier was that the evidence required was subject to a 24 month time limit, irrespective of the fact that the prospective respondent to an application posed a long term and on going threat.

It is also noteworthy that section 10 of LAPSO refers to funding of "exceptional cases" which do not fall within the scope of section 9 which of course includes the category of domestic violence. This section read in conjunction with regulation 33 therefore has the effect of prohibiting granting of family legal aid to those victims of domestic violence unable to meet the strict evidential requirements for supporting documentation.

It was against this background that in 2015 Rights of Women (assisted by the Public Law Project) sought to challenge the legality of the restrictive criteria imposed by the government in April 2013 by way of judicial review in the Administrative Court. Despite the extensive research relied upon by Rights of Women indicating that as a consequence of the changes women suffering domestic violence were prevented from accessing the family courts, the High Court held that the changes were lawful. Lang J held that the government's efforts to ensure that the domestic violence exception was strictly confined and not exploited as a route to obtaining legal aid was consistent with the statutory purpose of reducing the scope of legal aid. Rights of Women sought to challenge this decision and successfully appealed.

In January 2016 the Court of Appeal heard the appeal and gave its judgment on 18th February 2016. It was argued on behalf of Rights of Women that there were many situations in which victims of domestic violence found themselves at the receiving end of family proceedings not merely 24 months after any incidents of domestic violence had occurred but 24 months after it was practical to obtain the requisite verification. Moreover the main priority of any victim of domestic violence is to make immediate arrangements for their own and their children's safety and come to terms with the abuse suffered before issuing any legal proceedings. This is unlikely to be a quick process and clearly has an impact on their ability to obtain the documentary evidence of domestic violence in the prescribed form. It was also argued that victims of financial abuse were particularly disadvantaged under the regime as they would not be able to obtain any verification as required under regulation 33.

The Court of Appeal acknowledged that the purpose of LAPSO was to partly withdraw civil legal services from certain categories of cases in order to save money. However the statute's purpose was also to make services available to the great majority of deserving cases, such as victims of domestic violence. Rights of Women argued that Regulation 33 frustrated the purpose of the Act as set out in paragraph 12 of Part 1 of Schedule 1 of LAPSO which makes provision for legal aid to those suffering from domestic violence.

Longmore LJ in giving the leading judgment in the appeal accepted the submission made on behalf of Rights of Women that there was " no obvious correlation between the passage of such a comparatively short period of time as 24 months and the harm to the victim of domestic violence disappearing or even significantly diminishing" [at paragraph 45].

The Court of Appeal also considered the legislative history of LAPSO in its judgment. It was noted that when the bill was first debated in the House of Lords an amendment was passed to insert a provision to the effect that no time limit would apply to the forms of evidence that would be accepted in relation to domestic violence, however that was rejected by the House of Commons.

The appeal was allowed and Longmore LJ held that [at paragraph 47]:

"…regulation 33 does frustrate the purposes of LAPSO in so far as it imposes a requirement that the verification of the domestic violence has to be dated within a period of 24 months before the application for legal aid and, indeed, insofar as it makes no provision for victims of domestic abuse."

A declaration was made by the Court of Appeal that Regulation 33 was invalid insofar as it [at paragraph 51]:

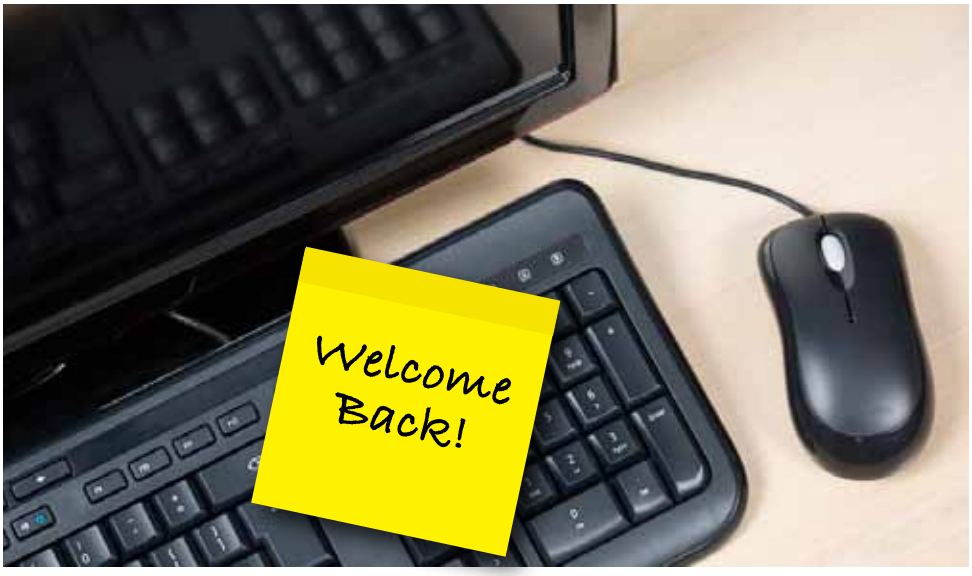
"a) requires verifications of domestic violence to be given within a 24 month period before any application for legal aid; and

b) does not cater for victims of domestic violence who have suffered from financial abuse. "

This Court of Appeal decision is evidently a welcome decision for victims of domestic violence and the family justice system as a whole. In my view the government will have to amend the 2012 Regulations by removing the arbitrary reference to a 24 month period for when domestic violence can be verified by way of documentary evidence. Further careful consideration is also required as to how to assist those experiencing financial domestic abuse, which by its very nature is more difficult to prove. It is now a matter for the Ministry of Justice to consider the important changes to be implemented following the declaration of the Court of Appeal and to perhaps remember the observations of Longmore LJ at the beginning of his judgment in this case that "Legal aid is one of the hallmarks of a civilised society".

By **Paul Wilson** specialising in Employment & Civil Law

Disability and the Management of Sickness Absence



The interaction of the obligations and duties under section 15 and 20 of the Equality Act 2010 to disabled employees and the management of sickness absence raises particular problems for employers.

The duties cut in irrespective of the length of service of the employee unlike the right not to be unfairly dismissed. When an employee is on long-term sick leave, the concern may arise as to whether the employee is a disabled person for the purposes of the Act so that there is a need to proceed with particular caution before taking any management action. Likewise, when an employee is regularly and intermittently absent from work, the worry will be whether disability may be the underlying reason for the intermittent absence so that disability related absence needs to be discounted so as to avoid any potential liability under the Act. As the case law develops the extent of employers' obligations in this context are becoming clearer. It seems clear that a more stringent approach and one that favours employers is being taken to disability rights in this context.

The position when it comes to sick pay has been tolerably clear for some time following O'Hanlon v Commissioners for HMRC [2007] IRLR 404 (CA). In that case the Court of Appeal agreed with the EAT that "it will be a very rare case indeed" where paying sick pay for a period beyond that for which it would be payable to a non-disabled person would be considered to be a reasonable adjustment. It was recognised that there is a general exception to this principle posed by Nottinghamshire County Council v Meikle [2004] IRLR 703 (CA) namely that where the reason for the employee's absence from work is the employer's failure to make reasonable adjustments in the first place, that in those circumstances it is likely to be a reasonable adjustment to continue to pay full contractual pay when the employee's entitlement under the employer's sick pay scheme has ceased. Whilst these cases were concerned with the duty to make reasonable adjustments, it is suggested that the position in terms of liability under section 15 of the Equality Act 2010 is likely, but not necessarily, to be the same. Whilst it may be easy for an employee who ceases to receive sick pay or whose sick pay is reduced to show unfavourable treatment, it is suggested that the employers actions are likely to be considered to be justified for the purposes of section 15(1)(b) for the same reason that the continuation of sick pay would not be considered to be a reasonable adjustment. Part of the justification rationale in every case must be that it is a management function of employers to decide in advance the extent to which they can meet the cost of sick pay entitlements in order to be able to provide such a scheme (if any) and that in any event an enhanced payment of sick pay is something different from the main purpose behind the legislation which is to assist disabled employees to maintain their presence at work.

The case of Doran v Department of Work and Pensions (2014) UKEATS/0017/14/SM provides a valuable insight into how the duty to make reasonable adjustments interacts with the time-honoured question of how long an employer may be expected to keep an employee's job open before taking steps to dismiss in the context of long-term sickness absence. It demonstrates that it is important to give careful consideration to whether a duty to make reasonable adjustments has actually arisen. In Doran the employee had been off work for approximately 5 months and had provided the DWP with fit notes stating that she was not fit for work for another 2 months. At that stage a decision to dismiss was taken. Before that various meetings had taken place with the employee under the absence management procedure and occupational health advice had been sought. The key feature of the situation was that the employee had not indicated that she was fit to return to work or what her intended return date would be.

She argued that there had been a failure to make reasonable adjustments by, for example, not redeploying her or by not temporarily reducing the number of days she would be required to work. The EAT agreed with the ET which dismissed her claim, that on the facts the duty to make reasonable adjustments had not arisen because the claimed adjustments could only be regarded as reasonable adjustments once she was back at work or when she indicated that she would be able to return to work. It follows that where an employee remains certified as unfit to work in circumstances where the employee's return is not being prevented by a failure to make reasonable adjustments in the first place that any such duty will only be triggered when the employee actually returns to work. This keys in with the approach taken in O'Hanlon and Meikle. Once again it is suggested that the outcome is likely (but not necessarily) to be the same in terms of liability under section 15.

Most recently in Griffiths v Secretary of State for Work and Pensions [2016] IRLR (March) 216 (CA) the Court of Appeal grappled with issue of when it might be a reasonable adjustment to discount disability related absence when calculating the trigger point for management action under an attendance management policy. The claimant employee in this case was a disabled person by reason of post-viral fatigue and fibromyalgia. She had a 66 day absence from work, of which 62 days were attributable to her disability. As a result of that period of absence she was given a formal written attendance improvement warning under the policy. The trigger point under the policy was 8 working days in any rolling 12 month's period. The claimant argued for two adjustments, firstly that the disability related absence should have been discounted and secondly that the policy should be modified by increasing the number of days of absence by 12 before the trigger point was reached so that she would be permitted longer periods of absence before management action could be taken compared to non-disabled employees. The ET, with whom the EAT agreed, held that no duty to make reasonable adjustments had arisen and that in any event the claimed adjustments would not have been reasonable adjustments. The Court of Appeal (Elias LJ, Richards LH and McCombe LJ) overturned the finding that there had been no duty to make reasonable adjustments but agreed that the ET had been entitled to reach the conclusion on the facts that the claimed adjustments were not reasonable. The judgment in the case was given by Elias LJ.

The Court of Appeal held that the appropriate formulation of the PCP to which the claimant had been subjected in these circumstances was that she had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. It was clear that PCP would place a disabled employee, whose disability increased the likelihood of absence from work on the grounds of ill-health, at a substantial disadvantage because the employee would find it more difficult to comply with that requirement. It was accepted therefore that the duty to make reasonable adjustments was triggered. That is in itself of assistance to disabled employees bearing in mind that both the ET and EAT had arrived at the conclusion that the duty did not apply. (It is interesting to note that both the ET and EAT were prepared to apply the same kind of reasoning as that applied in Lewisham LBC v Malcolm [2008] 4 All ER 525 to reach this conclusion. That approach had been rejuvenated post the implementation of the 2010 Act by RBS v Ashton [2011] ICR 632 (EAT). The Court of Appeal thankfully held that to use a comparator based on the approach in Malcolm, that is a non-disabled person with the same absence record, was manifestly wrong. The proper comparator for the purposes section 20 is simply a non-disabled person.)

It was noted that the adjustments proposed by the claimant would be capable of reducing the disadvantage resulting from the operation of the policy. Nevertheless, it had been open to the ET to find that those adjustments were not reasonable adjustments. With regard to the first adjustment proposed, the ET had noted that according to the medical evidence because of the nature of the claimant's condition that further periods of potential lengthy absence would be likely to arise and had therefore considered that in that context that it was not reasonable to expect the DWP to discount such an extended period of absence (which was after all nearly 8 times more than that permitted under the policy). It was entitled to reach that view even though the illness had been diagnosed and the treatment plan had been devised during that period. So far as the second proposed adjustment was concerned, there was no obvious point in time by which the trigger point should be extended and the exercise of doing so would be arbitrary. In a case where the future absences were likely to be long, then a short extension of the trigger point was likely to be of little value.

It was observed that where a disabled employee was likely to be absent because of disability related illness for more limited periods of time and only occasionally, that it might be possible to extend the trigger point in a principled and rational way and hence that might be a reasonable adjustment in those circumstances.

While the Court of Appeal stressed that every case will turn on its facts, the steer given in Griffiths is that it is unlikely to be a reasonable adjustment either to discount disability related absence or to extend the trigger point for management action where an employee has been absent from work because of disability related sickness for extended periods of time or when the absence has been long-term. At the other end of the spectrum it might be a reasonable adjustment where the absence is exceptional or where it is intermittent and occasional. It is tentatively suggested that the outcome is likely to be the same if a claim is framed as a section 15 claim. In those circumstances the justification argument would cover the same territory, so to speak, as the reasonableness argument in a section 20 claim. The net effect is that the outcome in Griffiths makes it less risky for employers to take management action under an absence management policy where there has been long-term sickness absence.

Chambers News

David Rhodes

As most of our readers will know David, our senior criminal clerk, passed away on the 5th February. He had put up a remarkable fight against the tumour that he had suffered from for some years. His will to live reflected his desire to succeed in his work and family life. He worked in chambers for over 25 years and always worked for chambers – to improve its standing, to enhance its members and to ensure our professional clients always received a high standard of service.

David will be greatly missed by members of chambers and doubtlessly his support, vocal and otherwise, will also be missed by the Banthams.

HAYLEY SANDERSON

Hayley Sanderson has agreed to take over as senior criminal clerk in chambers. Up to the present time she has been the criminal fees clerk but has assisted with criminal clerking on many occasions. We anticipate that her careful and steady approach will benefit chambers by providing for further development of our professional clients and in particular expansion of our expertise. We wish her well. The editor wonders whether she will continue the senior clerk's tradition of supporting the Banthams?

On the 10th February a packed court room in Bradford, with a link to Leeds, heard an eulogy from The Recorder of Bradford. Michelle Colborne QC replied on behalf of the Bar and Mr Ray Singh on behalf of the solicitors. A copy of the eulogies can be obtained from Val Verity in chambers.

New Member

In January, Chambers welcomed **Anne-Marie Hutton** to the criminal team. Anne-Marie has previously practised as a criminal solicitor with Petherbridge Bassra for many years in Bradford. She is confident that her experience and knowledge gained with them will provide her with a sound basis for beginning life at the Bar. She already has much experience of defending in the crown courts in a wide range of cases. Her time in the police stations has enabled her to develop a rapport with clients quickly, leading to a good working relationship through the court process – a real, practical and direct relationship.

Anne-Marie was born and bred in North Yorkshire and developed a fondness for the Bradford city with its elegant and impressive buildings. No longer having to account for her time between court appearances, her new self-employed "freedom" has (almost) co-insided with the opening of the new Broadway shopping center. Though she states this has concerns for her bank manager, she understands the importance of "winding down" after court!

We welcome Anne-Marie to chambers and wish her well in her new career.

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

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