



**King Street Chambers**  
The Chambers of Mrs Nancy Hillier

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## **Civil Team Newsletter – April 2009**

Hello.

I have lost count of the newsletters. All I am aware is that it is Easter and the sun is here at last.

Also, Happy New Tax Year.

### **Forthcoming seminars**

King Street Chambers from time to time holds seminars that are free and attract at least 1 hours CPD. Details are on our website ([www.kingstreetchambers.com](http://www.kingstreetchambers.com)). The next seminar is as follows:

**Title:** Employment Act 2008.

**When:** Wednesday 15.4.2009 at 530pm

**Where:** King Street Chambers

**Cost:** Free.

**CPD:** 1 hour Law Society accredited

If you want to attend you can either call us on 0116 2547710 or email us at [seminars@kingstreetchambers.com](mailto:seminars@kingstreetchambers.com). Please could you mention the newsletter.

### **Previous handouts etc.**

Handouts from Chambers' seminars, its newsletters, articles etc appear on Chambers' website. Go to [www.kingstreetchambers.com](http://www.kingstreetchambers.com) and click on *Resources* on the menu bar. Then select *crime* or *civil* to access the files.

Recent handouts on *cohabitation* and *Part 6* appear there.

## Case reports

Personal injury – foreseeability – duty of care – expected conduct of child - assessment

### *Orchard v Lee*

[2009] EWCA Civ 295 *Coram* Waller, Rimer and Aitkens LJ on 3.4.2009

This case has hit the headlines and is the case of the dinner lady who was knocked flying when the 13 year old boy ran backwards into her. Waller LJ said

*[9] But I respectfully suggest that the primary question should be whether the conduct of the child is culpable, i.e. whether it has fallen below the standard that should objectively be expected of a child of that age. That will be assisted by what injury the child could foresee as likely to be caused by that conduct, but is still a separate question.*

Nothing particularly new but worth a reminder. He added a note of common sense as if to pour oil on the imaginary disturbed waters of the compensation culture that certain tabloids think we live in.

*[19] I, of course, feel sympathy for the appellant. But it seems to me that the judge's assessment of this case was clearly right. 13 year old boys will be 13 year old boys who will play tag. They will run backwards and they will taunt each other. If that is what they are doing and they are not breaking any rules they should not be held liable in negligence. Parents and schools are there to control children and it would be a retrograde step to visit liability on a 13 year old for simply playing a game in the area where he was allowed to do so.*

Negligence – housing – local government - duty of care – assumption of responsibility – statutory duties – sexual assault – *Housing Act 1996*

### *X and Y (by their litigation friend the Official Solicitor) v Hounslow LBC*

[2009] EWCA Civ 286 *Coram* Sir Anthony Clarke MR, Tuckey and Goldring LJ on 2.4.2009

X and Y were a married couple with learning difficulties. They had been taunted by jobs and were known to be at risk of assault. In fact they were physically and sexually assaulted by these jobs. The authority was actively trying to re-house them.

*Held*, the *National Assistance Act 1948* and the *Housing Act 1996* imposed duties on the authority. The authority was doing no more than required by the acts. Therefore a duty of

care did not arise. There was no assumption of responsibility either (see *Mitchell v Glasgow Corp* in previous newsletters). Besides if responsibility had been assumed only the social worker would be responsible as all the housing department had done was visit the flat. Finally because of the conflicting interests that a supplier of social housing faces, it would not be fair, just or reasonable to impose a duty. On the facts, the social worker would not have been found liable.

**Consumer law – contract – declarations – injunctions – jurisdiction – challenge by OFT to terms of contract – could court injunct future use of terms - *Unfair Terms In Consumer Contracts Regulations 1999 – Council Directive 93/13/EEC***

### ***Office of Fair Trading v Foxtons Ltd***

**[2009] EWCA Civ 288 *Coram* Waller (V-P), Arden and Moore-Bick LJ on 2.4.2009**

If in a challenge by the OFT to general terms under the *Unfair Terms in Consumer Contracts Regulations 1999* the court holds a term in the standard conditions is unfair, then it had the power to grant an injunction to prevent the enforcement of that term in existing, as well as future, contracts.

**Landlord and tenant – insolvency – assignment of tenancy – tenant’s authorised guarantees – disclaimer of lease – effect on tenant’s liability under guarantee.**

### ***Shaw v Doeman***

**[2009] EWCA Civ 283 *Coram* Mummery, Stanley Burnton and Elias LJ on 1.4.2009**

Where a tenant had entered into an authorised guarantee agreement in which the tenant remained liable for the rent then, although the liquidator of the assignee company had disclaimed the lease, that did not release the tenant from the guarantee because the effect of the *Insolvency Act 1986 s.178(4)(b)* was that a disclaimer did not affect third parties.

**Proprietary estoppel – assurances must be clear and unambiguous – clear enough – determining whether assurance is clear and unambiguous**

### ***Thorner v Majors***

**[2009] UKHL 18 *Coram* Lords Hoffmann, Rodger, Walker and Neuberger on 25.3.2009**

The House of Lords considered a case of proprietary estoppel. Their Lordships considered how one determines whether a representation is clear and unambiguous.

Per Lord Hoffman at [26]

*Against that background, respectfully adopting Lord Walker's formulation, I would hold that it is sufficient if what Peter said was "clear enough". To whom? Perhaps not to an outsider. What matters, however, is that what Peter said should have been clear enough for David, whom he was addressing and who had years of experience in interpreting what he said and did, to form a reasonable view that Peter was giving him an assurance that he was to inherit the farm and that he could rely on it.*

Per Lord Neuberger at [84]

*It should be emphasised that I am not seeking to cast doubt on the proposition, heavily relied on by the Court of Appeal (e.g. [2008] EWCA Civ 732, paras 71 and 74), that there must be some sort of an assurance which is "clear and unequivocal" before it can be relied on to found an estoppel. However, that proposition must be read as subject to three qualifications. **First**, it does not detract from the normal principle, so well articulated in this case by Lord Walker, **that the effect of words or actions must be assessed in their context**. Just as a sentence can have one meaning in one context and a very different meaning in another context, so can a sentence, which would be ambiguous or unclear in one context, be a clear and unambiguous assurance in another context. Indeed, as Lord Walker says, the point is underlined by the fact that perhaps the classic example of proprietary estoppel is based on silence and inaction, rather than any statement or action - see per Lord Eldon LC ("knowingly, though but passively") in *Dann v Spurrier* (1802) 7 Ves 231, 235-6 and per Lord Kingsdown ("with the knowledge ... and without objection ") in *Ramsden v Dyson* LR 1 HL 129, 170.*

*[85] **Secondly, it would be quite wrong to be unrealistically rigorous when applying the "clear and unambiguous" test. The court should not search for ambiguity or uncertainty, but should assess the question of clarity and certainty practically and sensibly, as well as contextually.** Again, this point is underlined by the authorities, namely those cases I have referred to in para 78 above, which support the proposition that, at least normally, it is sufficient for the person invoking the estoppel to establish that he reasonably understood the statement or action to be an assurance on which he could rely.*

*[86] **Thirdly, as pointed out in argument by my noble and learned friend Lord Rodger of Earlsferry, there may be cases where the statement relied on to found an estoppel could amount to an assurance which could reasonably be understood as having more than one***

*possible meaning. In such a case, if the facts otherwise satisfy all the requirements of an estoppel, it seems to me that, at least normally, the ambiguity should not deprive a person who reasonably relied on the assurance of all relief: it may well be right, however, that he should be accorded relief on the basis of the interpretation least beneficial to him.*

My emphasis added to the above.

**Consumer law – road traffic – local government – false descriptions – odometers - informations – power of local authority to lay – s. 1(1)(A) Trade Descriptions Act 1968 – s.222 Local Government Act 1972**

### ***R (Donnachie) v Cardiff JJ and Cardiff City Council***

**[2009] EWHC 489 (Admin) Coram Leveson LJ, Sweeney J 16.3.2009**

Informations laid by a local authority in respect of a cab firm alleging the application of false odometer readings were valid. The local authority had specifically had in mind the *Local Government Act 1972 s.222* and it was in the interests of the inhabitants of the area that the company was prosecuted in respect of alleged offences in other areas.

**Insolvency – family law – bankruptcy - annulment – divorce – wife applies to annul bankruptcy – husbands assets exceed liability – shift in burden of proof – *Insolvency Act 1986 s.282***

### ***Paulin v (1) Paulin (2) Captivo (In Liquidation)***

**[2009] EWCA Civ 221 CA (Civ Div) Coram Longmore, Wilson and Lawrence Collins LJ on 17/3/2009**

H had been declared bankrupt on debtor's petition. W sought to have the order annulled on the basis that his assets exceeded liability. She proved that. The court held that in such a situation, the evidential onus moved to the debtor to show he could not pay his debts.

**Proceeds of crime – confiscation order – bankruptcy**

### ***R v Shahid***

**CA (Crim Div) (Hallett and Keith LJ, Recorder of Liverpool) on 13/3/2009**

The making of a bankruptcy order does not itself prohibit the making of a confiscation order.

Personal injury – damages – interim payments – periodical payments – how to calculate interim payment

***Cobham Hire Services v Eeles (a child)***

[2009] EWCA Civ 204 Dyson, Smith and Thomas LJ on 13/3/2009

Held by Smith LJ

*[42] Before leaving this case, we wish to summarise the approach which a judge should take when considering whether to make an interim payment in a case in which the trial judge may wish to make a PPO. We also wish to clarify the roles of the judge and the Court of Protection, as it appears to us that Foskett J may not have properly appreciated their respective roles.*

*[43] **The judge's first task is to assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by PPO.** Strictly speaking, the assessment should comprise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both. However, we consider that the practice of awarding accommodation costs (including future running costs) as a lump sum is sufficiently well established that it will usually be appropriate to include accommodation costs in the expected capital award. The assessment should be carried out on a conservative basis. Save in the circumstances discussed below, the interim payment will be a reasonable proportion of that assessment. A reasonable proportion may well be a high proportion, provided that the assessment has been conservative. The objective is not to keep the claimant out of his money but to avoid any risk of over-payment.*

*[44] **For this part of the process, the judge need have no regard as to what the claimant intends to do with the money.** If he is of full age and capacity, he may spend it as he will; if not, expenditure will be controlled by the Court of Protection.*

*[45] We turn to the circumstances in which the judge will be entitled to include in his assessment of the likely amount of the final judgment additional elements of future loss. That can be done when the judge can confidently predict that the trial judge will wish to award a larger capital sum than that covered by general and special damages, interest and accommodation costs alone. We endorse the approach of Stanley Burnton J in Braithwaite. **Before taking such a course, the judge must be satisfied by evidence that there is a real***

*need for the interim payment requested. For example, where the request is for money to buy a house, he must be satisfied that there is a real need for accommodation now (as opposed to after the trial) and that the amount of money requested is reasonable. He does not need to decide whether the particular house proposed is suitable; that is a matter for the Court of Protection. **But the judge must not make an interim payment order without first deciding whether expenditure of approximately the amount he proposes to award is reasonably necessary.** If the judge is satisfied of that, to a high degree of confidence, then he will be justified in predicting that the trial judge would take that course and he will be justified in assessing the likely amount of the final award at such a level as will permit the making of the necessary interim award.*

**Landlord and tenant – administrative law – local government – licensees – notice to quit – travellers site**

### ***Doran v Liverpool City Council and others***

**[2009] EWCA Civ 146 Jacob LJ, Toulson LJ, Aikens LJ on 3/3/2009**

Where a licensee wished to advance public law grounds for not making a possession order, he or she had to show a seriously arguable case that the local authority's decision to recover possession was one which no reasonable person would consider justifiable, and the submission in the instant case that no reasonable local authority would have served on the appellant a notice to quit her pitch on a traveller site was hopelessly unarguable.