



King Street Chambers
The Chambers of Mrs Nancy Hillier

Civil Team Newsletter – March 2009

Hello.

Welcome to what I think is the fourth of King Street Chambers' civil team newsletters. In this edition, Richard Adkinson

- writes some case reviews,
- and sees what's in print.

Happy reading!

Case reports

Health and safety at work – personal injury – foreseeability – knowledge – makeshift work tools – permission to make and use – *Provision and Use of Work Equipment Regulations 1998*

Couzens v T McGee and Co

[2009] EWCA Civ 95 *Coram* Sir Mark Potter P, Smith and Wilson LJ on 19.2.2009

This case concerned an employee who fashioned a makeshift work tool. He had been transporting waste when his lorry overturned. He said that he'd been unable to move his foot because a piece of scrap metal kept in the door side pocket caught his trousers. The metal was a piece of scrap metal used for all sort of tasks such as cleaning mud off the tyres.

Held: (1) If an item of equipment that had not been supplied by an employer was being used at work, it would not be "work equipment" for the purposes of the Regulations unless the employer expressly or impliedly permitted its use or must be deemed to have permitted its use.

(2) Deemed permission would be inferred where the employer ought to have realised that an item was being used but apparently had not and therefore did nothing to stop it.

(3) As the piece of metal was not a reasonably necessary item of equipment, there could be no duty to provide instructions on how to use it.

Negligence – duty of care – landlord and tenant – housing – local government – violent tenant – duty to warn others tenants – human rights - Scotland

Mitchell v Glasgow City Council

[2009] UKHL 11 Coram Lords Hope, Scott, Rodger, Brown and Baroness Hale on 18.2.2009

While a Scottish case, this is important because of the subject matter, the source of the authority and the more than superficial similarity between Scots and English law in negligence.

M were the widow and daughter of the man D whom his next-door neighbour had killed. D and X were tenants of the G. D had done many horrid things over a prolonged period of time e.g. smashing in D's windows and doors after being asked by D to turn the music down, making threats to kill D and intimidating others. G invited this tenant to a meeting to discuss his behaviour and repossession proceedings. The tenant attended, became angry, apologised, went home and killed D. M's case in negligence and under *Article 2* of the Convention was that G had a duty to warn D of the risk that he faced given the meeting that was taking place and the steps being taken against the tenant.

Held: (1) The crucial issue was whether G was under a duty to warn D that the tenant would carry out a criminal act (i.e. the violence) which G neither created nor had it undertaken to avert. Cases which arose from another's deliberate wrongdoing could not be founded simply on the degree of foreseeability.

(2) therefore, applying *Maloco v Littlewoods Organisation Ltd* [1987] AC 241, for M to hold G liable, M must show that it was readily understandable that the law should regard G as under a responsibility to take care to protect M from that risk.

(3) Applying the tests of fairness, justness and reasonableness and considering public policy, G did not owe a duty of care. The implications would be too wide and far reaching.

(4) As a general rule, a duty to warn another person that he was at risk of loss, injury or damage as the result of the criminal act of a third party would arise only where the person who was said to be under that duty had by his words or conduct assumed responsibility for the safety of the person who was at risk

(5) As to M's case under art.2, the issue was whether the local authority ought to have known that, when X left the meeting, there was a "real and immediate risk" to D's life: *Osman v United Kingdom* [1999] 1 FLR 193 ECHR. In the circumstances the case was not made out on this point.

Note: Note that the Article 2 does not appear to have failed as a matter of law but as a matter of fact. Therefore any public authority (does that include housing associations in light of *Quadrant Housing?*) should tread carefully in these cases.

Order and judgments – costs – order referring costs judge to paragraph of judgment – desirably of practice

Richardson Roofing Co Ltd v Ballast Plc and others

CA (Civ Div) Coram Jacob, Aikens and Sullivan LJ – 13.2.2009

A case in which a lot of procedural stuff happened. The main point was the counselling to judges that they should not as a matter of practice make orders referring costs judges to paragraphs of their judgments for guidance on carrying out the assessment. Judgments provided the reasons; any order made at the end of a judgment should stand on its own.

Torts – *Protection from Harassment Act 1997* – Sending unjustified bills and threatening letters to former customer – real prospect of successfully arguing course of conduct amounting to harassment

Ferguson v British Gas Trading Ltd

[2009] EWCA Civ 46 Coram Sedley LJ, Jacob LJ, Lloyd LJ on 10.2.2009

BG had tried to strike out F's claim for damages. And failed.

F had been a customer. But no more. She had switched. BG then sent her several bills which she claimed were unjustified. She received letters threatening to cut off her gas supply, to start legal proceedings against her, and to report her to credit rating agencies. She contacted B several times by letter and by phone, but the bills and threats continued. B argued that the conduct in question was not enough to amount to harassment. BG suggested that as F knew that the correspondence was computer-generated, it should not have been taken as seriously as if it had come from an individual. BG also suggested that even if the conduct would amount to harassment if carried out by an individual, it did not apply to BG. BG said that F had to plead the harassment (if that is what it were) was directed

by someone with sufficient seniority or that it was one employee for whom BG were vicariously liable: relying on *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

Held: (1) A course of conduct must be grave before the offence or tort of harassment was proved: *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, *Conn v Sunderland City Council*. However the fact that there was parallel criminal and civil liability was not generally significant in considering civil liability. It was relevant that one had to put up with a certain amount of annoyance in life. Therefore, things had to be fairly severe before the law, civil or criminal, would intervene. At the very least, it was strongly arguable that B's conduct was capable of satisfying the test of gravity.

(2) The argument that F knew the claims were unjustified was absurd: the Act was there to protect people against unjustified harassment. If the impugned conduct was justified it was unlikely to amount to harassment at all. Although the threats were sent by B's computer system, they were to be read by a real person, not a computer. A real person would be likely to suffer real anxiety and distress if threatened in the way F was threatened.

(3) It was not appropriate, on an incompletely argued strike-out application, to analyse the authorities on corporate liability under the Act in detail. However the court observed that there were no corporate mind provisions like in the *Trade Descriptions Act 1968 s.24*, which was considered in *Tesco*. Why should a large corporation be excused conduct which, if carried out by an individual, would amount to harassment? The court's provisional view was that F had pleaded enough to allege actual knowledge of the conduct complained of, *Tesco* considered.

(4) It seemed that a company must be taken to have knowledge of material within the knowledge of its employees, even if top management knew nothing of the particular case. While there probably be difficulties showing BG knew the conduct amounted to harassment, showing that BG ought to know is enough to establish liability.

Banking – negligence – money laundering – authorised disclosure – suspicion – reasonableness of suspicion – *Proceeds of Crime Act 2002*

Shah & Anor v Hsbc Private Bank (UK) Ltd

[2009] EWHC 79 (QB) *Coram* Hamblen J on 26.1.2009

Amongst other things, this case concerned disclosures made under the *Proceeds of Crime Act 2002* by HSBC and whether a suspicion had to be rational.

The Court held that suspicion is purely subjective: *K Ltd v National Westminster Bank Plc* [2006] EWCA Civ 1039. It did not matter whether there were reasonable grounds for that suspicion provided it was a genuinely held suspicion: *R v Da Silva* [2006] EWCA Crim 1654. While a suspicion had to be more than mere unease, on the other hand it had to be based merely on possible facts. The sufficiency of those possible facts as a grounding for that suspicion was irrelevant, unless good faith was in issue.

Therefore where a banker was compelled to make an authorised disclosure under the Act he could not be in breach of contract for doing what he was compelled to do. To impose a test of reasonableness would put a banker in an impossible position and mean that he could be in breach of duty even though he was acting in compliance with the law.

Accordingly, in order for a customer to impugn the decision to make an authorised disclosure under the Act customers had to challenge the good faith of the bank's suspicion.

Civil procedure – costs – costs incurred attending at coroner's inquest – whether recoverable as costs in subsequent civil proceedings – *Supreme Court Act 1981 s.51*

Roach v Home Office; Matthews v Home Office

[2009] EWHC 312 (QB) *Coram* Davies J, Master Wright and Robert Carter as Assessors on 25.2.2009

In short, where there are subsequent civil proceedings, the factual basis of which is linked to the subject matter before a coroner's inquest, then the costs are in principle recoverable within the civil proceedings. This is because s.51 is wide enough to capture all costs of or incidental to civil proceedings.

Further: the issue of a public funding certificate has no bearing on recoverability; and it is not necessarily appropriate to divide the costs of an inquest by the dual role or purpose of the legal representative at the hearing. While their purpose for being there would no doubt

be a relevant consideration, it is not decisive. One must however consider relevance where the costs of attendance at an inquest were claimed, in whole or in part as costs incidental to the subsequent civil proceedings.

In print

Keith Wilding

Deputy Head of Chambers Keith Wilding, who also sits and a tribunals' judge, has written an article on the new First and Second Tier tribunals structure. The article is entitled "A People's Court" and appears in the Solicitors' Journal edition printed on 3.3.2009.