



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

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## **Civil Team Newsletter – January 2009**

Hello. Happy New Year!

Welcome to the second of King Street Chambers' civil team newsletters. In this edition, Richard Adkinson

- writes some case reviews,
- reviews bills before Parliament concerning booze, sex and cohabitation,
- tells you about new suggested hourly rates.

Happy reading!

### **Case reports**

**Employment – discrimination – harassment – sexual orientation – *Employment Equality (Sexual Orientation) Regulations 2003***

#### ***ENGLISH v THOMAS SANDERSON LTD [2008] EWCA Civ 1421***

E was employed by T. 4 of his work colleagues for a long time had subjected him to sexual innuendos that he was gay, based it seemed on the fact he went to boarding school and that he lived in Brighton. E was heterosexual and married. It was accepted that his work colleagues knew he was not gay. As he was not gay, not perceived as being gay and no one actually believed him to be gay, was he protected by the regulations?

(3-2 in favour) The Court of Appeal said yes. The single critical assumed fact was that E had repeatedly been taunted as gay. The calculated insult to his dignity, which depended not at all on his actual sexuality, and the consequently intolerable working environment were sufficient to bring his case within *reg. 5*. All that is required is that the claimant's (or

someone else's) sexual orientation, whether real or supposed, is the basis of harassment directed at him or her.

**Housing – Assured Tenancy – Suspended possession – when does tenancy end?**

***KNOWSLEY HOUSING TRUST v WHITE and other conjoined appeals***  
***[2008] UKHL 70***

More on tenancies and suspended possession orders. The House of Lords has decided that (a) an assured tenancy subject to a suspended possession order does not end until possession is delivered up,

(b) when making a suspended possession order under the *Housing Act 1985*, the court could proleptically direct that the order be discharged once its terms had been complied with and could do so even if the terms had not been strictly complied with.

Therefore a tenant made subject to a suspended possession order who had served notice exercising the right to buy under the 1985 Act would have the right to buy revived if and when the order was discharged.

I had no idea what “proleptically” meant. According to Webster’s dictionary, it means putting forward an argument or objection before it is raised or treating an event of the future as though it has already happened.

**Landlord and tenant – company law – management company – leaseholder also shareholder – demand from company for payment from shareholder – is it service charge?**

***MORSHEAD MANSIONS LTD v LEON DI MARCO [2008] EWCA Civ 1371***

M had been set up as a managing company of a block of flats. L was a leaseholder in the block and also a shareholder in the company. The company decided to set up a recovery fund to be contributed to by its shareholders. L contended that this was in fact a service charge under *Landlord and Tenant Act 1985 s.18* and for various reasons he was not liable for it. Not so said the Court of Appeal. While the effect may be the same, his obligation to pay arose under the relationship of shareholder and company, not landlord and tenant. Therefore it fell outside the statutory protection. This may be of importance to any leaseholder who is also a shareholder in the landlord (e.g. where there has been enfranchisement).

**Boundaries – encroachment of fence due to seasonal variations – remedy of self-help – trespass – nuisance**

***MACNAB v RICHARDSON (2008) (neutral citation unknown) (Lawtel AC9200836)***

Boundary disputes are fun! The boundary line had been determined already in previous court proceedings. M put up a wire fence set in concrete. It then started to move by a very short distance into R's land (and so encroaching on his boundary) as the weather changed. R therefore decided to remove the fence. You can guess the rest. M sued R for trespass, R relied on self-help.

The Court of Appeal upheld the first instance decision. The marginal encroachment of a fence due to seasonal variation, across a boundary between two properties, did not justify the exercise of the remedy of self-help by the removal of the offending fence posts and wiring. The removal of those items constituted an act of trespass entitling the fence-owner to damages.

**Inherent jurisdiction – civil procedure rules – limit of latter on exercise of former**

***TOMBSTONE LTD v RAJA and others [2008] EWCA Civ 1444***

In court? Does it want to invoke its inherent jurisdiction to do something inconsistent with the CPR? Well it can't.

**Personal injury – Limitation – Disapplication of limitation period**

***CAIN v FRANCIS; MCKAY v HAMLANI and another [2008] EWCA Civ 1451***

Isn't limitation exciting? This is a good case for review by the Court of Appeal of the law on how delay impacts on whether a court should exercise its discretion under *s.33 Limitation Act 1980*. In the cases there arose the issue of delay and whether it was a windfall, given that the Defendants were otherwise doomed to failure on the merits. Emphasising that there should be consistency, the Court of Appeal said

(1) In a case where the defendant had had early notice of the claim, the accrual of a limitation defence should be regarded as a windfall and the prospect of its loss, by the exercise of the *s.33* discretion, should be regarded as either no prejudice at all (*Firman v Ellis*

(1978) QB 886 CA) or only a slight degree of prejudice (*Donovan v Gwentys Ltd* (1990) 1 WLR 472 HL).

(2) The loss a limitation defence is only prejudicial if his right to a fair opportunity to defend himself had been compromised.

(3) Despite the wording of s.33, Parliament cannot have intended that the financial prejudice, as such, should be taken into account.

(4) Thus it followed that it could not be relevant either as one of the circumstances of the case.

(5) Any prejudice to the claimant in being prevented from proceeding with his claim would be greatly reduced if he had a good claim against his solicitor.

(6) In a case where the defendant had suffered some forensic or procedural prejudice that would diminish his ability to defend himself, it would be relevant to consider that the claimant had another remedy.

(7) But the fact that the claimant has a possible claim against his solicitor would not necessarily mean that the time limit should not be disapplied.

(8) The basic question to be asked was whether it was fair and just in all the circumstances to expect the defendant to meet the claim on the merits, notwithstanding the delay in commencement.

(9) The length of the delay, of itself, was not a deciding factor. It was whether the defendant had suffered any evidential or other forensic prejudice which should make the difference.

(10) The reason for the delay might be relevant.

(11) Although the delay referred to in s.33 was delay after the expiry of the limitation period, it would also be relevant to consider when the defendant knew that a claim was to be made against him and the opportunities he had had to investigate the claim and collect evidence.

## **New bills before Parliament**

These bills before parliament seem relevant and presumably will make it to the statute book. The Act may be different from the bill of course, but it's worth seeing what Parliament is thinking.

### ***The Police and Crime Bill***

This week's Criminal Justice Initiative is set out in the *Police and Crime Bill*. How is it relevant to us non-crime lawyers who turned away from the dark side?

### **Licensing**

Do your clients sell booze? s.19A will be added to the *Licensing Act 2003* and will allow the secretary of state to impose conditions on all premises or a certain class of premises. The number of conditions though cannot exceed 9.

If that is not exciting enough, there will be a new s.21A which will allow the licensing authority by resolution to impose "*such permitted conditions as it considers appropriate on existing relevant premises licences in a particular locality in its area if it considers that—*

*“(a) there has been nuisance or annoyance to members of the public, or a section of the public, or disorder, in or near the locality,*

*“(b) the nuisance, annoyance or disorder is associated with the consumption of alcohol in the locality or with the consumption of alcohol supplied at premises in the locality,*

*“(c) there is likely to be a repetition of nuisance, annoyance or disorder that is so associated, and*

*“(d) it is appropriate to impose the conditions for the purposes of mitigating or preventing the nuisance, annoyance or disorder concerned.”*

Note that this power will allow condition to be imposed on all premises in a locality and so one can immediately see how certain parts of this fair city may be targeted. At least they'll have to have regard to any guidance issued before making a decision.

Prospective new s.73A, 73B and 74A impose similar regime in relation to club premises.

## **Lap dancing**

I never thought I'd get to write about lap dancing in a newsletter. I assume that lap dancing clubs need lawyers from time to time. Well basically the law is being "tightened up" so that local authorities will have the power to restrict the number of "sex encounter venues" in an area. Apparently a "sex encounter venue" will be anywhere with live performances or live displays of nudity which, ignoring financial gain, is provided principally for sexually stimulating any member of the audience (whether by verbal or other means)! Hmm. It won't include sex cinemas, sex shops, anywhere where such entertainment is provided only once per month or other prescribed premises.

## **Closure orders for relevant sexual offences**

The police will have the power to close premises associated with certain pornography or prostitution offences. It mirrors the ordinary closure orders that we're already familiar with. Basically the residents get booted out and commit an offence if they go back. Only the police can apply to the magistrates once they've issued the notice. However the magistrates - when deciding whether to make the order permanent - may adjourn for up to 14 days in order to hear from any occupier, any person with responsibility or control for the premises or anyone else with an interest. Therefore while of limited impact this may well effect anyone who is the landlord of such a property and in fact may be relevant to social landlords since anyone who breaches a closure order commits an offence.

## ***Cohabitation Bill***

This bill aims to introduce a statutory scheme to cover the separation of people who though not married (or in a civil partnership) live together as husband and wife (or civil partners). The act will replace the common law and constructive trust principles that we all know and love and can be opted out of at the start of the relationship by a written agreement or by express declaration of trust. That'll make an interesting conversation to have when talking about moving in together!

Also it seems that it will not cover disputes where a third party (e.g. a trustee in bankruptcy) is involved or where the relationship is a family one (e.g. between mother and son).

## **Other stuff**

The Advisory Committee on Civil Costs have published the new guideline rates and they have been approved by the Master of the Rolls. They take affect from 1.1.2009. Find the details here:

[http://www.judiciary.gov.uk/publications\\_media/general/guideline-hrly-rate.htm](http://www.judiciary.gov.uk/publications_media/general/guideline-hrly-rate.htm).

They are for Leicester:

Rate A: £198 p/h, rate B: £174, rate C: £144, rate D: £109. Bargain!