2 KING'S BENCH WALK NEWS

Issue 7 – Winter 2017

Chambers news and announcements

Welcome

William Mousley Q.C., Head of Chambers

Welcome to the Christmas 2017 newsletter.

2017 has been an excellent year for 2 King's Bench Walk. We merged with 1 Inner Temple Lane in January 2017 and now have 74 barristers. The merger has gone extremely well and has strengthened our presence in London and on the Western Circuit. We continue to attract barristers of the highest calibre, and are delighted to have our three pupils from this year taken on as tenants.

This edition of the newsletter in particular congratulates David Jenkins on his fifty years at the Bar, an august achievement.

Our involvement in the community remains steadfast— with participation in charity events, cycle rides, football matches and rock concerts. We look forward to similar participation in 2018.

Our members of Chambers have contributed current and specialist articles which I hope you find helpful, and of use. As always, we work towards improving the content of our newsletter. Please let us know if you have any suggestions for improvement. We continue to strive to be a progressive and enlightened set of Chambers; providing an exceptional level of service to our professional and lay clients.

Finally, may I wish you all a peaceful and happy Christmas.

In this 7th edition of 2 King's Bench Walk news, Elisabeth Bussey-Jones writes the second of her series of articles on the hearsay provisions and Islam Khan writes on comparative judicial restraint in four different jurisdictions. John Ward-Prowse gives a unique perspective on the "Piegate" incident after Sutton United v. Arsenal in the FA Cup and James Culverwell tells us of a recent property case. In addition, there are the usual news, case notes and updates.

In this issue

From the clerks' room

Tempus Fugit

Daren Milton

I'm getting old. To my mind it was only a couple of weeks ago I wrote my clerk's room blog speaking of our pending merger yet incredibly, it was 52 weeks ago.

It's been a seamless transition, many have said.

As with all transitions the truth is that a lot of hard work goes unnoticed and the real credit must go to my clerks' rooms, both in London and Portsmouth. Job roles have changed, new responsibilities for some of the team and new regimes introduced. It's the way they have adapted and the way they have coped with change that's been the most impressive part of the continued successes we enjoy.

It's easy to forget that the self-employed Bar is a unique animal, filled with talented people, learned in what they do but who are, by definition, singular. It's the clerks that are the mortar between the bricks, the conductors, the business managers. Our clerks at 2KBW are unique too and I'm very proud of them. Every member of my team says they feel as if they've been working together for far longer than a year, each finding their place within the organisation swiftly, encouraging and learning from each other and creating their own piece of the 2KBW jigsaw.

We share a common goal. That's what makes my team rare and that's what sets them apart from other clerks' rooms.

I have high expectations of my clerks and barristers alike and they know it. There's no more "them and us" here—it's we. That's what gives 2KBW its unprecedented quality and outstanding character.

We are blessed with an esteemed history and are excited about our future. Whilst it's hard to imagine 2KBW will ever lose its Western Circuit heritage, it's our modern approach, adaptability, willingness to branch out and our sense of camaraderie that enables us to embrace change, spread our wings and move forward as one.

We have some exceptional talent here at 2KBW—not only in our membership—so here we are a year on, with a kind of newly formed clerking team, 22 new-ish members of chambers and slightly lived-in, modernised, premises but importantly, we've made many new friends and with our nationwide presence we've an ability to look after our clientele, old and new, like never before.

To many, this transitional year has had the appearance of having gone really very smoothly indeed. And they would be right, it's been like a duck gliding on water…

Thank you for all your support this year, and I wish you all a prosperous and happy 2018.

Profile: David Jenkins

David is one of the most experienced advocates on the Western Circuit. He was called in 1967 and is celebrating 50 years at the Bar. He is well known across the circuit and in London. He equally defends and prosecutes, and is a Grade 3 prosecutor on the RASSO list.

I was born in Braunton, Devon, on 17 April 1945 and attended Oakmount Prep School in Southampton; Bembridge School on the Isle of Wight; and Southampton University.

My father, John Jenkins, was called to the bar in 1949 aged 32 and joined Southampton Chambers, then in Cumberland Place. He was an accomplished public speaker having won the Observer Mace speaking competition and a political scholarship to Oxford, which he never took up as he joined the Warwicks at the start of the war.

My father never drove and my first introduction to the Western Circuit was driving him around. I remember driving him to Dorchester aged 17 and staying at the Antelope, where I was invited to join the Circuit Mess for the evening. The senior members of the Bar were all ex-forces and let their hair down.

David after University

John joined 2KBW in the early 1960s, and I was called to the Bar in 1967. I did my first six months' pupillage at Office Row with Ian Starforth Hill Q.C. He had a mixed civil and criminal practice and was a fearless prosecutor. My second six months was at 4 Pump Court with Michael Hutchison Q.C. who had a heavy civil practice and was later appointed to the Court of Appeal.

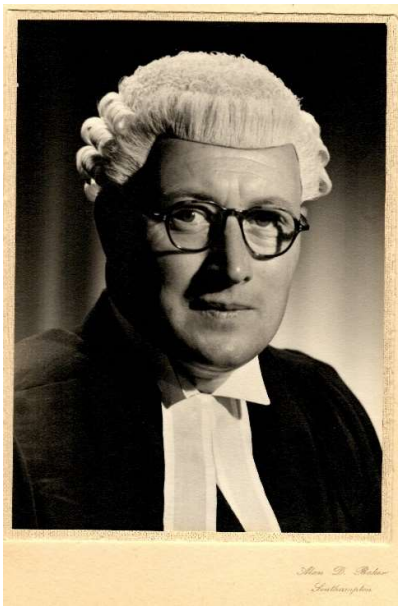
I joined 2KBW in 1968 after marshalling for Lord Justice Sir John Stephenson Q.C. at Leeds and on the Northern Circuit. I also sat for a few weeks with Lord Simon (then President of the Probate, Divorce and Admiralty Division of the High Court).

When I joined 2KBW, Raymond Stock Q.C. had just taken over as head of chambers from Sir Norman Skelhorn Q.C., who had been appointed DPP. Chambers in those days was on the second floor of 2KBW and the clerks' room with John Walton as Chief Clerk was in the hallway. We were a small set, predominantly on the Western Circuit, and I was about the twelfth or thirteenth member to join.

We all had mixed practices and I had a diet of undefended divorces, personal injury and contract cases, planning appeals, licensing, company winding up cases and crime. My first introduction to the latter was going to the Bailey to take a rape trial out of the list for Ian Kennedy Q.C. The application was refused and as there were no replacements available I found myself representing an American sailor for rape. I was so awful that the jury acquitted him!

Unexpectedly, my father turned up at the first trial I did on the Isle of Wight, and told me that he was prosecuting. He opened the case by saying "I appear to prosecute, and my learned son defends!"

At the time, chambers did a lot of Magistrates' Court road traffic cases. One of my first was at Highgate Magistrates' Court, defending a man who had driven the wrong way up the M1. I had a conference with him and we were called into court. I told him to follow me in, and he said, "It's alright, sonny, I'm waiting for my barrister." When I replied, "but I am your barrister," he said "I supposed I had better plead then!"



David's father, John Jenkins

I developed into doing more serious crime work. We were lucky to have Robin Miller in chambers in the sixties and seventies who had a large Devon and Cornwall practice. I often stayed at his home when working there, along with others such as Michael Selfe, Stephen Parish and Tony Bailey.

I also became Standing Counsel for the British Transport Docks Board at Southampton and did all their personal injury and contract work.

My main practice in Southampton and Portsmouth was criminal, where I gained regular clients. In the mid-seventies I was briefed by Frank Campion to defend a scrap metal dealer, Billy Blundell, in the Seven Sisters Road whose gang was in competition with another. They were fighting for domination of the East End after the Kray gang was broken up. The two gangs met and there was a shootout in a cab office in Walthamstow.

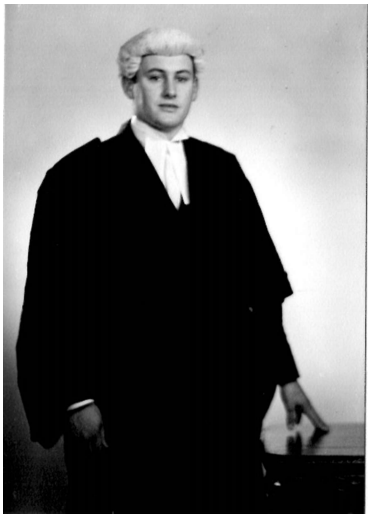
The Crown was represented by Desmond Vowden Q.C. I was led by Bill Hemming and the twenty defendants had an array of top silks of the time including John Mortimer Q.C., Billy Rees-Davies Q.C. and Claude Devine Q.C. My client was first on the indictment and my leader was part heard elsewhere for the first few days. I made submissions on the indictment for ten minutes and was followed by the others who took two and a half days. The trial judge rejected all of the submissions and told the silks that nothing had been added to the first ten minutes!

The defendants had organised themselves and challenged over ninety jurors; because of this case, jury challenges were no longer unlimited. Our gang was triumphantly acquitted.

In the seventies, I was the first barrister to be briefed to prosecute in the Diplock Courts held in Longkesh Internment Camp, Belfast, the location of the infamous 'H Blocks'. There were no juries and the court was presided over by a single judge. Counsel were referred to as Counsel A or B and hearsay evidence was allowed. Prosecution witnesses were referred to as Army/Police officer A or B unless they forwent their anonymity. Witnesses were asked whether they had paid for the information received and the Crown was asked whether they had had any corroborated truthful evidence from that witness. The IRA turned their backs to the Court and refused to acknowledge it, whereas the UDA always fought, and were generally acquitted because of the nature of the evidence.

After being called to the Bar, 1967

By the eighties and nineties my circuit practice had expanded and I was junior in about 2 or 3 murders a year.



David in 1967

Christopher Leigh Q.C. led me in several of those murders, but the one I remember most was the murder of an English woman by her American Husband. They were both alcoholic and had drunk and fought their way around England. They had separated by the time of the incident but had met up in Lymington after they had both been drinking heavily. In the morning when he woke up, he found her dead next to him with a severe injury to the head. The Crown said he had struck her with a blunt object, and the defendant said she must have fallen and hit her head on a kerb before they met. We called a psychiatrist from Hawaii who knew them both and said that it was an accident waiting to happen. The jury acquitted.

So the years have rolled on.

A client I remember well was LC. He was massive. He went with a drug dealer to collect a debt from a student. He stood outside the door and all the people in the room could see of him was chest down. Debtors usually paid up swiftly! The student could not pay up, so the drug dealer stabbed him in the main leg artery. Lee struck the dealer and said, "that's not what we came here to do", called an ambulance, and stayed with the student until it came.

He put a tourniquet on the leg, but not being too bright, he put it the wrong side of the wound and the student nearly died. The jury acquitted him of attempted murder but convicted of blackmail. He was given a short sentence.

I have had a number of pupils, of whom three stick out. Firstly, there was Alexia Zimbler, who joined me at the beginning of a large drug conspiracy prosecution and from the outset set to and put things in shipshape order. The case had difficulties as the police had gone out drinking the night before the bust and the majority of the drugs slipped past them. However, with her help we got home. Solicitors also noticed that the quality of my paperwork had improved while she was my pupil!

Next, there was Mike Williams who was inspirational. We did not lose a case in the 6 months he was with me.

Finally, there was Danny, who kept me amused and poured a jug of water over the lower parts of the jury just before I was about to address them.

There have been six heads of chambers since I joined. Raymond Stock, who was a clever but shy man and an awesome advocate. Nat Blaker, who was dapper, the Circuit wine treasurer, and enjoyed El Vinos. He led me in a leading breathalyser case, *Edkins v. Knowles* [1973] Q.B. 748, about when a person was "driving or attempting to drive." Then there was David Owen Thomas, a powerful and tenacious Welsh advocate. He was followed by Anthony Donne, then Michael Vere-Hodge Q.C. and finally the glory of Tim and Bill Mousley.

Then, of course, the clerks. John Walton was an old-fashioned clerk who always called you 'Sir'. Roger Plager expanded chambers in the glory days of the Bar when you could earn some money. He was followed by Jim Whiffin and finally, last but not least, Daren, who has built up chambers to be stronger and better than it ever has been before!

I could go on for ever, but it is the camaraderie of the Bar which has been for me its outstanding feature. This is especially so on Circuit, where you not only co-defend with and prosecute other members of the Bar, but you repair to a local inn at the end of the day and mould friendships.

Enough is enough. I have missed out the sordid but nevertheless amusing incidents for want of propriety. Also, I have not gone into many of the recent cases I have done, but it has been a good life.

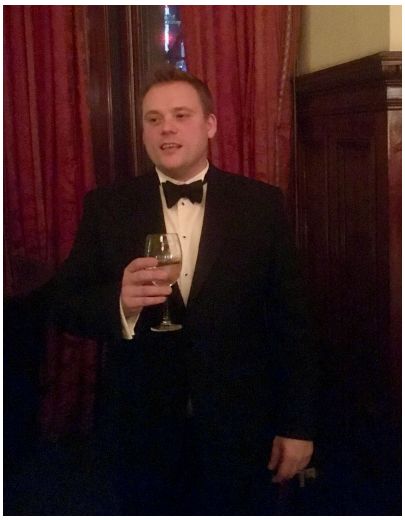
News

Chambers celebrates David Jenkins' 50 years at the Bar

2KBW held a Christmas dinner at One Whitehall Place on the 8th December, at the same time celebrating David's time at the Bar. The event was well attended by both current and former members of chambers.

Daren Milton and William Mousley Q.C.

David and Bill



Left: Michael Williams

Right: David Jenkins

Criminal update

Case note: *Ghosh*busters: redefining dishonesty—*Ivey v. Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67

Kaj Scarsbrook

Correct test where dishonesty is an issue – overruling *Ghosh* principle

Judgment date: 25th October 2017

Where A was disputing that his conduct when cheating at a casino was dishonest, it was unlikely that an opportunity to re-examine the test for dishonesty in *R. v. Ghosh* [1982] Q.B. 1053 was going to occur in a criminal case when *Ghosh* remained binding at first instance and thus the Supreme Court took the opportunity to do so in this case. The Ghosh rule was reformulated as a strictly objective test and the former second (subjective) limb of the test should no longer be given as a legal direction.

Dishonesty

Where the rule in *Ghosh* was used in relation to an assessment of dishonesty ((1) was what the defendant did dishonest to the ordinary standards of reasonable and honest people? (2) did the defendant himself realise what he had done was dishonest by those standards?), it had become apparent that there were a number of problems with the second limb.

The two-limb test was a compromise with an example given in the case which was central to the court's reasoning:

> Take for example a man who comes from a country where public transport is free. On his first day here he travels on a bus. He gets off without paying. He never had any intention of paying. His mind is clearly honest; but his conduct, judged objectively by what he has done, is dishonest. It seems to us that in using the word 'dishonestly' in the Theft Act 1968, Parliament cannot have intended to catch dishonest conduct in that sense, that is to say conduct to which no moral obloquy could possibly attach.[1]

The Supreme Court rightly pointed out that the man in that example would escape conviction by the correct application of the first (objective) leg of the test: to determine the honesty of his conduct, one must ask what he knew or believed about the facts affecting the area of activity in which he was engaging. What is objectively judged is the *standard* of behaviour, in the context of any known state of mind of the actor.

It is a crucial function of the criminal law to determine what is and is not criminal; it is not right that the second limb of *Ghosh* should allow the accused to escape liability where he has made a mistake of fact as to the contemporary standards of honesty.

Juries were being asked to ask themselves the objective question and apply their own standards of dishonesty, but then to ask themselves what the defendant himself thought. The idea that something ordinarily dishonest can become honest just because the defendant thought it was cannot have been easy to grasp.

The test clearly established in civil proceedings was an objective one following *Twinsectra Ltd v. Yardley* [2002] UKHL 12 applying Nicholls L.J. in *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 A.C.

[1] Lane L.C.J. in *Ghosh* at [1063].

378[2]. Whilst the Court was always clear to distinguish civil and criminal decisions, there is no logical basis for the meaning of dishonesty differing.

Examining historical case law upon which *Ghosh* was based, it was clear that in actuality many of these cases supported an objective test rather than a subjective one.[3] In *Ghosh* these cases were treated with some supporting an objective approach and others supporting a subjective one; with analysis they were not quite so binary.

As a result, the second leg of the *Ghosh* test no longer represents the law. Directions based on it ought to no longer be given. The test is as set out by Nicholls L.J. in *Royal Brunei Airlines* and Hoffmann L.J. in *Barlow Clowes International Ltd v. Eurotrust International Ltd* [2005] UKPC 37:

> Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards.

Where dishonesty is in question the fact-finding tribunal's test is therefore as follows:

1. What was the subjective state of the individual's knowledge or belief of the facts? The only question is whether or not that belief is genuinely held, not whether it is reasonable.
2. In that context, was the individual's conduct honest or dishonest, applying the objective standards of ordinary decent people?

The appeal

This appeal concerned Mr Ivey and another professional gambler, S, developing a specialist technique called 'edge sorting' which relied on the minute discrepancies in the print on the back of a pack of cards and convincing the croupier via apparent luck-based 'quirks' to avoid excess shuffling in order to greatly increase the chance of winning at Punto Banco.

In this way Mr Ivey won some £7.7m, which the casino did not pay, taking the view that this was cheating. Mr Ivey gave frank and truthful evidence admitting all he had done. His case was that he was not cheating but deploying a perfectly legitimate gaming tactic.

Dishonesty in gambling is governed by s.42 of the Gambling Act 2005 which states that it is an offence to cheat or enable another to cheat. It was common ground that the 'contract for betting' entered into by the parties was subject to an implied term that neither would cheat; breaching this term would mean that Mr Ivey could not recover his winnings.

It was advanced for Mr Ivey that cheating involves dishonesty; Mr Ivey did not consider what he did to be cheating (evidence about which was accepted by the Court as being truthful) and so the second limb of *Ghosh* was not engaged.

What Mr Ivey did was cheating. He executed a careful sting. Had he re-arranged the cards himself, no-one would doubt he was cheating; he achieved the same result by tricking the croupier into doing so. He took positive steps to fix the deck – that it was clever and skilful does not alter that. What he did was therefore *prima facie* dishonest (albeit it was concluded that there was no

[2] *C.f. Barlow Clowes International Ltd v. Eurotrust International Ltd* [2005] UKPC 37 per Hoffman L.J.
[3] *R. v. Feely* [1973] QB 530 and *R. v. Greenstein* [1975] 1 WLR 1353 were cited in *Ghosh* as supporting an objective approach whereas *R. v. Landy* [1981] 1 WLR 355, *R. v. Waterfall* [1970] 1 Q.B. 148, *R. v. Royle* [1971] 1 WLR 1764 and *R. v. Gilks* [1972] 1 WLR 1341 were seen as supporting the subjective test. *Landy,* for example, was in the context of a banking fraud where the actual state of mind was critical and not whether a state of knowledge *meant* the defendant's conduct was dishonest. It was difficult to see how anybody could see the actions of themselves as honest in the context of that case. The other cases were similar and could also support an objective test.

requirement for dishonesty in cheating) unless the second limb of *Ghosh* prevented it from being so.

If there were a legal element of dishonesty in relation to cheating at gambling, the case would satisfy the new test *ante*. Mr Ivey's conduct was cheating, contrary to his own opinion; it was also, also contrary to his own opinion, dishonest. Accordingly, the appeal was dismissed.

Articles

Hearsay—Back to Basics (*Part Two*)

Elisabeth Bussey-Jones

The first part of this article appeared in the Autumn edition. It primarily addressed the question of what constitutes hearsay (not necessarily as simple as it may seem), followed by the six step *R. v. Riat* approach, which ensures that even if hearsay can be brought within an exception to inadmissibility, safeguards are properly considered to ensure a fair trial.

This part of the article goes into more depth on to the exceptions to hearsay. As indicated in part one, the aim of this article is to provide a "hearsay in a nutshell" summary, drawing from recent case law and the combined wisdom of Professor David Ormerod Q.C. and our leading criminal texts.

So, starting with the four categories of exceptions to the hearsay rule:

Exception 1: Statutory Exceptions (Sections 116 and 117)

The most common circumstances in which hearsay applications are likely to be made are when the witness is unavailable for one reason or another.

Section 116 provides that hearsay is admissible where:

- a statement is made which would be admissible if given orally in evidence;
- by an identifiable witness (n.b. anonymous hearsay is not permitted);
- who was competent at the time of making the statement (section 123*)*; and
- one of the conditions of section 116(2) are satisfied.

The five alternative conditions of section 116(2) are:

s.116(2)(a): The maker of the statement has died

Two particularly important cases to note are *R. v. Ibrahim* [2012] 2 Cr.App.R. 32 and *R. v. Riat* [2013] 1 Cr.App.R. 2 (five co-joined appeals but reference here to *Riat* itself). Both these cases involved situations where the sole and decisive evidence for the case came from a witness who had since died.

In *Ibrahim*, the approach taken by the Court of appeal was to find as follows:

- if the complainant had been alive, her statements would have been admissible;

- the conditions set out in s116(1) and (2)(a) had been met;
- it was a pre-condition for the admission of untested hearsay that it be shown to be potentially safely reliable and in the circumstances of the case the complainant "*belonged to a category of potentially very unreliable witnesses*";
- it could not be shown that the complainant's statements on the central issues were reliable; and
- given that conclusion and that the evidence was central to the Crown's case, the admission of the untested hearsay evidence had such an adverse effect on the proceedings that the trial judge ought to have excluded it pursuant to section 78 of the Police and Criminal Evidence Act 1984 or alternatively, the judge should have directed the jury to return a not guilty verdict pursuant to section 125 of the Criminal Justice Act 2003 (CJA 2003).

Accordingly, the conviction was quashed.

In *Riat*, the Court of Appeal clarified that in so far as *Ibrahim* may be interpreted to require a judge to be satisfied that the hearsay was "demonstrably reliable" to be admitted under the CJA 2003, that was not the correct interpretation. Lord Justice Hughes said at paragraph 5:

> This court was far from laying down any general rule that hearsay evidence has to be shown (or "demonstrated") to be reliable before it can be admitted, or before it can be left to the jury. That is to take only half of the paired expressions as if it represented a separate and universal rule. If that had been the rule adopted, the appeals under consideration in *Horncastle* would probably not have been dismissed. Nor can that be the rule, for it would mean that hearsay evidence has to be independently verified before it can be admitted or left to the jury.

And at paragraph 6:

> The true position is that in working through the statutory framework in a hearsay case … the court is concerned at several stages with both (i) the extent of risk of unreliability and (ii) the extent to which the reliability of the evidence can safely be tested and assessed.

Very briefly, the individual case of *Riat* concerned convictions for sexual offences where the complainant was a 14-year-old karate student of the defendant. There was evidence in addition to the ABE interviews that the complainant had disclosed to friends that sexual activity between her and her teacher had taken place. One friend said she had seen the complainant and the defendant in a room together and another had seen relevant text messages. There was also evidence that the complainant had disclosed to a nurse at school that she feared she may be pregnant and when the nurse confirmed that she would have to disclose that information, the complainant sought to protect the defendant by suggesting she had a relationship with an 18-year-old boy. The case came within s.116(2)(a). The Court of Appeal reviewed the evidence and, finding that the jury could safely assess the evidence, upheld the conviction.

s.116(2)(b): The maker of the statement is unfit to be a witness due to their bodily or mental condition

In order to establish the s.116(2)(b) criteria for the absence of a witness, admissible evidence is required that can be proved to the criminal standard. See for example *R. (Meredith) v. Harwich Justices* [2006] EWCH 3336 (Admin.) where on a question of unfitness it was held that the prosecution had to prove beyond reasonable doubt that the relevant person was unfit to be a witness.

(Note also § 11.17 in *Archbold*: *"... where the evidence is sought to be introduced by the defence, it is the civil standard:* R. v. Mattey and Queeley *[1995] 2 Cr.App.R. 409, CA."*).

s.116(2)(c): The maker of the statement is outside the UK and it would not be reasonably practicable to secure their attendance

As to "reasonably practicable to secure attendance", the case of *R. v. Gyima* [2007] Crim. LR 890 concerned a robbery witnessed by a 14-year-old on holiday in the UK from the United States. The trial judge admitted the ABE interview being satisfied section 116(2)(c) was met. Although the appeal was successful on arguments concerning admission of bad character, the Court of Appeal held that the nonco-operation of the parents of the witness and the costs of establishing the video link were factors the Court was entitled to consider when testing whether "reasonably practicable" had been met.

With the advances in arrangements for video links and the ease at which they are established at short notice, I would speculate more effort may now need to be made.

s.116(2)(d): The maker of the statement cannot be found and reasonably practicable steps have been made to find them

With regards to steps that have been made to find a witness, in *R. v. Horncastle* [2009] EWCA Crim 964 the Court of Appeal said:

> It is, however, important that all possible efforts are made to get the witness to court. As is clear, the right to confrontation is a longstanding requirement of the common law and recognised in Article 6(3)(d). It is only to be departed from in the limited circumstances and under the conditions set out in the CJA 2003.

Contacting a witness the day before they were due to give evidence was not deemed sufficient: *R. v. Adams* [2007] EWCA Crim. 3025.

Witness promising to attend and then lying low, with police checking known addresses, however, was deemed sufficient: *R. v. Fletcher* [2007] EWCA Crim. 2996.

s.116(2)(e): the maker of the statement does not give evidence or continue to give evidence due to fear.

This is construed widely and includes fear of death or injury of another person and fear of financial loss (s.116(3)).

It must be established that there is a 'causative link' between the fear and the failure or refusal to give evidence and every effort must be made to facilitate the giving of evidence by special measures; and question of 'fear' to be tested *voir dire*. If the witness is present, it may not be appropriate for the defence to cross-examine but in such a case, the judge must take on the responsibility of testing the criteria robustly. (*c.f. R. v. Shabir*, 176 J.P. 271, CA).

In *R. v. Davies* [2007] 2 All E.R. 1070, CA, the court warned against seeking to test the *basis* of a witness's fear because to do so would undermine the very purpose of the provision.

A witness should not be given any assurances that they will not need to give evidence as that may be an inducement to assert fear. However, the fact that such an assurance has been given does not mean this gateway is not applicable. See the important case of *R. v. Harvey* [2014] EWCA Crim. 54. That case also establishes that it may not always be necessary to hold a *voir dire* on fear cases.

In fear cases, there is an additional 'interests of justice' test to be met as set out in s.116(4).

Where a party has caused the absence of a witness

In relation to all absence of witness scenarios, section 116(5) provides that where the absence is proved to have been caused by or on behalf of the party seeking to admit the hearsay, the criteria set out in each of those exceptions will be taken not to have been proved.

Section 117: Business and other documents

This gateway relates to information coming to a person in the course of trade or business, and it envisages multiple hearsay (passing through more than one person).

The distinction needs to be made as to whether or not the material in question was created for the purposes of the criminal proceedings or investigation. **If not**, it is automatically admissible subject to the exclusionary discretion. **If so**, it is admissible if the proposed witness is absent for the same reasons as set out in section 116 (as above) **or** the proposed witness cannot be expected to have any recollection of the matters having regard to the length of time since they provided the information and other circumstances, subject again to the exclusionary discretion.

Section 117(2) states the Court can direct hearsay under this gateway is inadmissible where its reliability is doubtful owing to its contents, the source of the information, or the way in which the information or document was created or received.

Exception 2: Any rule of law preserved in section 118

This section applies to:

- public records (for e.g. births, deaths, land registry documents)
- admissible character/reputation – good and bad (section 101 of the CJA)
- *Res Gestae*
- Confessions (s.76 of the PACE)
- Admissions by agents
- Evidence of common enterprise
- Expert evidence

Section 118(2) provides that with the exception of the above, the common law rules relating to hearsay evidence in criminal proceedings are abolished.

Most hearsay applications will probably come under other exceptions to the hearsay rule but an example of where this section may come into play is found in the case of *R. v. Newell* [2012] EWCA Crim. 650. In that case, the Court of Appeal held that counsel appearing for a defendant at a PTPH hearing had ostensible authority on the defendant's behalf to include information on the PTPH form and when at trial the defendant sought to distance himself from an admission set out on the PTPH form, the contents of the form were admissible as an admission by an agent.

Exception 3: All parties agree

This exception means what it says on the tin! Acquiescence may be enough but consider the nature of the evidence and at least alert the Court to the nature of the evidence and the agreement reached.

In the case of *R. v. Shah* [2012] EWCA Crim. 212, hearsay evidence had been agreed which, to cut matters short, should not have been. Despite the agreement at trial by counsel and the trial judge not raising any questions, the admission of that evidence formed one of the reasons why the conviction was deemed unsafe and overturned by the Court of Appeal.

Exception 4: In the interests of justice (section 114(1)(d))

Section 114(2) sets out the factors to which the Court must 'have regard' when deciding whether to admit hearsay on the basis of being in the interests of justice. Those factors, slightly simplified, are:

1. probative value, if true, on an issue in the case or valuable in understanding other evidence;
2. what other evidence has or can be given on the matter to be relied upon;
3. importance of matter in the context of the case as a whole;
4. the circumstances in which the statement was made;
5. the reliability of the maker of the statement;
6. the reliability of the evidence of the making of the statement;
7. whether oral evidence of the matter can be given and, if not, why not;
8. difficulty in challenging the statement; and
9. how much that difficulty will prejudice the party facing it.

"Have regard" means the court will be required to exercise its judgment in the light of those particular factors and others it considers relevant, to give consideration to them and assess their significance and the weight they carry. The Court does not need to embark on an investigation of each and every factor—but simply have regard to them.

It was made clear in Riat that this exception to hearsay should be considered as a last resort when other exceptions do not apply. Hughes L.J. said: "*We observe only that it must not become a route by which all or any hearsay evidence is routinely admitted without proper scrutiny*."

A couple of examples where s.114(1)(d) has been applied successfully and unsuccessfully are as follows.

R. v. Meade [2007] EWCA Crim. 740: the police found two defendants in a flat with 44 wraps of class A drugs and large sums of cash. The Crown applied to adduce the hearsay evidence of a witness who had told police he had been present and that the first defendant and another were drug dealers. The trial judge had regards to the s.114(2) factors and admitted the evidence on the basis of its probative value. The Court of Appeal upheld the judge's decision on the basis that he had carefully gone through the factors and gave reasons for his decision.

R. v. Freeman [2010] EWCA Crim. 1997: the judge admitted the evidence of the complainant's mother of an incident of ABH and blackmail. The complainant's mother had withdrawn her complaint and said she would not be attending court. Moses L.J. said:

> Generally, criminal justice in this country requires a defendant to be given the opportunity to confront a witness … the effect of depriving the appellant of the opportunity to cross-examine the witness was that he was deprived of the opportunity to explain how it was that the first set of statements came to be made and why it was that she now resiled from them … We can only emphasise the principle that reluctance is not a ground for not making

> a witness come to court, and reading a statement is not an alternative to a reluctant witness. We have concluded that the judge erred in permitting this statement to be read.

Another poignant example and one involving the additional requirements required to be proved when dealing with multiple hearsay (s.121) is *R. v. Thakrar (Miran)* [2010] EWCA Crim. 1505**.** Two brothers shot dead three males and a dog in a house and seriously injured two females. The motive was said to be a drug dispute.

The first defendant's case was that he was there co-incidentally when a drug deal was taking place. The second defendant relied on alibi. The Crown sought to adduce written evidence of reluctant witnesses in Cyprus who had heard the first defendant boasting about the murders when he had fled to Cyprus from the UK. What was overheard also implicated the second defendant.

The Cypriot police officer who took the statements (not adhering to the same procedures that would be used in the UK) was available to give evidence as to what he had been told by the witnesses in Cyprus who were refusing to attend and who could not be compelled. On a *voir dire* the trial judge found the police officer's evidence to be convincing and concluded the interests of justice required the admission of the statements.

Dismissing the appeals against conviction, the Court of Appeal held that the statements of the witnesses contained details consistent with unchallenged evidence which can only have been known by an eye witness, in particular the striking of one of the victims with a gun and the shooting of the dog. The judge was entitled to accept the evidence of the police officer as to how the statements were taken, there was no motive for the witnesses to invent the accounts and no reason for the Cypriot police to concoct the confessions. As to the evidence of one defendant implicating his brother, the second defendant, the court held that it was impossible to see why one brother would falsely accuse his brother.

The reliability was therefore high and the evidence valuable given that the second defendant was relying on alibi. There was fresh evidence at the appeal but that was deemed to be incredible. The Court held it had no lurking doubt given that the first defendant's case was inexplicably inconsistent with the evidence of the survivors.

A bit more on safeguards...

I have addressed the safeguards in part one of this article, but it may be helpful to consider how the *Riat* approach to multiple counts on an indictment may produce different outcomes as to admissibility of hearsay in relation to different counts.

In *R. v. Pederson* [2013] EWCA Crim 464, the defendant was charged with assaulting the complainant and released on bail with conditions not to attend her address. Having breached those bail conditions, a restraining order was imposed. Further breaches of that restraining order resulted in fresh proceedings, part of which involved a separate rape allegation. At trial the conditions of s.116(2)(b) were met. The trial judge allowed DVD interviews with the complainant to be admitted in relation to the breaches of the restraining order but refused admission of that evidence on the count of rape.

The Crown then offered no evidence on the rape but the Defendant was subsequently convicted of the breaches of the restraining order and he appealed. The Court of Appeal said in the absence of the ability to cross examine the complainant on the rape count, the judge had been right to refuse to admit the evidence on that count.

However, in relation to the breach of the restraining order counts, the judge had been right to admit the hearsay evidence as there was other evidence available to the jury to enable them to assess the reliability of the maker of the statement (for example, background evidence relating to

their relationship, phone records, and evidence from a neighbour who had seen the defendant and complainant together when the restraining order was in force).

I hope the above has been a helpful summary of a well-trodden but often taken for granted area of law. It is surprising how often the issue of hearsay arises and how often it is not identified. It is worth remembering that as in the case of *Shah* above, even where hearsay has been overlooked, and then acquiescence has been taken to equate to agreement, a conviction may nonetheless be deemed to be unsafe and overturned on appeal.

Comparative Judicial Supremacy: The US, India, Germany, and the UK

Islam Khan

Politicians will always blow their own trumpet and talk of parliament's domination over the judiciary, meaning thereby that an exciting tug-of-war for supremacy between the two branches of state is always at a crossroads.

This is not the first time, with an issue of human rights or when something significant in sight, that the incumbent regime has called for the doctrine of judicial restraint or for restrictions applying overriding constitutional supremacy over the judiciary. In comparing judicial supremacy, this article explores the key issues of judicial supremacy in the US, India, Germany and the UK.

The USA

With reference to the interpretation of the Constitution, the US judicial review system has been serving as a guiding light for over 200 years. There is no doubt that due to their power of judicial review, courts in countries like the US, India, Germany and the United Kingdom factually enjoy absolute supremacy over their respective legislative houses today.

As far as the powers of judicial review are concerned, they have of course been derived everywhere from a common source—the American jurisprudence. This in many other commonwealth countries is known as a *Writ.*

The News International, in April[1] and September 2010,[2] discussed at length how the USA, the country which introduced the position of a President (as single head of state) to the world towards the end of 18th Century, has left its apex court to constitutionally determine the validity and application of the laws passed by its legislators.

Authored by this scribe, although these research reports attracted quite a venom and criticism on government-sponsored blogs and websites, they also succeeded in igniting a few heated debates on the subject. A thorough study of the 1787 US Constitution, the contents of which have been borrowed by dozens of nations during the last two centuries to frame their own constitutions,

[1] *Courts in US, India, Germany and Hungary,* The News International (25th April 2010), https://www.thenews.com.pk/archive/print/670782-courts-in-us,-india,-germany-and-hungary, accessed 1 December 2017.
[2] *Judicial oversight works wonders in several states,* Ibid., (27th September 2010), https://www.thenews.com.pk/archive/print/608879-judicial-oversight-works-wonders-in-several-states, accessed 1 December 2017.

indicate that the Supreme Court in the land of Columbus enjoys both original and appellate jurisdiction on any law framed by the legislators sitting in the Congress and Senate.[3]

Article III of the US Constitution states:

> The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.[4]

The US Constitution permits the US Congress to legislate for the government and its officers, besides being required to confirm federal judicial appointments and define by law the jurisdiction of the judicial branch in cases not specified by the Constitution.

While the judicial power of the US apex court extends to all cases, it even enjoys the authority to decide how the Congress may actually mean or want the application of law otherwise made by it. There is a long list of parliamentary decisions that US Supreme Court had struck down over the decades and it goes without saying that the concepts of both judicial review and judicial restraint have been effectively exercised by American judges since 1803, the year when the legendary Chief Justice John Marshall had started establishing the pre-eminence of court over both Executive and Legislative branches.

It was not an easy journey for a young developing nation where the first President George Washington laid the foundation stone of invoking executive privilege for the first time in 1796.

Washington's successors, such as Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, Eisenhower, Harry Truman, Richard Nixon, Bill Clinton and George Bush Junior have all followed suit by confronting the Chief Justices of their time and making use of the sword of executive privilege.

India

The Supreme Court of India has special advisory jurisdiction in matters which may specifically be referred to it by the President of India under Article 143 of the Constitution. The Indian judiciary has the power to adjudicate upon the validity of all the laws and the court has power to declare any law invalid, if it deems it to be *ultra vires* of the Constitution.

Like the US, India also is indulged in constant government-judiciary rifts.

Despite the fact that the Indian Supreme Court enjoys appellate and advisory jurisdiction, questions have been raised since 1951 about the scope of the constitutional amending process contained in Article 368 of the Indian Constitution.

The first government-judiciary conflict in India had arisen after the court had started invalidating the Land Reform Acts, to the sheer dismay of the Nehru regime.

After the Court had overturned laws redistributing land from landlords on grounds that the laws violated the land owners' rights, the Indian Parliament had gone on to pass the First Amendment

[3] U.S. Const. art. III, § 2.
[4] *Ibid.*

in 1951, followed by the Fourth Amendment in 1955 and 17th in 1964, to protect its authority to implement land redistribution.

The Supreme Court countered these amendments in 1967 in the *Golaknath v. State of Punjab* case[5] when it ruled that Parliament did not have the power to abrogate fundamental rights, including the provisions on private property.

To counteract against the landmark *Golaknath* decision, former Premier Indira Gandhi then made a series of attempts through various constitutional amendments to establish the supremacy of Parliament over the judiciary. However, the Indian Supreme Court declared that Parliament could not use its amending powers to damage, emasculate, destroy, abrogate or alter the 'basic structure' of the Constitution that was fundamental to its citizens.

Arguments in this context surfaced again between Indian judges and lawmakers in 1985 on the Anti-Defection Act, when Parliament took the powers to decide the issue of defection of political parties.

Tension again mounted in 2006 on issues ranging from a court ban on commercial premises in unauthorized areas of Delhi to the refusal of Lok Sabha's Speaker to expel corrupt legislators.

The Indian apex court's verdicts to declare the recommendation of President's rule in Bihar as unconstitutional and to bring the decisions of the Speakers of the Assemblies under judicial review had also infuriated the parliamentarians. The Indian Supreme Court judgment in the *Kesavananda Bharati* case[6] of 1973 then went on to establish the "Doctrine of Basic Structure."

According to this verdict, certain basic features of the Indian Constitution could not be altered either by parliament or the Supreme Court. The judgment stated that although these amendments were constitutional, the court still reserved for itself the discretion to reject any changes made by Parliament, through which the Constitution's basic structure was altered.

In *Indira Gandhi v. Raj Narayan* case[7] of 1975, the Supreme Court applied the theory of basic structure and observed that the amending power of the parliament only destroyed the 'basic feature' of the constitution. But despite remaining on the back foot during the Indian Emergency period of 1975-77, in which Indira Gandhi had even tried to depress the judiciary by appointing a junior judge as the chief justice, the Indian arbiters did not lose heart and continued to exercise their powers of Judicial Review.

In 1975, the Indian Parliament passed the 39th alteration, which limited judicial review for the prime minister's election and empowered a body to review this election, besides coming up with the 42nd modification that prevented the court from reviewing any Constitutional amendment. The Indian judiciary, however, remained ineffectual during the 1975-77 Emergency.

Germany

The Federal Constitutional Court in Germany is empowered with reviewing acts of the Federal Republic Congress (the Bundestag) for their constitutionality.

The Federal Constitutional Court of Germany can even review and reject constitutional amendments on the grounds that they are contradictory to the rest of the Federal Republic Constitution. This goes beyond the powers of the US Supreme Court and the Indian Supreme Court in many ways.

[5] *L.C. Golaknath and Ors v. State of Punjab and Anr.* (1967) AIR 1643; (1967) SCR (2) 762.
[6] *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.* (1973) 4 SCC 225.
[7] *State of Utter Pradesh v. Raj Narain* (1975) AIR 865; (1975) SCR (3) 333.

The German Supreme Court too has made politicians honour its verdicts on Constitutional regulations and can reject constitutional amendments if they are contradictory to the Constitution.

It has twice struck down the legislation legalising abortion in 1975, besides having banned the Socialist Reich Party (a neo-Nazi party) and the Communist Party from functioning during the 1950s.

Former German Chancellor Gerhard Schroeder described the National Democratic Party of Germany as a latter-day version of Hitler's Nazi party and tried to have it banned for fanning racial violence, but Germany's Supreme Court thwarted Schroeder's attempt in 2003.

United Kingdom

In the UK's case, a fissure between its national tendency of legislative supremacy and the European Union's legal system is pretty visible because the legal system of the EU empowers the Court of Justice of the European Union with judicial review.

During the last 400 years, England has seen some 'unsung court heroes' who dared to challenge the Sovereign. In 1616, Sir Edward Coke was dismissed after he had defied King James I.

Judicial review is not a prohibited phenomenon in the UK and the High Court enjoys supervisory jurisdiction over public authorities and tribunals. However, the British Supreme Court remains the final authority and court of last resort in all matters under the English law, but subject to the review of the European Court of Human Rights in relation to matters arising out of human rights questions. And recently there has been huge political slander on this point.

To cite an example of judicial dominance in UK, when the British government had proposed to introduce a new Asylum and Immigration Act by excluding the judicial review power of the courts, members of the judiciary had protested to the extent of saying that they would not accept any such exclusion. Consequently, the government of UK had to withdraw its proposal. A study of the UK law shows that remedies such as a Quashing order; a Prohibiting order, a Mandatory order; Declaration or Declaration of incompatibility, Illegality, Injunction and Damages are available in proceedings for judicial review, which explicitly means that this doctrine of judicial oversight is being acknowledged throughout the Commonwealth and other jurisdictions.

Lord Justice Nolan stated in *M v. Home Office*:

> The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is.[8]

Lord Bingham stated in the Belmarsh case:

> The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision … Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.[9]

[8] *M v. Home Office* [1992] Q.B. 270 at 314.
[9] *A and others v. Secretary of State for the Home Department; X and another v. Secretary of State for the Home Department* [2004] UKHL 56.

Lord Hoffman citing Lord Denning in the case of *Alconbury*[10] reminded us that what is in the public interest is for legislatures and ministers to judge, but also that "*when ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law.*"

The rule of law must be respected at all levels. It is a fundamental principle that ensures the effective running of the state. Legislation, policies or any provisions of the state are to protect its national interests and its citizens. However, adverse affects on the rights of its citizens or which are contrary to its interests must only accord with the law—anything short of the law must call for the judiciary to provide a remedy so that the state can run effectively.

Who ate all the pies?

John Ward-Prowse

Another excursion into sports law.

In February 2017, Wayne Shaw was a goalkeeper/coach with Sutton United FC. He was charged with 2 alleged breaches of FA Rule E5(a) in that he intentionally influenced a football betting market or, in the alternative Rule E3(1) in that he acted in a manner which was improper and/or brought the game into disrepute. These charges arose out of an incident during an FA Cup fixture between Sutton United FC and Arsenal FC on the 20th February 2017.

The incident giving rise to these charges occurred on the 83rd minute of the fixture when Mr. Shaw (who was a named substitute for Sutton United FC) ate a pasty whilst in the technical area.

This somewhat innocuous incident took on importance as 'Sun Bets' had given odds of 8/1 that he would eat a pie live on air.

Following the fixture Mr. Shaw came to the attention of the media. He spoke with the press. He was interviewed by Piers Morgan and Susanna Reid live on the Good Morning Britain programme and on Radio 4 on the 21st February 2017.

The FA's investigation relied on the results of its investigation into the matter including the number of bets placed on the market, the total staked (£296.43); the total returned (£2,667.87) and the fact that save for one bet all bets were a £5.00 stake or less.

The basis of the FA's charges against Mr. Shaw

In respect of the alleged breach of Rule E5 (a):

Mr. Shaw knew of the betting market offered by Sun Bets on him to 'eat a pie live on air' and intentionally influenced that betting market by eating a pie/pasty during the fixture as caught by the cameras and televised at the time.

In respect of the alleged breach of Rule E3 its case was:

Mr. Shaw eating the pie/pasty in the technical area, during the fixture, in the knowledge that in doing so he was likely to trigger the market, amounts to improper conduct.

The FA's case was heavily reliant on comments made by Mr. Shaw following the fixture. What was clear was that Mr. Shaw referred to his eating of the pasty as 'banter', something he was consistent with throughout the FA's investigation. It was not clear from what Mr. Shaw said to the Independent newspaper—asked if anyone he knew backed the offer he answered: "*I think there were a few people. Obviously, we are not allowed to bet. I think a few of the mates and a few of the*

[10] *R. (Alconbury Developments Ltd) v. Secretary of State for the Environment* [2001] 2 WLR 1389.

fans. It was just a bit of banter for them. It is something to make the occasion as well as you can look back and say it was part of it and we got our money back"—as to whether he was aware of this prior to him eating the pasty or after him eating it.

In his interview on Good Morning Britain it was put to Mr. Shaw that the bookies had odds of 8/1 on him being seen on camera eating a pie and that all his mates and his teammates had all piled in, hence the pie, and was that true? Mr. Shaw replied that "*we're not allowed to bet but a few friends can, I think they could only put a fiver on*". He was then asked if he was aware that they'd all piled in and he replied "*I was on a couple. I gave them the nod*".

Mr. Shaw's case

In his dealings with the FA, Mr. Shaw had explained the events surrounding the fixture that appeared to be a hectic time for him and his teammates, including attending Wembley on the 13th February 2017 for a photoshoot and penalty shootout involving Ian Wright; travelling away to Guysey on the 14th February, not returning until the following day and then attending at media day at Sutton United's ground on the 16th February. Subsequently Mr. Shaw was heavily involved in preparing for Arsenal's visit on the 20th February, including hoovering the dug outs shortly before the game.

Mr. Shaw was described by the Club Secretary of Sutton United, Ray Ward, in his letter dated 26th February 2017 to the FA as a 'larger than life character' and that he had been involved in football for 32 years. Football is his life.

Mr. Shaw is a large man. He doesn't have the physique one would expect of a footballer. His size has been the subject of banter and abuse from football supporters for many years, having often been subjected to the chant "*Who ate all the pies? Who ate all the pies? You fat bastard, you fat bastard…*" He takes this in his stride, accepting that it is part of the football mentality.

He was being subjected to this chant by the Arsenal fans during the game on the 20th February and as a result he thought he would have some banter with them, hence why he ate the pasty when he did.

Mr. Shaw's explanation as to why he ate the pasty when he did was that he hadn't eaten as he suffers with reflux that on occasions causes him to vomit. At half-time he was feeling hungry. He went to the canteen where he obtained a pasty. He took it with him. Once all 3 substitutes had been used he knew he wouldn't feature in the fixture so to curb his hunger he ate the pasty.

As far as Mr. Shaw was concerned it was as simple as that. He did not eat the pie when he did for any other reason than to curb his hunger.

Mr. Shaw was interviewed by the Gambling Commission on the 25th April 2017. Following this interview, he was informed that the matter would not be taken any further.

Despite Mr. Shaw's case that him eating the pasty was simply banter between him and supporters, the whole episode turned into a nightmare for him. A nightmare where he lost his employment (he was told if he didn't resign he would be sacked) and where he was subjected to a lot of unwanted attention. This incident and the aftermath exacerbated existing health problems and made him highly anxious that he would not be able to partake in a game that is his life.

The matter brought attention from celebrities such as Gary Linekar and Piers Morgan who were critical of the FA in what they perceived to be a sense of humour failure.

Mr. Shaw was somewhat bemused in how he faced those charges, yet John Terry the former Chelsea captain who was substituted on the 26th minute (his shirt number being 26) in his last game against Leicester, when substantially greater sums were paid out in the betting market, faced no charges. It gave the appearance to Mr. Shaw of 'one rule for one and another rule for the other'.

The hearing

Mr. Shaw's case was heard at Wembley Stadium by the Regulatory Commission of the Football Association on the 6th September 2017 by David Phillips Q.C. and two lay members. The FA was represented by counsel, Yousif Elagab. I represented Mr. Shaw.

Prior to the hearing, I spoke with the lawyer to the Commission who indicated that the FA took these charges very seriously. He indicated that if Mr. Shaw admitted the charges he would probably receive a ban of between 12-18 months. If he contested the charges and the charges were proved he would probably receive a ban of between 3-5 years.

Having relayed this indication to Mr. Shaw he was adamant that he was not culpable for any wrongdoing and he wanted to contest the charges. The hearing therefore proceeded.

The hearing was conducted in an executive box at Wembley Stadium. This offered modern technology including a large television on which clips of the fixture were played along with the interviews that Mr. Shaw had with Piers Morgan and Susanna Reid on Good Morning Britain. Counsel had the luxury of separate executive boxes where discussions with the client and instructing solicitor took place and food and drink were laid on. Lunch was spent eating on the balcony overlooking the Wembley pitch.

Having heard the evidence, the Commission found Charge 1 proved and made no finding on the alternative charge.

The Commission made the following consequential orders against Mr. Shaw—(a) 2 month's suspension from football and all football activities; (b) fined £375.00; (c) contribution of the sum of £500.00 towards the costs of the hearing.

In the event, it wasn't a bad result and Mr. Shaw was pleasantly surprised with the shortness of the suspension that was his main concern.

I'm informed by my instructing solicitor that Mr. Shaw is now back in football at FC Totton and enjoying life again, and yes, he's still eating all the pies!

What makes a house a home?

James Culverwell

It is a common feature of the law that words and objects which, to a lay observer have a clear and commonplace meaning, take on a different identity in law. Parties will often enter into agreements entitled, for example, 'lodger agreement', when in law it is actually an assured shorthold tenancy agreement ('AST').

The relevance (or irrelevance) of such labels in defining a legal position is most eloquently put by Bingham L.J. (as he then was) in his judgment in *Antoniades v. Villiers*[1]:

> A cat does not become a dog because the parties have agreed to call it a dog. But in deciding whether an animal is a cat or a dog the parties' agreement that it is a dog may not be entirely irrelevant.

I was recently instructed on a tenancy deposit dispute in which my client, the landlord, had let out three rooms in his mid-terraced house. The rooms were let under a self-styled 'contract for services'. The landlord's intention was clearly to avoid creating an AST (and the obligations flowing therefrom), and the occupier had signed up to that agreement. When the occupier issued

[1] [1988] 3 WLR 139.

a claim for non-protection of a deposit stating that it was actually an AST, the landlord relied on an exception to the definition of an AST to show that the deposit protection provisions did not apply. An agreement cannot be an AST if the dwelling is a 'part of a building', and the landlord lives in another part of that same building.[2] The matter went to trial with the claimant contending that the three rooms of this house, taking up part of the ground floor, were somehow a separate building from the rest of the house and thus able to form the subject of an AST.

This may seem somewhat absurd on the face of it (I certainly thought so), but defining whether a building is a building, a part of a building, a flat, or a separate dwelling, can be extremely important. It is not always as obvious as it appeared in that case, and it can significantly impact on an individual's property rights with significant financial implications. In *JLK Limited v. Ezekwe*[3] the Upper Tribunal (Lands Chamber) ('the Upper Tribunal') recently considered another situation.

The facts

This case concerned student accommodation constructed in the old Liverpool Fire Brigade building. The building was converted to student accommodation which comprised 93 bed-sitting rooms ('units') and a number of communal kitchens and living rooms. Each kitchen and living room was shared by five units, described as a 'cluster'. The units were let on long leases to investors with service charges paid to the landlord for the communal areas.

The matter first came before the First-Tier Tribunal (Property Chamber) ('the FTT') when 56 of the leaseholders sought to challenge the service charges. It fell to the FTT to determine whether or not the units were 'separate dwellings'. As with many definitions in this area, the root of this requirement is spread across a number of provisions. Essentially, a service charge is defined as an amount payable by a tenant of a 'dwelling',[4] and a 'dwelling' is further required to be a 'separate dwelling'.[5] Jurisdiction is then given to the FTT to determine disputes over service charges as previously defined.[6]

The FTT held that the units were separate dwellings and it did have jurisdiction to determine the amount of the service charges. The landlord appealed.

The appeal

The Upper Tribunal was required to decide whether a 'dwelling' within the meaning ascribed to it in the Landlord and Tenant Act 1985 ('the 1985 Act'), could only be a dwelling if it was used as someone's home, and whether the units were 'separate dwellings'.

On the first point, the Upper Tribunal reviewed much of the law surrounding the definition of a 'dwelling'. The meaning of the word 'dwelling' has been much discussed in the senior courts. The general consensus was often that it involved more than simply a 'residence', and that it was suggestive of "*a greater degree of settled occupation … connoting the place where the occupier habitually sleeps and usually eats*".[7] However, this definition was of the word 'dwelling' as used in the Housing Act 1988 ('the 1988 Act'), which places 'dwelling' in the context of being someone's 'only or principal home'.[8] The Upper Tribunal found that in the context of the 1985 Act, the requirement for a 'dwelling' to be a 'home' did not exist. The units could therefore be 'dwellings' without being 'homes'.

[2] Paragraph 10, Part 1, Schedule 1, Housing Act 1988.
[3] [2017] UKUT 277 (LC).
[4] Section 18 of the Landlord and Tenant Act 1985.
[5] Section 27A of the Landlord and Tenant Act 1985.
[6] Section 38 of the Landlord and Tenant Act 1985.
[7] Per Millett L.J., *Uratemp Ventures Ltd v. Collins* [2002] 1 A.C. 301.
[8] Section 1(1) of the Housing Act 1988.

On the latter point, the key issue was whether the units could be separate when they had access to other, communal rooms. The courts have established a principal that a 'part of a house' cannot be a 'separate dwelling' if the tenant has the right to use a 'living room' shared with another.[9] Again, the Upper Tribunal drew a comparison with definitions for the 1988 Act. Under the provisions of the 1988 Act, where a room would otherwise be prevented from being a 'separate dwelling' by virtue of its tenant sharing accommodation with others, that room is specifically deemed to be a 'separate dwelling' and is afforded the protection of the Act. The 1985 Act contains no such deeming provision and so the rule from case law applies strictly.

It was therefore held that the units in *JLK Ltd v. Ezekwe*, were not 'separate dwellings' and the FTT did not have jurisdiction.

Conclusion

Given the quantity of student accommodation in this country which is designed along a similar 'cluster' format, the decision will have wide-reaching implications. This is also likely to stretch further than simply service charges, because 'separate dwellings' attract other rights and restrictions under the 1985 Act.

For anyone interested in my own foray into the world of defining properties, the case went part-heard and settled before the return date (favourably for the Landlord, I might add). I was thus left without a final determination, but I like to think my cross-examination on day one left the occupier feeling that there was no option but to wave the white flag!

[9] *Cole v. Harris* [1945] 1 K.B. 474, approved by the House of Lords in *Baker v. Turner* [1950] A.C. 401. It should also be noted that 'living room' was also the subject of an expansive legal definition in *Cole*, and means a room in which one lives to include a kitchen.

Chambers cases

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

Crime

Michael Shaw and Chris Hewertson secure convictions and five 'extended sentences' following the successful prosecution at Luton Crown Court of two armed gangs in Bedford involved in a series of reprisal shootings.

The prosecution was brought as part of Operation Kruse, a considerable investigation into gang warfare in Bedford. The gangs operated in the organised, commercial supply of Class A drugs. One of the rival gangs executed a drive-by shooting in a tightly-packed residential square letting off rounds from a Skorpian machine-pistol, an automatic weapon used by Czech tank officers. A female was shot in the arm in a ricochet as part of the targeting of a gang member's address. HHJ Lithman QC, sentencing the men, referred to the groups making the streets of Bedford more reminiscent of 1920s Chicago. Five shootings occurred overnight in July 2016 as part of 10 wider gang incidents. For more details see here.

Nine men have been found guilty of firearms offences and conspiracy to cause GBH with intent after five linked shootings in Bedford last July. Overnight between Friday 8 July and Saturday 9 July 2016, shots were fired at four different properties. A large-scale investigation was launched by Bedfordshire Police and a number of people from two different gangs were subsequently arrested and charged. Now following two separate trials at Luton Crown Court, nine men have been found guilty of a total of 20 charges.

Detective Chief Inspector Will Hawkes said:

> This was a complex and lengthy investigation into what was a shocking course of events one summer night last year.
>
> We absolutely will not tolerate the use of firearms in our communities and we were determined to find those responsible.
>
> This should act as a lesson to others that if you use a firearm to cause harm, violence, or intimidation in our county then you will be caught and made to pay.
>
> I'd like to thank all of our officers who worked on this case, from those who attended the initial reports of the shootings to all of those who have assisted with the investigation over the past year.

All have been remanded in custody pending sentencing on the 28 and 29 November. Two men and a woman were found not guilty of similar offences at the second trial.

Editorial

Editor: Kaj Scarsbrook

As always, I invite articles and submissions from members of chambers for the newsletter. They can be of any length and on any subject, within reason! Articles can be emailed to either myself or Tracey, and we are more than happy to discuss ideas for improvement. The continued aim is for 2KBW News to be a valuable resource for members of chambers, clients, and the public alike.

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