

New Administrative Court

On the first of May a new Administrative Court opened in Leeds. This is a consequence of the growth of judicial review in all areas of law, including criminal law. To coincide with the opening **Stephen Wood** has recently completed a two part seminar entitled "A beginner's guide to the Administrative Court". The first part dealt with 'appeals by way of case stated' and the second 'judicial review of criminal proceedings'. These talks covered much ground in detail, and clearly explaining the circumstances when either jurisdiction might be invoked, the procedure involved and the available funding. The talks were enhanced by the addition of sample forms, examples of applications and recent case reports (in which SW successfully appeared – obviously!). The notes which accompanied both talks are available both in paper and electronic form. Please contact our Administrator, Helen Craven, if you would like copies.

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I am Moving to Scotland with the Children – Do I Need the Court's Permission?

By Joanna Moody

The short answer is no. There is no statutory requirement of consent or leave of the court in respect of moving a child anywhere within the United Kingdom, regardless of whether or not there is a residence order in force.¹ This was recently confirmed by the Court of Appeal in **Re B (Prohibited Steps Order)**², a case concerning a relocation to Northern Ireland, where Thorpe LJ stated:

'The requirement for judicial sanction in the absence of parental consent is limited to removals from the United Kingdom, and thus a removal from England to Scotland, or to Northern Ireland, does not require the approval of the court. Obviously if there is a major issue between the parents that is litigated in the context of an application for a prohibited steps order, as this present case demonstrates.'

However, as Thorpe LJ identifies, where there is a dispute between the child's parents the correct approach is to seek a prohibited steps order preventing such a move. An alternative approach is to seek conditions to be attached to a residence order where one is in force or is being considered by the court. For the parent wishing to travel, it may be appropriate in some circumstances to seek a specific issue order when faced with a parent who opposes the move.

The Court has the power to make a prohibited steps order or a specific issue order under section 8 of the Children Act 1989, or to attach a condition to a residence order under section 11(7) of the Children Act 1989.

In **Re B** the Court of Appeal was concerned that the Judge at first instance had not been referred to the case of **Re E (Residence: Imposition of Conditions)** [1997] 2 FLR 638, which concerned conditions imposed upon a residence order preventing a move from Blackpool to London. In **Re E** it was held that:

¹Re T (A Child) 28th June 2001, CA (unreported)

² [2007] EWCA Civ 1055

- a) Section 11(7) applies to all four section 8 orders. The wording of the section is wide enough to give the court the power to make an order restricting the right of residence to a specified place within the United Kingdom. However, a restriction on the right of the carer to choose where to live sat uneasily with the general understanding of a residence order.
- b) A general imposition of requirements (subject to exceptional cases) on residence orders was not contemplated by the legislature, and where a parent was a suitable carer, a condition of location of residence was an unwarranted imposition on the right of the parent to choose where they live within the United Kingdom.
- c) The court should consider where a child should live as one of the relevant factors where there are cross applications for residence, but it should not be divorced from the question of with whom the child should live.
- d) If the case was finely balanced the proposals of each parent would assume considerable importance. If one parent planned to remove children against their wishes to somewhere less suitable it was an important factor to take into account.

In the case of **E v E (Shared Residence: Financial Relief: Yardstick of Equality)**³, the Court of Appeal overturned a trial Judge's decision to allow a mother to relocate from Bognor to Bexhill-on-Sea. Wall LJ criticised the court below for accepting the mother's proposal 'without any proper analysis of its consequences [and] implications for the children.' He stated at para 32:

'The matter can, we think, be tested by taking an analogy with the line of case which begins with Poel v Poel [1970] 1 WLR 1469 and finds its most recent expression of principle in Payne v Payne [2001] 1 FLR 1052. A mother with a residence order wishes to relocate abroad with her children. The children's father objects. The function of the court is to decide whether or not the relocation is in the best interests of the children.'

³ [2006] 2 FLR 1228, CA

In that context, the judge's duty is to subject the mother's relocation proposals to rigorous scrutiny and (assuming the mother to be acting bona fide) to balance their benefits for the children and the effect on the mother of refusing her application, against the effect on the children of the disruption of their relationship with their father. The fact that the mother does not need the formal leave of the court to move to Bexhill is beside the point.'

It follows that in considering internal relocation cases the court must have the child's welfare as its paramount concern which will include consideration of the welfare checklist pursuant to section 1(3) of the Children Act 1989. In order to decide the welfare issue the court must scrutinise the plans of the travelling parent, and carry out the necessary balancing exercise of the benefits and detriments to the child.



Joanna Moody practises in family law.

Fireman falls "Fowl" of Heavy Legal Burden

By Matthew Rudd

Mr Barron, who was a fireman, purchased a house together with Miss Fowler 17 years before they separated. Mr Barron paid all of the deposit of nearly £30,000, and paid the mortgage, council tax and utility bills throughout the relationship, yet the Court of Appeal found that, in the absence of any agreement to the contrary, he hadn't rebutted the presumption of equal beneficial shares following the joint legal ownership.

In **Fowler -v- Barron [2008] 2 FLR 831** the Court of Appeal overturned the judge of first instance who had given Miss Fowler nothing by using resulting trust principles (i.e. Mr Barron had paid all of the deposit which resulted in him having a 100% share of the house). The Court of Appeal applied **Stack -v- Dowden [2007] UKHL 17** and found that, unlike in the latter case (where the split was 65/35), there was nothing exceptional about the facts, which would shift the presumption that joint equal beneficial ownership would follow joint legal ownership.

The facts in **Fowler** were found to be different from **Stack** in the following

ways:

- There was evidence as to mutual wills;
- There was no evidence that Mr Barron and Miss Fowler had any substantial assets apart from their income and their interest in the property;
- Miss Fowler made no direct contribution to paying for the property.

The Court of Appeal found that it was not reasonable to infer that the parties intended that Miss Fowler should have no share of the house if the relationship broke down. That might leave Miss Fowler dependent on state benefits and housing for support. The way that she used her own income indicated that the parties largely treated their incomes and assets as one pool from which household expenses would be paid.

It was argued on behalf of Mr Barron that a finding of a half share would leave Miss Fowler better off than a cohabitee who had contributed a fixed share of the purchase price, as there it might be inferred that there was a common

intention to share ownership in the same proportions as the contributions.

The Court of Appeal dealt with this by stating that the reason why the result in the latter case may be different is because that is what the court infers to be the parties' intention. It would have been open to them to agree to divide the ownership in any other way. The basis, on which **Stack** proceeds, is that the court's jurisdiction is based on the parties' common intention, expressed or inferred. The parties' autonomy to devise a solution suitable for their circumstances is preserved.

Fowler is a stark example of a case where fairness and reasonableness still have no place in this area of law.



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Video conferencing

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Nuptial agreements: Say “I do” then sign-up...

By Robert Cole

It was always said that pre-nuptial agreements were not worth the paper that they were written on and indeed that agreements made after marriage would be subject to the strenuous investigation of the court against the backdrop of section 25 Matrimonial Causes Act 1973.

However, the recent decisions of **Crossley v Crossley [2007] EWCA 1491**, which dealt with a claim in light of a pre-nuptial agreement and **MacLeod v MacLeod [2008] UKPC 64**, that considered the impact of post-nuptial agreements may give rise to the view that such agreements are worth writing, particularly the latter.

Of course cases are always subject to their facts and **Crossley** was peculiar by reason of the background circumstances. This was a whirlwind romance; the star-struck lovers met in June 2005 were engaged by September 2005 signed their pre-nuptial agreement in November 2005 and were married by January 2006. Fourteen months later it was over.

The husband was a 62 year old property developer with assets of £45 million; the wife was 50 years of age and had assets of £18 million. This was his second marriage and her third. They had therefore been round the mill and each had teams of lawyers advising on the agreement that was entered into.

The pre-nuptial agreement provided that each should walk away from the marriage with whatever they brought to it and that neither would apply to any court in any jurisdiction for financial provision of any kind arising from their marriage. Notwithstanding this, the wife made a claim by Form A on 11th September 2007.

This was responded to by a summons from the husband asking the wife to explain why her claim should not be resolved in accordance with the terms of the pre-nuptial agreement. At a preliminary hearing the wife asserted that she was not bound by the terms of agreement as the husband had failed to make full disclosure of assets in Andorra and Monaco. She therefore sought a full valuation of all assets and the filing and reply to questionnaires. Bennett J rejected the wife's approach and whilst he required both parties to file a Form E, he decided that there

should be an early evaluation of whether the pre-nuptial agreement was valid and would be relevant conduct so as to be binding on the parties. The wife appealed that decision.

Thorpe LJ rejected all the wife's arguments. His Lordship found that Bennett J had not ordered that the summons be considered as a preliminary issue but that its presence was one of the factors under section 25; the existence of the agreement cannot oust the court's obligation to apply section 25. However, the fact that this was a short, childless marriage with two mature parties of considerable independent wealth, who had each previously been married and divorced gave rise to a very strong case that a possible result of the section 25 exercise will be that the wife would receive no further financial award.

Thorpe LJ commented at paragraph 15 *“...if ever there is to be a paradigm case in which the courts will look to the prenuptial agreement as not simply one of the peripheral factors of the case but a factor of magnetic importance, then it seems to me that this is such a case.”*

Thorpe LJ also observed that there is a strong argument for legislation to clarify the status of pre-nuptial agreements, given the pressure coming from the European Union to tackle the differences that exist on property-sharing between the member states.

The case therefore re-iterates that the presence of the agreement will be a relevant section 25 factor, especially in a short, childless marriage.

However, do not expect the courts to get carried away in enforcing pre-nuptial agreements. Whilst the decision in **MacLeod** was not dealing with pre- (or ante-) nuptial agreements, Baroness Hale stated, *“The Board takes the view that it is not open to them to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense...There is an enormous difference in principle and practice between an agreement providing for a present state of affairs which has developed between a married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and un hoped for future.”*

The distinction is drawn in **MacLeod** at paragraph 35 between pre and post-nuptial agreements on the basis

that any financial arrangement made between spouses will be a maintenance agreement capable of being varied under section 35 Matrimonial Causes Act 1973; whereas an agreement made before the marriage will not.

This distinction is reiterated at paragraph 37, where it is made clear that an agreement made at any time during the marriage which makes provision for the parties if and when living separately is a maintenance agreement: not just agreements made at the time of or in immediate contemplation of separation.

The conclusions that can be drawn are that a pre-nuptial agreement is not binding on grounds of public policy (until Parliament acts on the anticipated recommendations of the Law Commission). However, that agreement may still be taken into account by the court. As such, whilst one party cannot hide behind a pre-nuptial agreement so as to defeat a claim on divorce, neither can the other party expect the court to completely disregard the conduct that gave rise to its existence and the contents of what was agreed.

Practitioners should warn their clients that where the marriage lasts and where there are children, it is more likely that the court will make an order with greater regard to the resources and needs of the parties and only apply the terms of the pre-nuptial agreement where it satisfies those factors.

In contrast an agreement made after the marriage will be deemed binding other than in circumstances of undue influence or fraud (the **Edgar** factors), allowing for the fact that the court retains the power to vary maintenance agreements under section 35. It should also be borne in mind that a post-nuptial agreement will not be open to challenge on the ground that the court would have provided differently to the terms of the agreement.

As such, if a client wants greater certainty of a binding agreement (so long as entered into with proper disclosure, legal advice and at arm's length) they are better to sign it after their honeymoon rather than before their wedding day!



Robert I G Cole practises in family law.

Hearsay Evidence: Strasbourg's line in the Sand

By Peter Hampton

In 480 BC King Leonidas I of Sparta and his 300 warriors faced the Persian Emperor Xerxes and a force 'beyond computation' in battle at Thermopylae, Greece. Leonidas refused numerous offers of peaceful servitude to Xerxes despite the knowledge that he faced certain death. Leonidas 'drew a line in the sand' in defence of Greece and in the name of democracy. Their sacrifice, in the face of hordes of skilled Persian warriors, became inspiration for the Greeks, in the defence of their country, and ultimately paved the way for the first democracy.

Part 11, Chapter 2 (s.114-136) of the Criminal Justice Act 2003 came into force on the 4th of April 2005. The legislation was built upon the provisions of the Criminal Justice Act 1988, sections 23-28. Those practitioners who appear before criminal courts on a regular basis will be more than familiar with the significant impact of the more recent legislation. Section 114 contains the gateways through which hearsay evidence may be admitted, including the well-meaning, but much abused, 'safety-valve' at s.114(d). Section 116 deals with the position where a witness is dead; unfit; outside the United Kingdom; cannot be found or is in fear. The detail of the provisions are available in criminal textbooks, I do not repeat them here.

Sections 114 and 116 widened the scope of circumstances within which hearsay evidence could be adduced. It was perhaps inevitable, given the adversarial system within which we operate, that s.114(d) would be taken advantage of, and misapplied, sometimes successfully. The courts, of course, have no option but to truly and faithfully apply the legislation inflicted upon them. The legislation has resulted in a rash of applications to the appeal courts. **In R v Cole; R v Keet [2008] 1 Cr. App. R. 5, CA** the Court of Appeal stated that 'where the source of the evidence is unavailable to be cross-examined and where the evidence of the missing witness is the

only, and potentially decisive, evidence Article 6(3)(d) does not lay down an absolute rule that evidence of a statement cannot be admitted.' **In R -v- Sellick & Sellick [2005] EWCA Crim 651** the court stated that 'Article 6(3)(d) is simply an illustration of matters to be taken into account in considering whether a fair trial has been held.'

The tension between the domestic legislation and Article 6 of the European Convention of Human Rights (the right to a fair trial, including the right of a defendant to examine or have examined witnesses against him) came to a head in **Al Khawaja & Tahery -v- The United Kingdom (Application No's 26766/05 and 22228/06) [2009] ECHR 26766/05**. The case came before the European Court of Human Rights as conjoined appeals and judgment was given on the 20th January 2009.

In **Al-Khawaja** the applicant was a consultant physician. He was accused of indecently assaulting two female patients. One of the complainants had died before trial. The judge at first instance stated that the contents of her statement were crucial to the prosecution on count one as there was no other direct evidence of what took place – 'putting it bluntly, no statement, no count one.' The judge allowed the evidence to be admitted at trial and the applicant was convicted. The applicant appealed unsuccessfully. A petition to the House of Lords was refused.

The European Court of Human Rights held that the applicant's right to a fair trial had been violated. The ECHR held that the conviction was based solely or to a decisive degree on the evidence of the witness concerned. 'Decisive' being interpreted as 'the sole or decisive basis for each applicant's conviction.' The ECHR held that the counterbalancing factors relied upon by the Government (i.e. the ability to cross-examine witnesses and to give evidence on the relevant topics etc) did not counterbalance the prejudice caused. The ECHR gave a similar ruling in **Tahery's** case.

What, if any, is the effect of **Al-Khawaja** on the admission of hearsay evidence before domestic courts in the future? In the author's opinion the following cumulative principles can be distilled from both the domestic and European jurisprudence – (i) the admissibility of evidence is primarily for the national law. However, legislation must be read and given effect in a way which is compatible with Convention rights; (ii) evidence must normally be produced at a public hearing and the defendant must be given a proper and adequate opportunity to challenge and question a witness; (iii) the assertions made in **Sellick** and **Cole** must be closely examined. The right to cross-examine a witness who provides the sole and decisive evidence upon which a conviction is based is not merely 'an illustration of matters to be taken into account in considering whether a fair trial has been held.' It is a fundamental principle upon which a fair trial is based; (iv) where the defendant himself is responsible for the absence of the witness he will not enjoy the same protection under Article 6; (v) where the evidence is not the only or decisive evidence in the case, the evidence is likely to be admissible if the domestic legislation is satisfied.

In slightly less dramatic fashion than Leonidas, Strasbourg has drawn its 'line in the sand'. The impact of hearsay evidence on the right to a fair trial, and the right to have the opportunity to cross-examine a witness, has been re-emphasised. It remains to be seen whether the line will remain or whether it is washed away by wave upon wave of future legislation.



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The Science of Human Memory and the Extent to which it is Admissible

by Nikki Peers

The British Psychological Society Research Board produced Key Points in its Guidelines on Memory and the Law, June 2008 (go to www.bps.org.uk and search 'memory and the law'). They provide a useful introduction to The Science of Human Memory, as follows:

Memories are records of people's experiences of events and are not a record of the events themselves. In this respect, they are unlike other recording media, such as videos or audio recordings, to which they should not be compared;

Memory is not only of experienced events but it is also of the knowledge of a person's life, i.e. schools, occupations, holidays, friends, homes, achievements, failures etc. As a general rule, memory is more likely to be accurate when it is of the knowledge of a person's life than when it is of specific experienced events;

Remembering is a constructive process. Memories are mental constructions that bring together different types of knowledge in an act of remembering. As a consequence, memory is prone to error and is easily influenced by the recall environment, including police interviews and cross-examination in court;

Memories for experienced events are always incomplete. Memories are time-compressed fragmentary records of experience. Any account of a memory will feature forgotten details and gaps, and this must not be taken as any sort of indicator of accuracy. Accounts of memories that do not feature forgetting and gaps are highly unusual;

Memories typically contain only a few highly specific details. Detailed recollection of the specific time and date of experiences is normally poor, as is highly specific information such as the precise recall of spoken conversations. As a general rule, a high degree of very specific detail in a long-term memory is unusual;

Recall of a single or several highly specific details does not guarantee that a memory is accurate or even that it actually occurred. In general, the only way to establish the truth of a memory is with independent corroborating evidence;

The content of memories arises from an individual's comprehension of an experience, both conscious and non-conscious. This content can be further modified and changed by subsequent recall;

People can remember events that they have not in reality experienced. This does not necessarily entail deliberate

deception. For example, an event that was imagined, was a blend of a number of different events, or that makes personal sense for some other reason, can come to be genuinely experienced as memory (these are often referred to as 'confabulations');

Memories for traumatic experiences, childhood events, interview and identification practices, memory in younger children and older adults and other vulnerable groups all have special features. These are features that are unlikely to be commonly known by a non-expert, but about which an appropriate memory expert will be able to advise a court;

A memory expert is a person who is recognised by the memory research community to be a memory researcher. It is recommended that, in addition to current requirements, those acting as memory expert witnesses be required to submit their full curriculum vitae to the court as evidence of expertise.

In reality, however, the admissibility of memory evidence has been severely restricted following the decisions in **Regina v J.H & T.G. (Deceased) (2005) EWCA Crim 1828** and **Regina v S, Regina v W (2007) 2 All ER 974**, when the Court of Appeal Criminal Division considered, in both cases, expert evidence provided by Professor Martin A. Conway, Professor of Psychology, Institute of Psychological Sciences, University of Leeds (M.A.Conway@Leeds.ack.uk).

In Regina v J.H. & T.G (Deceased), the court accepted that there was, within the defence report, an explanation of the formation of childhood memory and the features usually to be found in memories of childhood experience, before the age of about seven years old (childhood amnesia). The court said this amounted to true expert evidence, and thus was capable of providing the jury with admissible information on matters that would be outside their usual knowledge and experience, applying the principles of admissibility set out in **Regina v Turner (1975) QB 834; (1974) 60 Cr App R 80 CA.** However, this approach was qualified as being exceptional on the basis that “it will only be in the most unusual of circumstances that such evidence will be relevant and admissible at the trial of allegations of child abuse. The evidence would be relevant only in those rare cases in which the complainant provides a description of

very early events which appears to contain an unrealistic amount of detail. That, in the experience of this court, does not happen often”.

However an expert’s analysis of the accuracy or inaccuracy of witness statements made by adult complainants about incidents in childhood is likely to be inadmissible: **Regina v S, Regina v W.** Such questions, it was held, were critically for the jury to consider upon careful reflection on a claimed memory of distant childhood events. “*Save where there is evidence of mental disability or learning difficulties, attempts to persuade the court to admit such evidence should be scrutinised with very great care”.*

It is of practical note, however, that such expert evidence may still provide defence counsel with useful material upon which to negotiate with the prosecution, cross-examine or make jury comment. Further, Professor Conway based his assessments exclusively on the contents

of witness statements; he discounted any suggestion that an expert in this field should make any assessment of the character or demeanour of the witnesses, and hence positively discouraged experts encountering the individuals giving evidence on the basis that “his opinion about the accuracy of their memories would be influenced by his assessment of their character”. As a result, an expert assessment of live witness evidence would appear inappropriate.



Nikki Peers practises in criminal law.

The Criminal Justice and Immigration Act 2008

By Abigail Langford

The Criminal Justice and Immigration Act (CJIA) 2008, received Royal Assent on 8th May 2008. Despite its title, the act has very little to do with immigration, in fact only one part of the act specifically deals with it. The purpose of the CJIA was to assist with the government’s reform of the Criminal Justice System, including the political hot potato of prison over-crowding.

The Act comprises of 12 Parts and 28 Schedules, and makes important changes to sentencing, whilst introducing ‘new offences’ and amending existing provisions in relation to bail and youth justice. There are also minor amendments to other procedures within criminal practice. Much of the Act is now in force, with sections coming into force in a piecemeal fashion since July 2008.

One of the most significant changes of the CJIA relates to the reform of

the dangerous offender sentencing provisions introduced by the Criminal Justice Act 2003. In his Prison Review in 2007, Lord Carter identified Imprisonment for the Public Protection (IPP) sentences as being one of the primary causes of prison over-crowding, with statistics suggesting that there could be as many as 11,500 IPP prisoners by 2014. The problem seemed to be large numbers of prisoners with indeterminate sentences. It therefore became eminently clear that reform to these provisions was needed.

Section 13 and schedule 5 of CJIA significantly amends s225 of the CJA 2003. One of the most important changes is the removal of the mandatory requirement to impose IPP. This has now been replaced with judicial discretion. The position is that where a defendant is to be sentenced for a serious specified offence the court has the power, but no obligation, to

impose IPP.

The Court must first be of the opinion that the defendant poses a significant risk of serious harm to members of the public, by committing further specified offences. Secondly one of two further conditions must be satisfied: either at the time the offence was committed, the defendant had previously been convicted of an offence specified in Schedule 15A of the CJA 2003; or the notional minimum term to be served would be at least two years. Therefore a defendant with no relevant previous convictions can only be sentenced to IPP if the offence merits imprisonment for four years or more.

The CJIA also amends the provisions in relation to extended sentences by creating a discretionary power to impose an extended sentence, and also by increasing the immediate

custodial term to 4 years (section 15 CJIA).

At the lower end of the spectrum of change are minor amendments to procedure. One such amendment, is the change of the 'slip rule'. The CJIA (schedule 8 paragraph 28) amends section 155 of the PCCSA 2000 by doubling the time limit for a Crown Court to vary any order made at the time of sentence to 56 days. This amendment came into force in July 2008.

As well as reforming existing provisions the CJIA introduces 'new' offences, namely nuisance or disturbance on National Health Service premises, and possession of "extreme pornography".

Part 4 of the Act concentrates on procedure, including amendments to Legal Aid, bail in summary proceedings and extended powers of

'Designated Caseworkers' of the Crown Prosecution Service. Perhaps most noteworthy to those who practise in the Magistrates Court is the amendment of provisions of the Bail Act (s52 and schedule 12).

When considering a bail application in summary only proceedings, magistrates can only refuse bail firstly where the defendant has previously been granted bail and has failed to surrender, and therefore the court believes he will fail to surrender for the current offence; and secondly, where the defendant was on bail at the time of the alleged offence. If the defendant does not have a previous offence committed on bail, the court can only refuse bail if it is satisfied that the defendant will cause physical or mental injury to another, or cause fear for such injury. The overall effect seems to be that it will be more difficult for Magistrates to refuse bail in general terms of failing to surrender or the commission of further offences,

unless the defendant has previous convictions for doing so, or the court is satisfied of physical or mental injury.

Whether the objective in reducing prison over-crowding has been achieved remains to be seen. In the meantime we can all continue to keep up to date with the new provisions, no doubt just in time for them to be changed again.



[Abigail Langford practises in criminal law.](#)

No Stay, No Bonus? By Ian Brown

Bonuses are in the news at present, but courts and tribunals have been grappling with claims of unpaid bonuses for years. On this subject, there have been a dozen or more significant decisions reported in the last 10 years. Each case is, of course, decided on its own facts but the legal position in particular sets of circumstances has become clearer.

The devil is in the detail. Is the bonus a contractual entitlement or discretionary? If discretionary, what aspect of the bonus scheme is discretionary? e.g. the provision of a scheme, the calculation of the bonus or the criteria for entitlement to it. Is a discretionary bonus "wages" and therefore subject to the provisions of the Employment Rights Act as regards unauthorised deductions? If contractual, are the terms subject to the test of reasonableness under the

Unfair Contract Terms Act 1977? What about employees who have earned the bonus but leave before payment? What happens to the bonus scheme that entitles employees to shares in the business when the business transfers?

It is not possible to deal with all these matters in a short article, but a recent unreported case in the Employment Tribunal outlined below contains a common set of circumstances where some of these issues were considered.

The claimant, a financial adviser, was employed by the respondent, an insurance company, for some 10 years before resigning on 31 December 2007. His contract of employment stated that he would receive a basic salary together with the opportunity to earn a performance bonus. With regard to the bonus the contract stated: "Subject to satisfying the eligibility criteria, you will be eligible to participate in the company's annual bonus arrangements. The level and terms of the bonus scheme will be set at the company's sole discretion and may be varied from time to time. The company reserves the right to discontinue the bonus scheme at any

time without compensation. Full details of the current scheme are set out in the Human Resources section on the company's intranet."

The details on the intranet site indicated that the bonus for any year would be calculated in February of the following year, and payable on 31 March in that year (the bonus payment date). It was stated that an individual would only be eligible for a bonus if he or she was employed by the company on the bonus payment date and that no pro-rata payments would be made in respect of part years served. Accordingly, the claimant did not receive a bonus for the year ending 31 December 2007.

It was accepted by the Respondent that the claimant's performance in 2007 had been such as would qualify for a bonus, subject to his eligibility. It was also not challenged that the claimant had earned and been paid bonuses in each of the previous six years and that other employees doing similar work had received bonuses of 8 or 9% for the year ending 31 Dec 2007.

The claimant argued that the scheme was contractual, that he had earned the bonus by working throughout 2007, that the terms set out on the intranet had not been brought to his attention and therefore did not form part of his contract. In any event, he argued, they could not be regarded as “written terms of the contract” and were therefore not authorised deductions under Section 13 of the ERA. If the bonus scheme was held to be discretionary, he contended that this was a perverse exercise of that discretion.

Alternatively, he argued that the term of the contract the company relied upon for the failure to pay the bonus due had rendered a contractual performance substantially different from that which was reasonably expected, and therefore the term fell foul of the requirement of reasonableness under Section 3 of the Unfair Contract

Terms Act 1977. (That section applies as between contracting parties where one of them deals as a consumer or on the other’s written standard terms of business).

The Employment Tribunal found that the employee’s entitlement to participate in the bonus scheme was contractual. However, that entitlement was subject to the scheme being in existence at the relevant time (at the discretion of the company) and to the conditions of it. The conditions relating to eligibility were set out on the company’s intranet. In the case of **Kerr v Sweater Shop (1996) IRLR 424** the EAT held that notice on a notice board was not sufficient to amount to either “written terms of the contract” or “notification to the worker in writing”. In the present case the Tribunal was satisfied that terms of contract notified in a document on the company’s intranet accessible through the

computer on an employee’s desk amounted to “notification in writing” for the purposes of Section 13 of the ERA. The provisions as to eligibility were written contractual terms.

As regards the claimant’s contention under Section 3 of the Unfair Contract Terms Act (that the term unreasonably restricted the company’s liability for a breach of contract), the same point was raised in the case of **Commerzbank AG v Keen (2007) IRLR 132**. Mr Keen was held not to have been dealing as a “consumer” but simply as an employee, and the terms of his employment contract were not the company’s “standard written terms of business”, that is the business of insurance. Therefore, the Unfair Contract Terms Act was not applicable.

Ian Brown has recently retired from practice and as an Employment Tribunal Judge.

Chambers News

His Honour Judge Jonathan Gibson was appointed to the Bench in July of last year, having been made an Assistant Recorder in 1999. He joined Broadway House in 1982 and primarily practised in criminal law. He presently sits in Crown Square in Manchester. His Honour also continues to sit on the Mental Health Review Tribunal, a task he first undertook in 2002. He joins His Honour Judge Rodger Thomas QC, also from these chambers, sitting on the Northern circuit.

Congratulations to **Sophie Drake** who was recently made a Recorder. She expects to be sitting in Sheffield Crown Court. Miss Recorder Drake presently practises in criminal law.

New Members

Chambers welcomes Jamie Hill QC who joined us in the new year as a door tenant. A member of Fountain Chambers in Middlesborough, he practises in criminal law. He was called in 1984, made a Recorder in 2002 and a silk in 2006. We hope his legal judgment is better than his sporting, as illustrated by his devotion to Newcastle United.



Chambers congratulates Laura Thomas (formerly Daykin) and Abigail Langford on the completion of their pupillages. Both



have accepted invitations to join chambers. Laura works in family, civil and employment law while Abigail now practises in criminal law.

New Pupils

Lewis Donnelly has joined chambers as a pupil. He is under the watchful eye of Ian Miller who is instructing him in family law.



Kathryn Walsh has also joined as a pupil. She is working with Michelle Colborne in criminal law.



Both our pupils have completed their first six months and are accepting work in their own name.

We wish our new members and pupils all the best for their future.

Any views/quips expressed in the newsletter are those of the editor (David McGonigal) and should not be taken to represent those of chambers. No article may be reproduced without the permission of the author.

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