2 KING'S BENCH WALK NEWS

Issue 5 – Summer 2017

Chambers news and announcements

Welcome

William Mousley Q.C., Head of Chambers

Welcome to the Summer 2017 newsletter. 2 King's Bench Walk have been active in the community recently and have provided support and guidance to a number of organisations. Inside you will read about our participation in the London Legal Walk, and our sponsorship of the Horatio's Garden Drinks at the Chelsea Flower Show. Horatio's Garden is the nominated charity of Chambers. Our barristers have also been present at the Strictly Ball, which raises money for Macmillan Cancer Care and we have participated in the Ruby Ball and Law Rocks, and will be taking part in the London Prudential Cycle Ride.

I hope you will find the articles inside topical, interesting and helpful; again our members of Chambers have contributed to produce a newsletter which is useful and accessible.

Please let us know if we can improve the content of our newsletter – it is important to us. We continue to strive to be a progressive and forward thinking set of Chambers, providing an exceptional level of service to our professional and lay clients.

This is the fifth edition of the quarterly 2 King's Bench Walk Newsletter. In this issue, Marion Smullen tells us of a recent case involving corrupt police officers; Helen Easterbrook tells us to be careful about our data; Nick Barnes gives us an insight into Vesting Orders; Fiona McCreath talks about the Children Act; there is analysis into the FA appeals panel, the Queen's Speech and the new Vulnerable Witness Training from John Ward-Prowse, James Culverwell and Jeremy Wright respectively; and there are the usual updates and news, and a peek behind the door of the Clerks' Room.

If you have any comments or thoughts about the Newsletter you would like to share, or if you would like further information about the articles or authors, please email TMcCarthy@2kbw.com.

In this issue

From the clerks' room

The A Team

Daren Milton

It's been a busy three months since our last newsletter.

In addition to the day job, members of the team have visited Manchester, Birmingham, Portsmouth, Winchester and Reading (not to mention Mexico & New York for Charlie and Chloe)! We've attended our in-house family team supper, our sponsored charity event for Horatio's Garden at the Chelsea Flower Show, had a staff dinner and been to black tie events in London and Hayling Island. It's fair to say that the days of waiting for the phone to ring are well and truly over for the clerks.

I'm fortunate to lead a team of dedicated, hard-working and conscientious individuals whose combined input is paramount in the success of 2KBW. From Chris and Stephen's reliable and unflappable natures to Megan's charm and efficiency, from Charlie's effective productivity to Simon's proficiency. Alice is valuable and trustworthy and Scott is both energetic and committed and whilst Chloe's fledgling career is in its infancy, she shows real maturity and has a very bright future with us.

I suppose with 120 years of clerking experience at 2KBW it's no wonder things are going well and the clerks will not stop trying their best, which ultimately is all we can ever ask of one another.

With client care at the pinnacle of our endeavours and whilst we live within a system which is forever changing, permanently challenging and faithfully unpredictable, our clerks will do their level best to help clients, lay clients and principals as best we can.

I'd like to welcome Jamie Culverwell into chambers as our newest addition, upon the successful completion of his pupillage. With the celebration of David Jenkin's 50 years at the Bar this year 2KBW has a bright future and a sense of real loyalty.

I'll finish by saying to those of you that joined us last Friday 30th June at Sea Containers House for our drinks party, I hope you all had as enjoyable an evening as we all did. To those of you that couldn't make it, check out the photos to see what you missed and to those of you that weren't invited…. Get on our mailing list!

Have an enjoyable summer.

Profile: Barry McElduff

Barry McElduff is an experienced Criminal team member at 2KBW and was called in 2002. He is regularly instructed in serious and challenging cases, and is both a Grade 4 Prosecutor and RASSO approved.

He has appeared alone in cases involving attempted murder, knifepoint rape and serious gun crime. He regularly prosecutes and defends in multi-complainant cases of sexual offending.

He has secured acquittals in a number of complex cases involving allegations of drugs supply or serious violence and delivers seminars and lectures to both Prosecution agencies and defence lawyers.

What was your route to the Bar? I was running a different kind of bar – a friend owned a restaurant in Ireland and after finishing an English degree, I worked for him. I decided I could either continue working really late nights and drinking too much or I could have a real change of direction and end up working late nights and drinking too much.

Do (or did!) you have any particular role models?

[*A moment of silence*]

KS: It's a tough question.

BM: It is a tough question. My role model at the Bar is and was my first pupil-master, a certain Bill Mousley, whatever happened to him? Bill taught me that one of the most important things at the criminal Bar is to know when to stop asking questions.

KS: Is that a hint?

BM: Yes. However, he put this most keenly and sharply into practice in my first month with him, as we always seemed to finish court in time to watch (sadly) England's march to the 2003 Rugby World Cup.

What is your most challenging case to date? In 2010 I was led by Kate Lumsdon in a three month trial involving allegations of neglect towards the residents in a care home for elderly people with dementia. It was, if not the first prosecution in the country under the Mental Capacity Act 2005 then certainly one of them. In addition to the many thousands of pages of prosecution evidence, the defendants produced an enormous amount of material that needed placing before the jury. At times it felt as if we needed a team of 20 barristers. Of course it was just us, our client, and our very hard-working solicitor pitted against the army of the police, the CPS, and so on. Our client was acquitted on some but not all of the charges, and the case ultimately found its way to the Court of Appeal where the convictions that had arisen were quashed.

It was a very difficult and sensitive case. In respect of many of the residents who were said to have been neglected, their adult children were called as defence witnesses to speak to the high quality of care they had received.

What about your most memorable day? My first day on my feet. The 6th April 2004, Fareham Magistrates' Court. My client was charged with threatening to commit criminal damage. As I approached him to shake his hand and introduce myself I was immediately struck by the Loyalist paramilitary tattoos on his knuckles. Despite our conflicting backgrounds we bonded over our

thirst for justice in his cause. None of the prosecution witnesses turned up. The prosecutor sought an adjournment and I robustly resisted the application, praying in aid as he had told me his good character, at which point the prosecutor discreetly slid across the desk a rather hefty wodge of antecedents. I immediately apologised to the court for inadvertently misleading them and modified my submissions in that respect.

Happily though the magistrates refused the application and justice was done. Upon leaving court I somewhat exasperatedly said to my client "Why on earth did you say you had no previous convictions?" to which he replied, "I've made my peace with God and he's wiped the slate clean".

I shook his hand once more and muttered under my breath, "The Police National Computer takes a different view."

What attracted you to 2KBW? Well, firstly, they offered me an interview at a time when I was contemplating death by suffocation under my rejection letters.

KS: This sounds familiar.

BM: It's never too late to review your tenancy. I honestly felt good about the place the minute I walked in for my first round interview and I'm happy to say 15 years later, even though the clerks have now pinched the best room, I feel no different. I was a little stumped when they asked me why I wanted to practice on the Western Circuit, at that stage my research had not revealed to me that there were such things as circuits. Happily I wasn't marked down too heavily for my answer "Because it's the closest one to Ireland".

Who has been the best junior that you have led? That's the easiest question you've asked. They've all been rubbish.

Barry was speaking to Kaj Scarsbrook, who he is currently leading in the Operation Daraga trial, a multi-handed drugs conspiracy case at Bournemouth Crown Court. For more details on Barry, see his chambers profile.

News

The Bar Mess wins Law Rocks! 2017

Richard Whitcombe

In 2013 Richard Hutchings and I put together a band called "The Bar Mess" and entered "Law Rocks". Law Rocks is a global "battle of the bands" in which bands comprising lawyers and representing their respective firms/Chambers compete against each other for the benefit of many and varied charitable causes (see the link below). The format is ingeniously simple: the organisers provide the venue, the publicity and the sound system and the bands rehearse, put together a set and each undertake to sell 40 tickets at £20 a throw to their colleagues and friends. All the takings get put into a pot and each year the winning band gets a lot of money for their chosen charity and everybody else's charity gets a little, but not much, less. We've played every year since 2013, not only in the events at London's 100 Club but also at "unplugged" events at The Bedford in Balham, and up to June this year we had raised around £4K.

On Thursday 22nd June this year we came top out of five bands and won our event. We - that's Richards Hutchings and Witcombe, Raphie (a Belgian lawyer and friend) and Pedro (the band's "ringer") on drums - are chuffed to pieces. We love playing our music, and for us the chance to do so at a prestigious venue with a first class sound system once or twice a year is more than enough, but the fact that this year we've come out on top is something of which we're very proud. On Thursday 9th November we'll be playing at "Law Rocks Unplugged" once again, and at some point in early 2018 we'll be competing back at the 100 Club against the winners of the other 2017 events at a "Best Of" contest, in preparation for which we will be raiding our not inconsiderable back catalogue as well as conjuring up some big new sounds.

https://lawrocks.org/news/2016/nyc

London Legal Walk

A team from 2KBW recently took part in in the London Legal Walk on Monday 22 May. 2KBW helped the Harrow Law Centre raise over £3000 through sponsorship for the event.

Horatio's Garden drinks

2KBW supported Horatio's Garden at their recent Chelsea Drinks Party, held at the National Army Museum. 280 guests, including members of chambers, joined the charity for an evening of celebration, entertainment and informative talks with designers, patients and patrons.

London Prudential Cycle Ride

The latest event for the 2KBW Cycling Team sees them taking part in the London Prudential RideLondon 46 Sportive[1], again in aid of Horatio's Garden. On 30th July, the team will tackle the 46-mile route on closed roads, beginning at the Queen Elizabeth Olympic Park in East London and heading towards the Surrey countryside before finishing on the Mall.

If you're in London on the day, watch out for 2KBW's distinctive royal blue and orange jerseys as we inevitably lead the peleton into the finishing straight.

The team features star riders such as the all-round hard man and *superdomestique* Kelly Brocklehurst, the variably in-form climber Kaj Scarsbrook, and of course the ginger-bearded star sprinter Richard Sedgwick.

[1] Not a race! – *Ed.*

Chambers Summer Party

On Friday 30 June, 2KBW held a Summer Party on the roof of Sea Containers House, London, a hugely enjoyable evening, well attended by members of chambers and those who instruct us alike.

Criminal update

Powers and privileges: corrupt Police Officers

Marion Smullen

I prosecuted a case at Southwark recently involving a serving police officer. One of the counts on the indictment involved a count of Corrupt or improper exercise of police powers and privileges contrary to section 26 of the Criminal Justice and Courts Act 2015. This is a relatively new piece of legislation and neither I nor defence counsel could find any relevant case law. The defence took a point at the end of the prosecution case as to the exact ambit of the phrase "powers and privileges" as defined by the Act. The Act is badly drafted but section 26(10) of the Act states that the "powers and privileges of a constable" include the duties of a constable. The defence point was that for an offence to be committed there must be a clear mandatory duty imposed upon an officer as a constable.

The prosecution case was that the officer had failed to record and properly store a quantity of cash which had been handed to him by a member of the public. This occurred in a shopping centre and the agreed policy between the police based at the shopping centre and the management company dealing with the centre was that lost property should be directed to the Concierge desk and not taken into police possession. At the time the cash was handed to the officer, it appears that the Concierge desk was closed.

The prosecution case was that the officer, having taken possession of the cash, should have made a record initially in his pocket note book and then at the police station. The cash was handed to the officer on the 23rd April 2016 and he put the money in his trouser pocket. He said he hadn't worn those trousers again and that he had simply forgotten it was there until he was handed a disciplinary notice on the 17th May 2016.

The prosecution produced evidence as to the MPS policy about property found on a street but the Judge concluded that there was no case to answer because we could not show there was a statutory duty or one that was a national policy on recording lost property found on private premises. I think he was wrong because the language of the section does not restrict the terms "powers" or "duties" in such a way. I argued that you had to look at the language of section 26, which would cover MPS policy. The judge ruled against the prosecution but he allowed the addition of a count of theft in place of the section 26 count. I had to advise as to whether we would appeal his decision and because of the additional theft count, the CPS decided that they would not appeal.

A Call for Help

Helen Easterbrook

Have you ever stopped to think about the amount of time we spend connected to the internet? To each other? When was the last time you checked your phone? Your email? Are you reading this electronically?

We are, now more than ever, living in a digital world and for our clients that means more evidence that could convict them or acquit them. For devices that we can't live without, I would suggest that many of us don't understand them quite as well as we maybe would like to.

In this short article, I would like to cover a couple of the more common misconceptions and misunderstandings surrounding mobile device evidence and to ask your help in determining where our collective knowledge could do with improving.

Misconceptions and misunderstandings

Not all data is created equal. I often see call data schedules listing text messages, phone calls, call-forwarded calls and GPRS (or data sessions) all in the same schedule. These normally have start times and start cells for each event. The obvious inference is that the device was somewhere within the coverage of that cell at the time listed. The problem is that this is only true for voice calls, text messages and call-forward events… data sessions are very, very different. Without getting into the technicalities, for data sessions the only safe statement of fact that can be made, is that a device is within the coverage of that cell at or before the start time. In other words, if there are no other call events in the preceding hours it may have connected hours earlier and moved a long way since!

There are different types of cell-site survey. It may seem obvious but there is an evidential difference between a survey which tests the suggestion that cell 1234 provides coverage at an incident location and a survey that aims to discover the coverage of cell 1234. Similarly, there is a difference between a survey which tests the coverage at an area at a specific time, and one which relies on historic survey data. Probably one of the best examples of the latter is when considering offences committed at festivals. A survey conducted while the festival is ongoing will encompass the temporary cells installed to provide coverage during the festival. A survey conducted weeks or even days after that festival finishes would return very different results. Beware the expert who states a cell provides coverage at a particular location without backing it up with the survey maps!

IMEI numbers… how many digits? The criminal fraternity are undoubtedly tech-savvy and I would suggest we are seeing more examples of SIM swapping, dual SIM phones and possibly even IMEI tumbling phones. When much of our role consists of finding the small inconsistencies, a single digit difference in an IMEI between a handset download and a call schedule can seem like a godsend. The problem is that these differences are not always what they seem. The unique section of an IMEI is only 14 digits long and may be followed by a check digit. This check digit is generally not transmitted so is often listed as a zero on call schedules. On handset downloads however, you will normally see the correct check digit. To make matters worse, in data session records you may see a sixteenth digit! In this case, the fifteenth and sixteenth digits tell the network the software version the phone is running. In other words, when checking IMEI numbers it is the first fourteen digits you need to focus on!

Our collective knowledge

20 years ago, phone calls were made from the landline in the hall, your desk at work, or a payphone in the street. Now we can surf the web while mid-air or switch the heating on at home while we're still on the Tube. All of this is producing data which is being stored, and to which law enforcement agencies potentially have access thanks to the Investigatory Powers Act 2016. As lawyers, I would suggest we are playing catch up.

Having taught as part of the cell-site survey course for the College of Policing for the past few years I know the amount of information which is available to us, if only we asked for it. What I need your help with is in understanding the problems we face, particularly as defence lawyers. Do you struggle to understand the changing technology? Are you unsure how to challenge continuity of phone data? Do terms like TOR, Bitcoin and the dark web have you reaching for Google? If so, can I ask that you send me your questions? I want to understand the problems you are facing in court and when dealing with clients with a view to delivering a number of lectures over the next year, in Chambers or at your place of work. I hope to work with a number of organisations to look at the training we need to keep pace with that being delivered law enforcement.

Civil update

Vesting Orders

Nick Barnes

Facts

I recently advised on vesting orders in an insolvency matter. I have altered and simplified facts for the purposes of this article.

The property was held thus:

Freeholder "A"	
Leaseholder "B"	
Sub-leaseholder "C"	Mortgage "D"

B was a company that went into liquidation. B owned the lease. My client, C, owned the sub-lease. It was subject to a mortgage with D.

The liquidators of B sought to disclaim the lease in B's name under section 178 of the Insolvency Act 1986 ("IA86").[2] That section ends the rights, interests, and liabilities of B in respect of the property but it does not directly affect the rights or liabilities of A or C or D.[3] The sub-lease stays in being so far as needed. It does, however, free B of its obligations under the lease and the sub-lease. This means that:

- there is no-one against whom C could enforce her rights under the sub-lease (e.g. to maintenance of the premises);
- there is no one against whom A could enforce his right (e.g. to service charges); and
- these circumstances may make the sub-lease unmortgageable with a harmful effect on the property value.

[2] Insolvency Act 1986, s.178(2)
[3] Insolvency Act 1986, s.178(4)

There was a risk of forfeiture by A. C may still be in possession if the lease covenants are complied with, but who would fulfil those in lieu of B? The lease and sub-lease terms are not directly enforceable between A and C or D.

The problem or ill that a vesting order solves is the disconnect caused between the freeholder (A) and the sub-lessee (C).

A complication was the service of B's disclaimer notice. There are specific leasehold provisions relating to disclaimer notices.[4] Briefly, it does not take effect unless it has been served on C or D and there has been no application under IA86 section 181 within 14 days from the service date of the notice or the court directs that the disclaimer shall take effect. B must send the disclaimer itself 7 business days "after the date of the notice of disclaimer[5]" unless "(a) the liquidator is satisfied that the person has already been made aware of the disclaimer and its date, or (b) the court, on the liquidator's application, orders that compliance is not required in that particular case".[6]

The date of the notice was 16 October 2016 but only sent out by B on 14 November 2016. D received it on 19 November 2016 but it did not take any action. C did not receive the notice. He first became aware of the notice through correspondence with D on 27 March 2017. C or D must apply within three months of becoming aware of, or receiving a copy of a notice of the disclaimer *whichever is the earlier*.[7]

The disclaimer notice arose under the Insolvency Rules 1986 ("IR86"). On 6 April 2017, the Insolvency (England and Wales) Rules 2016 ("IR16") came into effect. Therefore, the disclaimer notice came under the IR86 and any application would need to be under the IR16.

In this case, C or D[8] may make an application for the property to vest in either of them. On such an application, the court may "make an order, on such terms as it thinks fit, for the vesting of the disclaimed property".[9] Again, there are specific provisions for leasehold property[10] that concisely mean the lease vests on the same terms. Once made, the order automatically vests the lease in the applicant without any need for any formal assignment or transfer.[11] C or D must take the property "as is" including all estates, burdens, or interests (including any mortgage) created by B.

Since both C and D were entitled to apply for a vesting order, the court must choose to which applicant it will be made. There is no statutory order, although a court will favour a mortgagee over an under-tenant, an under-tenant over a guarantor and a guarantor over another person.[12]

If C or D *declined* to accept a vesting order, they lose all interest and security in the property.[13] The court may then vest it in anyone able to perform B's covenants freed from any estates, burdens, or interests (including any mortgage) created by B.[14] Interestingly, there is no authority to vest a disclaimed lease in a landlord (A) subject to a sublease,[15] but once a lease has been

[4] Insolvency Act 1986, s.179
[5] IR86 Rule 4.188(1)
[6] IR86 Rule 4.188(5)
[7] IR16 Part 19.11(2)
[8] Insolvency Act 1986, s.181(2): "*An application under this section may be made to the court by— (a) any person who claims an interest in the disclaimed property, or (b) any person who is under any liability in respect of the disclaimed property, not being a liability discharged by the disclaimer.*"
[9] Insolvency Act 1986, s.181(3)
[10] Insolvency Act 1986, s.182
[11] Insolvency Act 1986, s.181(6)
[12] *Re AE Realisactions (1985) Ltd* [1988] 1 WLR 200
[13] Insolvency Act 1986, s.181
[14] *C.f. Hackney LBC v. Crown Estate Commissioners* [1995] EGCS 167
[15] *Re ITM Corp Ltd (In Liquidation), Sterling Estates v. Pickard UK Ltd* [1997] BCC 554

disclaimed, A would have the right to immediate possession of the property (subject to any sublease).

Outcome

On the face of it, C had until 18 February 2017 to apply for vesting orders and therefore she had lost her right. D was similarly no longer entitled to make a vesting application. However, there was no evidence B had sent the notices to C. C was not aware of them until 27 March 2017, in which case he had until 26 June 2017 to make the application.

An application was made and a vesting order was made in favour of C supported by D and unopposed by A (or B).

As an aside, there was a charging order on B's lease of the property. If a vesting order was made, C would take the property subject to that burden. However, my Instructing Solicitor obtained an email from source that satisfied the court that the charge was not enforceable against the lease.

Family update

Whatever happened to Planned and Purposeful Delay in Children Act cases?

Fiona McCreath

The phrase fell from judicial favour following the President's comments in *Re M-F (Children)* [2014] EWCA Civ. 991, wherein he referred to the use of the phrase 'purposeful' when describing delay. He stated the phrase should no longer be used as it can be misleading, and the relevant test is described at s.32(5) of the Children Act 1989, which allows an extension to the period in which the case must be resolved, "*only if the Court considers that the extension is necessary to enable the court to resolve the proceedings justly*".

So how is this translating into practice? In a recent case in which I represented a Local Authority, the paternal grandparents of a 2-year-old child sought Special Guardianship orders. The Local Authority's plan, supported by the Children's Guardian, was for adoption. The child had had very little contact with the grandmother since birth, and had only met the grandfather once. The Local Authority relied on a negative assessment of the grandparents and a fair amount of time was spent in evidence examining the reasons why there was no existing significant relationship between the grandparents and the child, and their understanding of the potential challenges which they faced in forming a permanent and committed relationship with a very damaged child. The Judge concluded that they lacked the commitment and skills to do so, despite clearly wanting to do the right thing. Love, sadly, was not enough.

During the case, both the Social Worker and Children's Guardian relied on research carried out into disruption to placements under Special Guardianship Orders. The research shows that 6% of placements under Special Guardianship Orders broke down, compared to 1% of adoptive placements. But interestingly, of that 6%, it was shown that 70% involved children who had been placed in kinship placements, where there was no existing relationship between the children and the Special Guardian. This was perhaps no great surprise, given the results of the 2014 report from the Department of Education (*Investigating Special Guardianship: experiences, challenges*

and outcomes: Research report November 2014[1]), which identified the 2 key factors in placement disruption following the making of Special Guardianship Orders as being:

- the age of the child (the greater the age making the risk of disruption higher) and
- the strength of the bond at the time of the making of the Special Guardianship Order (the stronger the bond making a successful placement more likely.)

So it appears that in the years following the introduction of Special Guardianship Orders, an important factor in the success or failure of such an order is the pre existing relationship between the child and the prospective carers.

The problem, as all practitioners will be aware, is that often these are members of the extended family who, for whatever reason, have been prevented from having that relationship, often through no fault of their own. They also have a habit of coming late to the proceedings, sometimes even as late as the Issues Resolution Hearing, when the Local Authority puts forward a plan for adoption, and reality hits the parents.

But how does this fit with the statutory 26-week deadline imposed on the Court and all parties within which Care proceedings must be concluded? The time limit is not optional, unless the case falls within the qualification of s.32(5) of the Children Act.

There is a real danger of rushed decisions, leading to placements of children with family members, who are virtual strangers to them. There is a vast difference between the training and very careful preparation of prospective adopters, and that of prospective Special Guardians, which once the assessment is completed, may be non-existent. Factor in the requirement for the Court to be satisfied that "nothing else will do", before a plan for adoption is approved, and there is a risk that a positive Special Guardianship assessment can lead to a mistaken belief that a family placement automatically overrides adoption. This approach was heavily criticised by the Court of Appeal in *W (A Child)* [2016] EWCA Civ. 793, where a decision had been made to remove a child from prospective adopters with whom she had been placed for 17 months, and Special Guardianship Orders were made in favour of the grandparents who had never met the child.

Whichever party you are representing in Care Proceedings, it is worth remembering that although the "no delay" principle in s.1(2) of the Children Act 1989 must be considered in every case, the child's welfare may require planned and purposeful delay, to ensure that the child's proposed plan for permanence is successful. Those of us old enough to remember the days before the Public Law Outline, will be familiar with cases lasting well over a year, with children subject to rolling interim care orders whilst rehabilitation to parents or placement with family members took place. This had the advantage of going at a pace which could be dictated by the particular circumstances of a case, rather than a statutory deadline of 26 weeks, and this allowed a relationship to develop between the child and prospective carer, at the child's pace.

Members of the extended family may have been positively assessed as potential Special Guardians. Any assessment of family, friends or connected persons, must consider the applicant's relationship with the child. If there is no existing relationship between them, then potentially, final orders could be made and Care Proceedings concluded before that relationship is built up.

It's always worth considering an application for an extension of the 26-week period under s.32(5) of the Children Act 1989, if you think your case falls into one of the three exceptions to the 26-week rule as set out by the President in *Re S (A Child)* [2014] EWCC B44 (Fam.), specifically paragraph 33(2)(c) where a realistic alternative family carer emerges late in the day.

[1] Jim Wade, Ian Sinclair, Lucy Stuttard and John Simmonds, *Investigating Special Guardianship: experiences, challenges and outcomes*, Reasearch report November 2014 (Department for Education, 2014).

If you are representing applicants for Special Guardianship Orders, or parents supporting this, and the lack of an existing relationship is being relied on by the Local Authority and/or the Children's Guardian to oppose your application, again consider applying for an extension to allow the bond to develop.

And if you are acting for a Local Authority, be ready to provide evidence from the social worker/assessor that the lack of an existing relationship between the prospective carers and child does not present an unacceptable risk of placement disruption if you are seeking to oppose an application for an extension.

The Court may well require some detail regarding how the Local Authority propose supporting and enabling the relationship to build up before placement, particularly if no application for a Supervision Order being made. Finally, make sure the Special Guardianship support package includes the services and support to be offered to the carers and child, to nurture and develop a relationship, if it is not already well established.

Special Guardianship Orders have undoubtedly been a very positive addition to the options facing a Court when a child cannot be cared for by its parents. Perhaps a little more time spent on nurturing the relationship between the child and potential carers whilst still under the umbrella of Care proceedings, with the child still separately represented and judicial scrutiny of any developing relationship, would prevent at least some of the placement breakdowns which occur, and the consequential devastating effect on the child of yet further disruption to their ability to form lasting, healthy attachments and relationships for the rest of their lives.

Finally, although the term "planned and purposeful delay" has fallen from favour, the principle survives, and it is worth remembering that the President also observed in *Re M-F*:

> "the 26 weeks rule 'is not, and must never be allowed to become, a straightjacket, least of all if rigorous adherence to an inflexible timetable risks putting justice in jeopardy', and my endorsement (para 29) of Pauffley J's warning in *Re NL (A child) (Appeal: Interim Care Order: Facts and Reasons)* [2014] EWHC 270 (Fam.), [2014] 1 FLR 1384, that 'Justice must never be sacrificed upon the altar of speed.'"

Articles

A day out of the ordinary

John Ward-Prowse

Jacob Rowe (*name changed for this article*) is an ordinary lad aged 13. He lives with his parents and sister somewhere in Portsmouth. He attends a local school and like many boys of his age he loves football. He supports Portsmouth FC and belongs to a football club in Portsmouth – East Lodge (the club James Ward-Prowse started with, aged 5). Jacob trains with East Lodge twice a week including Saturdays and plays competitively on a Sunday. He is a striker.

One Sunday in April 2017 Jacob played for East Lodge under 13s against a local team – Portchester under 13s. It was an away game. It was a highly competitive game against testosterone charged pubescents. It was refereed by a local 14-year old boy.

By half-time no goals had been scored. It was a hard-fought game between two teams that matched each other. Jacob was in a running battle with one of Portchester's centre backs who throughout the game was niggling Jacob with the odd kick and elbow off the ball. Jacob complained to the referee about the treatment he was being subjected to but it fell on deaf ears.

Having received another kick from the centre back Jacob warned him that if he did it again he would hit him. The centre back did it again. The red mist descended and Jacob turned and punched him in the face causing him to fall. Looking down and seeing his opponent writhing, crying and bleeding profusely from his mouth Jacob felt sick.

Players surrounded Jacob pushing him and complaining. Both team managers ran on to the pitch trying to defuse the situation that was developing. The referee called Jacob to him and showed him a red card. For the first time in his career Jacob was sent off. Distraught and in disbelief at what he'd done, Jacob left the field of play.

Subsequently, the injured Portchester player was taken to hospital where he received stitches to a laceration to his bottom lip. Jacob returned home where his parents and sibling consoled him.

Despite being only 13, in behaving in the way he had Jacob had to face a sanction. The sanction is decided by the Football Association who have regional offices across the country administering youth football.

Having received the referee's report, the Football Association submitted to East Lodge a form required to be completed by Jacob's parents. This form sets out the 'offence' with which Jacob had been charged – 'violent conduct'. Jacob had to indicate on the form whether he accepted the charge or wished to contest it. Understandably in the circumstances, having discussed the matter with his parents and his coach, the form was returned indicating that Jacob accepted the charge.

Subsequently, to their horror, Jacob's parents received a letter from the Football Association informing them that the Disciplinary Committee had met and had decided that Jacob's transgression was deserving of a sine die ban from all football, such decision being reviewed in 2 years' time. Jacob was devastated to the point that he was physically sick. His world had been taken from him.

Not all was lost however. Jacob's parents on re-reading the decision saw that there was a right of appeal against the decision, a right which they understandably exercised on their son's behalf.

The appeal was held at a hotel in Southampton. The appeal was heard by three members of the Football Association. They are assisted by a legally qualified clerk who advises on procedure and the regulations, which are extensive.

On arrival, I met Jacob's parents. Jacob wasn't in attendance. We were spoken to by the clerk who introduced himself and explained the procedure for the hearing that day that would comprise of the Football Association's regional office's representative who would present the appeal. This representative would be accompanied by the chairperson of the tribunal who imposed the sine die ban.

On walking with the clerk and Jacob's parents to a room in the basement of the hotel where the hearing would be conducted, the procession was joined by two ladies. One, tall and thin with a concerning pallor; the other short, with a 'blue' rinse reminiscent of Molly Sugden.

We were shown into a room where, behind a table, were three bespectacled elderly gentlemen. All were donning what were, no doubt, FA ties and blue blazers with the Three Lions badge. This was the appeal committee. The chair explained that they had travelled from different parts of the country – London, Somerset and Kent.

The clerk introduced the parties to the committee. The tall thin lady was the representative from the FA's regional office. The other lady was the chair of the tribunal who had imposed the sine die ban.

I addressed the committee first. It was perhaps the first occasion I have ever appeared before an appellate tribunal where I didn't have to concern myself with the statute or regulations, but rely on common sense. I didn't have to cite any authorities but drew the committee's attention to the inequity and disproportionate approach of the tribunal's decision to impose a sine die ban on a boy of 13, when we could all recall the sanctions that both Eric Cantona and Luis Suarez were subjected to for kicking a spectator and biting an opponent respectively that didn't come anywhere near such a ban.

In response, the FA's representative (who was clearly afflicted by some sort of bronchial condition) tried to justify the tribunal's decision. However, the FA's position became obviously untenable when the tribunal's chair disclosed that, when considering the sanction to be imposed on Jacob, the tribunal didn't have any paperwork before it but relied upon this being read to them over the telephone!

The tribunal's chair was asked by the appeal committee's chair whether the tribunal had seen the photographs of the injury to the Portchester player. She replied that they hadn't. The chair asked if the tribunal had had Jacob or his parents (or one of them) before it. She said no.

The committee considered their decision for half an hour and when we returned the chair announced that it was a unanimous decision that the appeal would be allowed and a two match ban substituted to run from that day.

Jacob's world had been returned to him. His parents were delighted, as were his club.

This appeal was an interesting experience and a welcomed change from my usual diet of child abuse and dysfunctional families. I hope to repeat the experience although I doubt whether I will ever have such a straightforward appeal again.

This is very nice work – if you can get it!

The Queen's Speech: what's in it for us?

James Culverwell

On 21 June, Her Majesty the Queen delivered her 64th Queen's speech. This was a rather more restrained affair than the pomp and ceremony which usually accompanies the State opening of Parliament (and may or may not have provided the opportunity of wearing an EU-themed hat).

Mirroring the gossip about the Queen's millinery choices, the speech was naturally dominated by Britain's exit from the EU, but aside from Brexit, what does this extended two-year session have in store for the legal sector?

Courts Bill

Although the abrupt conclusion to the previous parliament led to the abandonment of the Prison and Courts Bill 2016, it has been resurrected in part for the new session. Under the Courts Bill, the government proposes to reform the courts and tribunal system to improve access to justice, making better use of technology and modernising working practices. The briefing notes for the Speech explain that one of the tools for making better use of technology will be a system allowing those accused of less serious offences to plead guilty, accept a conviction and pay a statutory fixed penalty online. This will be an 'opt-in' system, and would apply to minor offences such as railway fare evasion.

The Bill also aims to 'improve judicial working conditions' making more senior judicial positions fixed-term. It is further proposed that judges will be 'deployed more flexibly to improve the opportunities for career progression'.[1] There is no mention of a rebalancing of pensions between the rungs of the judicial ladder, which those on the Circuit and High Court Benches may say would be the most effective way to improve working conditions.

Finally, it is said that the Bill will bring to an end direct cross-examination of alleged victims of domestic abuse by the alleged perpetrators in the Family Courts. It seems that this will be implemented through an extension of the use of 'virtual courts', echoing proposals for rape victims in the criminal courts put forward under the previous Lord Chancellorship.[2]

Draft Domestic Violence and Abuse Bill

Following one of the themes of the Courts Bill, the draft Domestic Violence and Abuse Bill aims to 'transform our approach to domestic violence and abuse' ensuring victims come forward 'safe in the knowledge that the state and the justice system will do everything it can to both support them and their children, and pursue their abuser'.[3]

The flagship provision of this legislation will be the creation of a Domestic Violence and Abuse Commissioner. The responsibilities of the Commissioner will include standing up for victims and survivors, raising public awareness, monitoring the response of statutory agencies and local authorities, and holding the justice system to account in tackling domestic abuse.

From a criminal perspective, the Bill will strengthen sentencing powers for domestic abuse involving children to reflect the life-long impact such behaviour can have. Beyond the criminal

[1] Queen's Speech 2017: briefing notes, 21 June 2017, p.40.

[2] … although regular readers of this publication will recall that Ms Truss somewhat exaggerated the implementation of those proposals: "Don't Truss-t everything you've heard: pre-recorded cross-examination of rape victims", *2 King's Bench Walk News*, Issue 4, Easter 2017.

[3] Queen's Speech 2017: briefing notes, p.37

justice system, there will be a new consolidated civil protection and prevention order regime. All the measures in the bill will be underpinned by a statutory definition of domestic abuse.

These proposals are aimed at tackling an issue which has long pervaded homes across the country. It is hoped that they will assist in furthering the recent trends in domestic abuse prosecutions and convictions, which are at their highest recorded level (100,930 prosecutions and 75,235 convictions in 2015/16).[4]

Civil Liability Bill

A legislative proposal which ought to interest not just personal injury practitioners but all practitioners insuring vehicles, is the Civil Liability Bill. Measures in this Bill are aimed at tackling the 'rampant compensation culture' which has crept into this country over recent years, largely in the form of low-value whiplash claims.[5] It is suggested that the measures will, on average, result in a £35 reduction in motorists' insurance premiums.

The Bill proposes to ban offers to settle made without support of medical evidence in an apparent attempt to prevent fraudulent claimants obtaining compensation for non-existent or exaggerated injuries. One of the major difficulties with this proposal is that, although the medical report would add a hurdle in the form of an extra fee, whiplash diagnoses are notoriously easy to fake because the examination relies so heavily on the patient's feedback.

Following years of debate and speculation, further proposals relating to the valuation of whiplash claims have been put forward. The Bill will introduce a fixed tariff for whiplash injuries lasting up to two years. Whilst this will *prima facie* provide a level of certainty for claimants and defendants in an area with much disparity between apparently similar injuries, it may overreach a vast number of other factors which ought to be taken into account when calculating compensation. These include the severity and intensity of the pain, the impact on the claimant's work and domestic life, and the presence of additional symptoms.

Whilst these proposals have admirable intentions, one major contributor to the increase in opportunistic and false claims has not been addressed. Practitioners will be familiar with clients who would not have made a claim but for a 'cold-call' from a claims management company or solicitors firm. Perhaps tighter regulation in this sector could achieve a similar result without jeopardising the compensation for genuine claimants.

Conclusion

All the aformentioned proposals are of course only that: proposals. On the whole they have commendable intentions but it remains to be seen whether they will survive both the passage through parliament, and the inevitable interference of budgets, technological constraints and lobbying.

[4] *Ibid.,* pp.37-38

[5] Despite huge advances in vehicle safety, road traffic accident ('RTA') personal injury claims have increased by 50% in the last ten years: *ibid*., p.39.

Vulnerable Witness Training: Saturday 17 June and Sunday 24 September

Jeremy Wright

Soon, every advocate who appears in a criminal case involving a vulnerable witness will need to have had specialist training. Five members of 2KBW (Matthew Farmer, Elizabeth Bussey-Jones, Jeremy Wright, Robin Sellers and Russell Pyne) have now gone through the necessary training course, and are now ready, willing and able – and authorised - to provide the same training to others.

The five members of Chambers are acting as a team to provide the necessary training to all Chambers' criminal practitioners, any non-criminal practitioners who would find it useful, and others who may be interested. Our Family Team are keen to be involved. We identified two dates – Saturday 17th June and Sunday 24th September. On the 17th June successful training sessions were held at 3 Guildhall Walk. The 24th September sessions will be held at 2KBW.

The training consists of—

i. A fair chunk of preparation well in advance of the day when you will be coming to the course - those responsible for designing the course recommend allowing at least 8 hours to prepare. In this time, you will be watching and reading materials on the Inns of Court College of Advocacy website, reading a criminal case study which you will find there, and then preparing written cross-examinations of three witnesses, before submitting them at least a week in advance of the course;

ii. receiving and considering the cross-examinations, which will be circulated within each proposed training group (one trainer, four or possibly five trainees); and

iii. on the day (24th September), being part of a training group. The course length is about 3½ hours, so we aim to run courses in both the morning (09:00 – 12:30) and afternoon (probably 13:00 – 16:30).

This is, obviously, a big commitment, especially for the trainers. It may be that you are not immediately filled with enthusiasm – about both the amount of preparatory work, and the prospect of giving up half a day of hard earned weekend time with friends and family. On the positive side, the five of those already trained, and those who undertook training on 17th June, found the course interesting, challenging, and useful. Since the training is soon going to become compulsory in any event, we thought that it is a good idea to get it done sooner rather than later, in the good company of members of 2KBW.

Chambers cases

See 2kbw.com/home/news for the most up to date news of chambers cases

Crime

Alex Kettle-Williams defends high profile case of alleged rape, assault and theft

Alex is instructed by AB MacKenzie in a case at Blackfriars Crown Court where the defendant denies raping two separate women, 15 years apart. The case has received media attention.

Sally Howes Q.C. and Russell Pyne secure conviction in murder trial

Sally and Russell, instructed by the CPS, successfully prosecuted a soldier who murdered his ex-partner by stabbing her 11 times. The jury unanimously convicted after deliberating for 2½ hours. Further details can be found here.

William Mousley Q.C. leads Elisabeth Bussey-Jones in manslaughter defence trial

Bill and Elisabeth are instructed by Roach Pittis Solicitors for the defence in a 'one-punch' manslaughter case at Winchester Crown Court. The case involves the death of a man following an altercation after a night out on the Isle of Wight. For more details see here.

Immigration

Islam Khan succeeds in notable case before the Immigration and Asylum Tribunal

Islam Khan successfully argued before the President of the Immigration and Asylum Tribunal that a supplementary decision made by the Secretary of State for the Home Department made whilst Judicial Review proceedings were ongoing was unlawful. For more details see here.

Training and Events

Chambers offers a variety of training opportunities, both in the form of seminars and in-house training to address specific requirements.

Training for West Midlands CPS

Elisabeth Bussey-Jones and Barry McElduff (both Grade 4 and RASSO-approved prosecutors) presented a three hour seminar to senior lawyers and investigators at West Midlands CPS in Birmingham on Tuesday 6 June 2017. It was a very well-attended seminar and prompted a lively discussion on aspects of serious sexual offences trials, with a particular forcus on issues relating to disclosure, joint enterprise, indictment drafting and s.41 applications.

Ms Bussey-Jones and Mr McElduff, along with Michael Selfe, were responsible for launching 2KBW's seminar programme in 2005. If you would like to learn more about this seminar or other seminars and presentations at 2 King's Bench Walk, please contact Tracey McCarthy at tmmccarthy@2kbw.com.

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