2 KING'S BENCH WALK NEWS

Issue 6 – Autumn 2017

# Chambers news and announcements

## Welcome

William Mousley Q.C., Head of Chambers

*Circuit Leaders at 2KBW prior to marking the opening of the Legal Year at Westminster Abbey. L-R: Paul Hopkins Q.C. (Wales & Chester Circuit); Richard Atkins Q.C. (Midlands Circuit); William Mousley Q.C. (Western Circuit); Michael Hayton Q.C. (Northern Circuit).*

Welcome to the Autumn 2017 newsletter. 2 King's Bench Walk remain active in the community and were recently involved in the Reading Crown Court Open Day for the public. With nearly 2,000 people there on the day it gave adults and children alike the opportunity to participate in a mock court case, and learn more about the judicial system. Read more about this inside and also about our Members of Chambers participating in the London Prudential Cycle Ride and the Just for Kids soccer match.

2 King's Bench Walk are delighted to welcome to Chambers James Culverwell, Hayley Manser and Charlene Richer who have been taken on as tenants following their successful completion of pupillage.

Once again, our Members of Chambers and staff have contributed interesting and current articles which I hope you will 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.

## In this issue

# From the clerks' room

## It's beginning to look a lot like Michaelmas

Daren Milton

The 2nd October marks the beginning of the Michaelmas Term, the first term of the legal year.

More importantly it marks the beginning of tenancy for our two latest recruits, Charlene Richer and Hayley Manser, hot on the heels of James Culverwell who I mentioned in my last bulletin. Chambers are delighted to have them in our ranks and wish them every success.

Pupillage is such a tough business. As if the process of gaining one isn't hard enough, when it begins it really is a step into the unknown.

2KBW invest heavily in our pupils. Every member gives their time willingly mentoring, advising, helping and encouraging. It's the clerks however, especially during the second six months of the year-long pupillage, who keep a weather eye out, acquire feedback, compare, challenge and push them. We try to give our pupils as much exposure to as many clients as we possibly can.

And we are good at it.

Reputation is everything and we demand excellence from our tenants, our pupils and our staff alike at 2KBW. It's this professional pride, our sense of togetherness and benevolence that sets us apart from many other sets of chambers. In addition, the joined-up thinking from our management team and our clerks' rooms in both London and Portsmouth have made us the Chambers we are today.

We would not, and could not have achieved the success we have over the past 5 years without the quality of our barristers. To gain a tenancy here you have to impress many people, including the clerks.

So as Charlie and Hayley embark on their tenancy at 2KBW, a vibrant, busy, collegiate and conscientious set, I welcome our two new pupils Matilda Robinson-Murphy and Daniel Milner to the 2KBW family. Being at 2KBW could be the start of something really rather good for them.

Please do take time to look at our website www.2kbw.com for up to date news, a list of our membership and their specialisms.

# Profile: Gulam Ahmed

*Gulam Ahmed is an experienced defence practitioner who is regularly instructed to defend in serious and high-profile cases. He came to the Bar with an LLM in Commercial Law and with experience of a busy solicitors' firm. He has defended in cases such as* AM *(the first person to have been extradited from Afghanistan) and the Rachel Manning murder case.*

**What was your route to the bar?**

My route to the bar was a traditional one. I completed my undergraduate and post graduate legal studies at Birmingham and then went to Bar School. I was called to the Bar in October 1997. I was unable to secure a pupillage straight after Bar School so worked for a busy Birmingham Solicitors for a year.

I undertook a civil, commercial and public law pupillage at 1 Essex Court and then at 2 Paper Buildings. During my pupillage I was sent to civil courts as well as criminal courts, but it always felt better coming out of a Magistrates' Court rather than a county court, so this then led to my move to what was then 15-19 Devereux Court headed by Helen Grindrod Q.C. The late Simon Gedge was my pupil supervisor. I haven't really moved since then. Devereux Court merged with 1ITL, and recently 1ITL merged with 2KBW.

**Do (or did) you have any role models?**

Professor Patricia Woodward encouraged me to apply to the Bar. She was my first role model. She was extremely dedicated and had a genuine desire to see her students do well.

At the Bar I have had a few role models: Mr Justice Collins who I was introduced to during my pupillage, Vasant Kothari my public law supervisor, Simon Gedge as mentioned above, and Marion Smullen.

**Is there anything you would have changed about your career?**

Definitely. I would have stuck to civil commercial work.

**What has been your most memorable day to date at the bar?**

I would like to recite a wonderful case where I was brilliant, saved the day and received an award for it! Sadly, there aren't any. Yet!

When I think back, the day that sticks in my mind is my first day at 15-19 Devereux Court. I had come from a mainly civil background so I anticipated a slow and structured introduction to full time crime.

I recall walking into the clerk's room on Monday morning. Spencer, one of the clerks, gave me a piece of paper and told me to go to Tower Bridge Magistrates' Court. I looked at the piece of paper and all it had on it was a name. I looked on the back; nothing. I was too embarrassed to ask what I should do, so I did what most young intelligent and able barristers do - I called a friend.

My friend advised me to go to Tower Bridge and ask for an adjournment. I thought that sounded simple enough, and so off I went. When I got to the Magistrates' Court I managed to get the advance information and locate my client without any difficulty. He had been charged with theft and criminal damage. Having spoken with my client for five minutes I sat waiting for my case to be called on. Nothing happened.

Eventually, hours later, I approached the usher and asked why my case had not been called on? She replied, "Cause you ain't told me you're ready!" With a very cross look on my face I told her I was ready. Soon after my client's name was called and we both confidently walked into court. When the DJ asked whether he could be arraigned I replied no. The DJ looked down his glasses at me and asked why. I told him because I wanted an adjournment. The DJ asked why again. Now I was stuck.

I was not expecting a second question. My friend did not tell me I could be asked difficult questions. I started to say things really quickly. I cannot to this day remember what I said. It did not sound like English. The DJ fired another question, "What time did you arrive at court?" I told him 9am. "What have you been doing here since 9am?"

"Waiting for my case to be called on," I replied. I felt everyone was looking at me in court and remember feeling really stupid.

The DJ fired another question, "You have not appeared before me before, have you?"

"No," I managed to say.

"Because if you had, you would know that I do not give adjournments. Now go and advise your client and when he is called back into court he will be arraigned," he sternly advised me.

I rushed out of court not looking at anyone. I took my client into a conference room and spoke to him about the charges. I advised him he should plead guilty and then I would apply for a PSR. The next half an hour flew past. I was back in court. The client was asked whether he pleaded guilty or not guilty. He pleaded guilty. The DJ then asked another one of his awkward questions. "What submissions do you have to make on whether this matter should be committed to the Crown Court?" Ahhh, I had not thought about that. Once again, I think I said something.

Then, "What do have to say about bail?" I replied, "he's on bail, Sir."

The DJ looked down at me and said slowly, "I know that but I'm about to take his bail away!" My reply started with something useless and ended with "Please do not take his bail away, Sir."

Well, the matter was committed to the Crown Court and my client was remanded in custody. To make matters even worse, my client got up and started swearing at the DJ and accusing him of having had sex with his daughter. The DJ gave my client a month in custody for contempt. Four security officers had to drag him away to the cells.

What do I do now? I thought. Nervously, I went to the cells expecting my client to shout unkind words at me. I started to speak but the client began talking over my apology and said he thought I'd done all I could do and it was the DJ who was to blame. I left the cells feeling better than when I'd entered. All I had to do now was explain this to the solicitors somehow.

I did what any brave lawyer would do; wrote a long attendance note and turned off my phone.

**What attracted you to ITL/2KBW?**

The detailed instructions and well-mannered clients.

**How have you found the merger?**

It's like our family has grown. Everyone is great.

*For more information about Gulam see his chambers profile.*

# News

## New tenants and new pupils

*New tenants and pupils with William Mousley Q.C. L-R: James Culverwell; Bill; Matilda Robinson-Murphy; Daniel Milner; Hayley Manser; Charlene Richer.*

2 King's Bench Walk are delighted to welcome to Chambers James Culverwell, Hayley Manser and Charlene Richer who have been taken on as tenants following their successful completion of pupillage.

For more information on James, Hayley or Charlene please visit our website.

Chambers also welcomes our new pupils, Matilda Robinson-Murphy and Daniel Milner, who commenced their pupillage in October 2017.

## 2KBW star in 5-a-side tournament

Simon Duggan

The 2KBW football team did chambers proud at the annual Just for Kids Law 5-a-side competition this month.

We were kindly invited to take part by chambers client Michael Ackah of Hodge Jones Allen, who sponsor the event each year.

The 2KBW team—Simon, Scott and Charlie from the clerking team with barristers Mark Stevens and Tobias Eaton—proceded to win their group unbeaten playing 1970s Dutch-inspired free flowing, free scoring football. Having powered past Wilson & Co 4-1 in the quarter finals the unbeaten run gloriously fell short at the semi-final stage.

Thanks go to Joel Carter at Just for Kids Law for organising such a well-run event and to Michael Ackah for the invite. We will definitely be back next year.


*The 2KBW football team (with supporters!)*

## Vulnerable Witness Advocacy training

2KBW has five Vulnerable Witness Advocacy trainers. Russell Pyne, Jeremy Wright, Elisabeth Bussey-Jones, Matthew Farmer and Robin Sellers have now trained 25 2KBW barristers who appear in criminal cases involving vulnerable witnesses. All those who undertook the course found it interesting, challenging and useful.

Contact tmccarthy@2kbw.com for more details on Vulnerable Witness Training.

# RideLondon Sportive

Richard Sedgwick

On a sunny Sunday 30th July, six members of 2KBW gathered in the Olympic Park to complete the Prudential RideLondon 46 to raise money and awareness for Horatio's Garden. Given that the Chambers Manager was on holiday, and the Bar isn't well known for being an especially well organised profession, it was impressive that that many managed to make it to the start line. However, Josh Scouller did manage to take part despite neglecting to register or pick up his numbers.

With the course being very short and flat, the team set off at a blistering pace, dropping other wave starters off the back like Team Sky going up the mountains. With the 2KBW breakaway soon out alone in front, there was little time to enjoy the sights of central London; Scouller was not letting up having spent a week long Alpine holiday apparently training for the ride instead of, as he should have been, gorging on wine and cheese.

Eventually the pace became too much for the author, and he had to watch Scarsbrook and Scouller disappear off into the distance somewhere around Raynes Park. While it wasn't a race, Scouller did very much win in a time of a little over two hours (Sir Chris Hoy taking a little under two hours). More importantly all members finished and were able to reconvene in a nearby pub for a recovery ale.

*The 2KBW cycling team (L-R): Richard Sedgwick; Josh Scouller (r); Ed Hollingsworth; Dan Wright (r); Kaj Scarsbrook; Helen Easterbrook*

# Reading Crown Court open day

Kaj Scarsbrook

*Simon Duggan; HHJ Paul Dugdale; Daren Milton; Kaj Scarsbrook*

On Saturday 9th September 2017, Reading Crown Court opened its doors to the public for the day and members of 2KBW assisted with running mock trials.

Because the court environment is something we deal with every day, one often forgets that the overwhelming majority of the public have no experience of the court system in any way. The Open Day, in its third year, was a fantastic opportunity for those who were interested in seeing how the court operates.

My highlights include being locked in a prison van and left by members of the cell staff—no doubt getting revenge for spending too long in conference one too many times—and being able to question our "jury" straight after they returned a verdict.

Despite my fearless prosecution of the erstwhile puppet, Pinocchio was acquitted a number of times in back-to-back mock trials. I questioned a 12-year-old juror as to why he was acquitted by them in the face of overwhelming evidence. Her answer was, with some relish, "well, we didn't see his nose grow once in the witness box!"

Some great acting by the police cadets, who ran our trial, and the young people playing witnesses in the other courts gave a real flavour of the job to packed-out public galleries. The 2KBW stand in the foyer was busy throughout with questions.

The Open Day is unique and of real worth in helping to open up and dispel some of the myths about the system. In excess of 2,000 people attended the event.


*Daren Milton and Dan Wright with a future tenant*

# Criminal update

## Case note: Sentencing Cuckoos—*R. v. Ajayi and another* [2017] EWCA Crim. 1011

Kaj Scarsbrook

**Sentencing – supply of drugs – assessing roles when "cuckooing"**

*Judgment date: 13th July 2017*

Where someone operating within an Organised Crime Group ("OCG") who did not clearly fall within a leading role on the drug supply guideline but nevertheless operated as a local manager or enforcer of a drug supply operation may fall within the definition of leading role. Those who are not a local manager or enforcer but are involved in the process of 'cuckooing' will usually fall into a significant role.

### Cuckooing

In two linked appeals before the Court, Treacy L.J. took the opportunity to evaluate a common feature of offending in both cases, that of cuckooing, and how it should be addressed by sentencing judges.

Perhaps unsurprisingly given the mutability of the business of drug supply, cuckooing is not referenced in the relevant Sentencing Council's Guideline from February 2012. Many practitioners will be aware of the practice of cuckooing, also referred to as the 'county lines' model of drug dealing. Generally, it is a feature of a larger drug supply operation or OGC dealing in Class A drugs (usually heroin and crack cocaine), where a drug dealer or organiser from a major city will travel to a more provincial location to sell drugs and set themselves up in a local address. Frequently this is that of a local drug dealer or drug users.

Often large supplies of drugs will not be kept locally but will be sent in supply runs from the metropolitan centre. Usually cuckooing involves the exploitation of children and vulnerable adults in order to assist with accommodation and supply[1]. Local drug users are frequently exploited by payment in drugs, the building up of a drug debt, or the use of threats and/or violence. Frequently, a regional manager will be assigned to oversee operations in the local area.

### Guidance on the guidelines

*Procedure to follow*

If the offence clearly establishes cuckooing, the court should reflect that *either* in the assessment of role (see *post*) or by treating the fact of cuckooing as an aggravating feature at step 2. Also relevant is the indication by Treacy L.J. at [9] that it may also "*operate so as to mitigate the position of a vulnerable recruit who has clearly been exploited.*"

*Leading roles*

Where a person is organising a cuckooing operation or OGC from a metropolitan centre, that person will clearly fall within a leading role on the guideline. There is scope, however, for local

[1] *C.f.* the National Crime Agency publication, *National Strategic Assessment of Serious and Organised Crime 2016* (9 September 2016), para. 128 [*accessed 1 October 2017*].

managers or enforcers (referred to *ante*) to fall within a leading role. Sentencing judges should carefully consider factors such as

> expectation of substantial financial gain, substantial links to, and influence on, others in the chain, and directing or organising buying and selling on a commercial scale (Treacy L.J. at [6]).

*Significant roles*

Those involved in cuckooing but not falling into the categories above should generally fall into a significant role. Evidence showing the involvement of others through pressure, influence, intimidation or reward should be given particular weight in determining culpability and upwards movement from the starting point ([7]).

**The appeals**

The appellant A appealed his conviction after trial on two counts of offering to supply heroin, two counts of offering to supply cocaine, and two counts of possessing with intent to supply heroin and cocaine respectively. He was originally sentenced to six and a half years' imprisonment on each count, concurrent.

The court held that the sentence was not excessive. It was at the upper end of the relevant range of a significant role and fell within Category 3 as street dealing.

A, from London, had been arrested at the home of a man called Sam Prior in Suffolk. Prior was a vulnerable drug user who had been persuaded by A to allow him to use his home as a base for selling drugs. Prior gave evidence for the Crown of intimidation. A's phone was examined revealing texts offering the regular supply of heroin and cocaine, and at the premises were found 81 wraps of crack cocaine and two of heroin. There was evidence of five 'drug runs' by A.

A was 28 with no previous convictions for drug offences. The cuckooing present required scrutiny and in particular the involvement of Prior[2] through intimidation. With a relevant range of three years six months to seven years' custody, there could be no complaint about the sentence following trial.

The appellant L was sentenced to concurrent two-year Detention and Training Orders (DTO) on two counts of possessing cocaine and heroin, respectively, with intent to supply, having pleaded guilty at an earlier stage. L was 17 years old at the time of the offences.

Again, the court refused L's application. It was within Category 3 and the trial judge placed L in a significant role. On appeal, the court placed him instead in a lesser role, but with full credit for plea and aggravating factors, a two-year DTO was not manifestly excessive.

Police in Portsmouth saw a group involved in a drug transaction, and when searching the given home address of one of the group, found L present. L was from London and has no links to Portsmouth. He was found with 59 wraps of cocaine and 64 of heroin, and a co-defendant at the house[3] was found with 150 and 151 wraps respectively. L had entered a basis of plea saying, in effect, that he was told what to do and was only there because he owed money to an older man.

[2] Who pleaded guilty to four drug supply offences and was sentenced to an 18-month suspended sentence.

[3] Who was sentenced to a two-year DTO for the same offences and did not appeal.

L had significant mental health difficulties and a significant criminal record. It was of note that he had never complied with any court order despite non-custodial attempts to divert him from offending. When in custody following the trial, he had assaulted a number of inmates and staff.

Both appeals were dismissed.

**Comment**

*Whilst* Ajayi *is hardly a controversial or surprising judgment, it does provide useful guidance on an area where there was previously a lack of sentencing material. Criminal practitioners will be aware of the recent upsurge in cuckooing cases, reflecting the adaptability of the Class A supply fraternity. The individual cases of the appellants A and L neatly illustrate Treacy L.J.'s comments* (ante). *In A's case the cuckooing served to aggravate; in L's, to mitigate (albeit the appeal was still dismissed).*

# Family update

## More than just "Good Practice"

Katrina Hambleton (née Thorne)

Until very recently, when a Local Authority issued an Application for a Placement Order, the Local Authority would routinely file with the Court the Application, Statement of Facts and Annex B report. It was also deemed good practice if the Local Authority also disclosed the Child's Permanence Report (CPR).

Unfortunately, this report was rarely routinely disclosed by the Local Authority and therefore not available for the Judge or indeed the Parents and Children's Guardian at any final hearing.

The CPR is a crucial document as required by the Adoption Agencies Regulations 2005. Regulation 17 outlines that the CPR must contain an analysis of the future options for the care for the child and why the Local Authority's preferred outcome is that of adoption. This is a detailed first-hand analysis and not just a stated view or summary.

Regulation 12 states that the Adoption Agencey's Decision taken by the Agency's Decision Maker (ADM) has to be recorded in the child's care record.

A recent decision by the Court of Appeal in the case of *Re S-F (a child)* [2017] EWCA Civ. 964 takes the disclosure of such documents by a Local Authority on applying for a Placement Order from being "good practice" to it now being "poor practice not to file them with the court".

*Re S-F* concerned a 4-year-old boy. On 16th October 2016 the Court granted a Care Order but refused to make the Placement Order sought by the Local Authority. The Local Authority, supported by the Child's Guardian, appealed this decision.

Both the Local Authority and the Child's Guardian recognized that continued contact with the parents was in the child's best interests and maintained that this would be their view even if an Adoption Order was made.

The Local Authority had originally filed a statement from the Adoption Social Worker outlining the number of available adoptive placements together with the Annex B report but had not filed the child's CPR report or record of the ADM.

The Appeal was subsequently dismissed.

Ryder LJ at paragraph [11] of his judgment indicated that both the CPR and Agency Decision Maker's record of the decision made are disclosable documents as they contain the required analysis and reasoning necessary to support an application for a Placement Order. They should be scrutinized by the Children's Guardian and are susceptible to cross examination.

Ryder LJ stated:

> It is good practice to file them with the Court in support of a placement order application. Given their importance, I would go further and say that it is poor practice not to file them with the Court because this is the documentation that records in original form the pros and cons of each of the realistic care options and the social work reasoning behind the local authority's decision to apply for a Placement Order.

In summary, it is now clear that whatever party you are representing within Care Proceedings where a Placement Application is issued, you will need to ensure that both these crucial documents are disclosed. A Court Order for such disclosure should not be necessary but may be if the documents are not forthcoming from the Local Authority.

I am in no doubt that Local Authority ADM's will spend much more time completing and recording their decision than has previously been the case, as they are now more likely to be called to provide evidence and cross examined if they are merely seen to be rubber stamping the Social Worker's own view without undertaking proper scrutiny and analysis first.

I had such an experience this week but in my case the Local Authority rightly agreed on the morning of the Final Hearing not to pursue a Placement Order.

# Articles

## Hearsay—Back to Basics (*Part One*)

Elisabeth Bussey-Jones

A routine and pretty boring subject, you may say. I wholeheartedly agree. If the phrase is mentioned in the robing room, eyes start to glaze over, the topic surely enjoyed only by those who treat *Archbold* as a bedtime read?

It is, however, part of the criminal lawyer's daily diet.

In writing this article I wanted to not only force myself through the discipline of going back to basics, but also to create a sort of "Hearsay in a nutshell" which summarises of the wisdom of Professor Ormerod, the chapters in our most reliable texts, the Criminal Procedure Rules and recent cases.

I haven't found it possible to complete this summary in one article, so keeping it short and to the point, part one of my summary is as follows.

**What is hearsay?**

We commonly know hearsay to be a representation of fact or opinion made by a person not giving oral evidence which is put in as evidence of a matter stated in it.

In order to qualify as hearsay since the introduction of the Criminal Justice Act 2003, four matters need to be satisfied.

First, there needs to be a statement (which includes not only words but a drawing or a representation).

Second, the statement is not made in oral evidence.

Third, the statement is relied upon in the proceedings for the truth of the matter stated in it.

Fourth, a departure from previous common law, the maker of the statement had to have as one of his purposes to cause another to believe or act on the matter stated as being true.

As to the third requirement, an example from older case law is *R. v. Subramanian* [1956] WLR 965 where a threat to kill relied upon in the defence of duress was not considered hearsay because reliance was not placed on the truth of the contents of the threat, but rather the fact it had been made and the effect that had.

Another example is where a false alibi is given, and rather than the alibi being adduced for the truth of its contents, it is adduced for the fact an alibi was provided.

A more interesting example is perhaps seen in *R. v. Touassaint-Collins* [2009] EWCA Crim. 316 where the Defendant was accused of committing a revenge killing. Prior to the killing, the defendant had received communication from another which complained that revenge had not yet been taken place. That communication was not regarded as hearsay because it was not being adduced for the purposes of the truth of its contents (the opinion of the writer) but that a statement had been made to the Defendant.

As a result of the need for the additional fourth element to be satisfied, matters that may previously have been considered hearsay will now no longer fall within that definition.

A diary that was never intended to be read by anyone is not hearsay because it was not for the eyes of another (*R. v. KN* [2006] EWCA Crim 3309). Callers' names on a phone are not statements; they are just an aide memoire for the phone user. (*R. v. Singh* [2006] ECWA Crim 660).

With regards to 'mechanically produced' evidence, the distinction is made between evidence which requires some human imput and evidence which doesn't. Photos, CCTV, telephone records which require no human imput (i.e. the machine does it by itself) are not hearsay.

Computer print-outs that rely upon human imput, for example, information from social media sites (save for times, dates and IP addresses) are likely to be hearsay and need to pass through one of the exception gateways before being admissible.

**The tricky area of inferences to be drawn from statements**

The fourth element which defines hearsay under the 2003 Act is the purpose of the maker of the statement and it is that purpose that is important and not the inference drawn by the person who receives it.

The leading authority on grappling with the purpose of the maker of the statement is *R. v. Twist* [2011] 2 Cr.App.R. 17. We are now discouraged from looking at authorities prior to that case.

The approach suggested is:

1. identify what relevant matter is sought to be proved (for example: that X deals in class A drugs);

2. ask whether there is a statement of that matter in the communication. If no, it is not hearsay (for example, "Will you have crack tomorrow?" is not a statement that X is a drug dealer but an inference that may be drawn from such a text. Strictly speaking, it is not hearsay as it is not a statement of the matter sought to be proved);

3. if yes, was one of the purposes of the maker of the communication (note, one and not the only or main purposes) that the recipient, or any other person, should believe that matter or act upon it as true? If yes, it is hearsay, if not it is not hearsay (for example, even if "Will you have crack tomorrow?" was a statement that X was a dealer, it would not have been the purpose of the maker of the statement to cause the recipient of the information to rely on the matter stated, as that was a matter common to the knowledge of them both in any event. The purpose was to find out if drugs will be available).

The Court in *Twist* makes it clear that decisions are case sensitive and the fact that evidence does not qualify as hearsay, does not mean it is admissible as real evidence. Such evidence may be excluded for other reasons, such as relevance or a section 78 argument. For example, one text asking to buy drugs may not go very far to inferring someone may be a drug dealer as opposed to mistaken identity on the part of the sender of the message.

Therefore, "That is the direction the robber ran" is hearsay because the matter sought to be proved is the direction of travel, there is a statement on that issue and the maker of the statement intended the recipient of the information to believe or act upon the statement as true.

"The stuff you sold me last week was rubbish" is not hearsay because, whether or not such a message contains a statement, the maker of the statement is not seeking to cause the recipient to believe the they are a drug dealer. The purpose is to complain about the quality.

**One it is established evidence is hearsay, what is the starting point?**

Evidence that does constitute hearsay is inadmissible in proceedings unless permitted by the rules set out in the CJA 2003. (Note: other acts continue to be of relevance where they provide a statutory exception to hearsay).

That is because it is necessarily second-best evidence; it is more difficult to test; and because the jury do not hear from the person upon whose assertion reliance is placed. (*R. v. Riat* [2013] 1 Cr.App.R. 2, per Hughes L.J.:

> Those very real risks of hearsay evidence, which underlay the common law rule generally excluding it, remain critical to its management. Sometimes it is necessary in the interests of justice for it to be admitted … Equally, however, sometimes it is necessary in the interests of justice either that it should not be admitted at all, or that a trial depending upon it should not be allowed to proceed to the jury because any conviction would not be safe.

**The exceptions which permit the admission of hearsay**

1. The evidence can be brought within a statutory exception (witness has died, is unfit, overseas, lost, fearful or business records);
2. it is admissible under one of the preserved common law exceptions (for example confessions, res gestae, public records);
3. all parties to the proceedings agree; or
4. the court is satisfied that it is in the interests of justice for it to be admissible.

These four exceptions are alternatives. They apply to any type of hearsay and they can be relied upon by any party. Just because hearsay does not fall within exceptions 1, 2 or 3, it may still be admissible under 4.

That last exception represents one of the starkest changes introduced by the 2003 Act. Much of the difficulty for lawyers is determining whether a statement falls within the definition of hearsay at all. Often it may be appropriate to err on the side of caution in allowing it to fall within the definition, but then consider its admissibility pursuant to that fourth exception.

**The *Riat* Approach**

One of the most important cases on the current application of the law relating to hearsay is the case of *R. v. Riat* [2013] 1 Cr.App.R. 2.

That case involved five separate appeals combined due to the fact that all convictions had followed the admission of hearsay and the point in issue on appeal was the admissibility of that evidence. *Riat* provides substantial guidance to the manner in which courts should approach the admission of hearsay evidence and the successive steps to be taken to incorporate safeguards which ensure the safety of the trial process.

It was made clear (at paragraph [8] per Hughes L.J.) that:

> Although there is no rule to the effect that where the hearsay evidence is the "sole or decisive" evidence in the case it can never be admitted, the importance of the evidence against the accused is central to these various decisions.

Once material is identified as hearsay, the successive approach is as follows.

**Step 1: is there a gateway permitting the admission of the hearsay evidence? (ss.116-118)**

- The default position is that hearsay is inadmissible.
- Many cases should give little cause for debate. The most contentious are likely to be "death, illness, absence abroad, the lost witness, and fear" or by the gateway under s.114(1)(d).
- Section 116(1)(b) requires witnesses whose representation is to be relied upon to be identifiable and s.123 requires the capability of the witness to be proved.
- Section 116(5) provides that hearsay is not admissible where the application is made on behalf of the party which has caused the witness's absence.
- The general principle underlying s.116 is to question the necessity to resort to hearsay evidence as opposed to the best source of that evidence.
- Additional safeguards are set out in s.116 concerning fear.

**Step 2: what material is there to assist in testing or assessing the hearsay? (s.124)**

The court should consider the "vital linked questions":

1. the apparent reliability of the evidence; and
2. the ability of the jury to test and assess its reliability.

At this stage the Court might be invited to consider evidence as to credibility or inconsistent statements.

> The judge is entitled to expect that very full enquiries have been made as to the witness's credibility and all relevant material disclosed; that will not be confined simply to a check

> of the Police National Computer for convictions. If it is the defendant who is seeking to adduce the evidence, and the evidence is important to the case, the judge is entitled to expect that the defendant has supplied sufficient information about the witness to enable such proper checks to be made.[4]

**Step 3: is there a specific" interests of justice" test at the admissibility stage?**

and

**Step 4: if there is no other justification or gateway, should the admission of the evidence be considered as being in the interests of justice? (s.114 (1)(d))**

Section 114(2) sets out the factors to which the Court must have regard when considering admission under this gateway which include the probative value of the statement, other evidence available, reliability of the maker of the statement, the difficulty in challenging the evidence and the prejudice it will have.

> We observe only that it must not become a route by which all or any hearsay evidence is routinely admitted without proper scrutiny. That would be to subvert the express provisions which follow in ss.116–118 (*Riat* at [22]).[5]

**Step 5: even if admissible, should the evidence be excluded? (s.78 PACE or s.126 CJA)**

The non-exhaustive considerations set out in s.114(2) are seen as a useful aide memoire for any judge when considering admissibility either under that section or section 78 of the PACE.

> S[*ection*] 126 provides a free-standing jurisdiction to refuse to admit hearsay evidence … It goes, however, further than s.78 because it applies also to evidence tendered by a defendant, which might, of course, be targeted either at refuting Crown evidence or at inculpating a co-accused.[6]

The judgment goes on to explain that hearsay should not be "nodded through", and that whilst a focussed decision must be made as to whether the evidence is admitted or not, that does not mean the hearsay needs to be "shown independently to be accurate".

**Step 6: if the evidence is admissible, should the case be stopped? (s.125)**

This power of the court is quite independent to the ability to stop a case on a submission that there is no case to answer. Section 125 requires the court to consider whether the hearsay evidence is so unconvincing that any conviction would be unsafe.

> That means looking at its strengths and weaknesses, at the tools available to the jury for testing it, and at its importance to the case as a whole.[7]

*Part 2 to follow: details of the exceptions to hearsay, previous statements (consistent and inconsistent), multiple hearsay and a final note on any points I feel may be outstanding!*

[4] *Riat* at [18].
[5] *Ibid.,* [22].
[6] *Ibid.,* [23].
[7] *Ibid.,* [28].

# Chambers cases

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

## Crime

**Oliver Weetch's client acquitted of kidnapping, robbery and assault**

After a seven-day, six-defendant trial, Oliver Weetch's client was acquitted of kidnapping, robbery and assault charges arising from an alleged group attack. For more details see here. Oliver was instructed by Kerry Hudson of Bullivant Law.

**Adrian Fleming appears in landmark legal highs case**

Adrian Fleming appeared on behalf of the CPS in a case concerning legal highs where the Crown's expert came to the view that nitrous oxide did not fit the legislative definition. Further details can be found here.

**Barry McElduff secures acquittal in case of serious violence**

Following a two-week trial at Winchester Crown Court, Barry's client was unanimously acquitted of charges of attempted kidnapping and s.18 GBH. Barry's client was said to be the "honey in the trap" that led to the complainant being the subject of a serious and prolonged attack involving the use of a taser and a knife. The Defendant always accepted presence but denied any involvement. The case involved extensive cell-site, forensic, DNA evidence and phone evidence.

Barry was instructed by Chris Gaiger of Gammon, Piercey & Gaiger Solicitors, Southampton.

**Alex Kettle-Williams secures unanimous acquittals in child sexual assault case**

Alex Kettle-Williams has successfully defended a case involving numerous child sexual assault allegations spanning a period of 5 years. The trial was heard at the Woolwich Crown Court and Alex was instructed by Messrs. Cotisens of Station Parade, Barking.

**Matthew Farmer's advice in private prosecution leads to conviction in high-profile murder case**

Matthew Farmer was instructed in early 2015 to advise on the possibility of a private prosecution of Robert Trigg for the murder of Susan Nicholson. Her parents refused to accept the conclusion of accidental death from the original coroner and, through Bennet Griffin Solicitors, instructed Matthew to advise on launching a private prosecution. A further forensic report was obtained on his urging and, based on this report, his advice that Mr Trigg's account was seriously deficient, and serious issues identified by him with the original investigation, the police reopened the investigation and Mr Trigg was eventually convicted on 5 July 2017.

Further details can be found on the 2KBW website, and reported, *inter alia*, here and 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.


On Saturday 5 August, Beresford Kennedy, Richard Carroll and Hayley Manser attended the British Bangladeshi Solicitors Society to provide an introductory seminar into Family law. Short, bite-size seminars were held on a range of topics including private Children Act proceedings, Injunctions and Trusts. The presenters were also available after the seminar to answer any questions, including any specific questions attendees had in relation to their own cases. Feedback was positive with attendees describing the seminars as 'exceptional', 'digestible' and 'very informative.'

Barristers at 2KBW are available to present on a range of topics from Criminal law to Civil and Family law. 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 or on 0207 353 1746.

## Editorial

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