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Mentoring: how a handful of hours a year can help transform fair access to the Bar

Almost everyone at the Bar of 2022 will be acutely aware of the need to improve diversity in our profession, none more so than those of us who help to manage our chambers or to recruit its pupils. As someone who sat on a pupillage committee for several years, I have first-hand experience of the intensive efforts that go into making such processes as scrupulously fair, and as likely to reveal a true aptitude for a career as a barrister irrespective of personal history, as possible.

Yet a fair recruitment process strives to elicit and assess the objective qualities required – the intellect, the tenacity, the entrepreneurial attitude – while excluding the subjective. Typically, this is done by assessing an applicant's qualifications, their work experience and performance in interview and tackling problem questions. A difficulty is presented by the fact that some candidates may have enjoyed access to educational and careers experience over many years that others have not. This naturally places them at an advantage in terms of demonstrating the objective qualities the Bar is looking for.

Alistair Cantor, Barrister at Cornerstone Barristers

A complete solution to this problem is not within the Bar's hands, but extensive work is being done across the profession to seek to improve access to it across all sectors of our society.

I firmly believe that one way barristers as individuals can make a significant contribution to these efforts, now and for the cost of only a few hours over the course of a year, is by mentoring. During my own rocky road to pupillage, I derived invaluable assistance from a number of

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Child exploitation: trafficking and abuse – an abrupt end to childhood

According to Save the Children, children make up 27% of all human trafficking victims worldwide, and two out of every three victims are girls.[1] According to the Organization for Security and Co-operation in Europe (OSCE) there are 25 million victims of human trafficking worldwide[2] accounting for a revenue of $35 billion per year resulting in the third largest source of income for organised crime after drug smuggling and the weapons trade.[3] Estimates suggest that less than 1% of victims of trafficking are ever identified.[4] Often occurring within highly professional, hierarchical networks, which regularly work alongside other trafficking networks and in conjunction with other forms of organised crime and criminal activities.

Child trafficking refers to the exploitation of girls and boys, primarily for forced labour and sexual exploitation but according to Save the Children, may also include domestic servitude, agricultural work, factory work and mining, or being forced to fight in conflicts. UNICEF reports that the most vulnerable children include "children on the move"[5] or child refugees and migrants who are often preyed upon and hopes for their or their family's education, employment prospects or better quality of life.

Caught in conflict

426 million children live in conflict zones worldwide.[6] Living amidst conflict increases children's exposure to the risk of grave human rights violations, which include child trafficking and gender-based violence. 72 million children — 17 percent of the 426 million children living in conflict areas, globally, are living near armed groups that perpetrate sexual violence against them.

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BSB clarifies its requirements for Professional Indemnity Insurance

Following a **public consultation** and having subsequently **sought approval** from the Legal Services Board, the BSB is amending its Minimum Terms of Cover (MTCs) for **Professional Indemnity Insurance (PII) for Barristers and BSB entities.** The amendments are clarifications rather than substantive changes.

These amendments clarify that insurance policies must cover losses incurred by clients and others, if a barrister or entity is subject to a cyber-attack. Insurance for costs to the barrister or entity resulting from the cyber incident (such as repairing computer systems) is not mandated by the MTCs, but the BSB will keep under review whether it should be required in the future. In the meantime, barristers and entities should consider whether they need additional insurance to mitigate those risks.

The amendments also clarify that insurers may exclude liability that would put the insurer in breach of any obligations under sanctions legislation.

The BSB's Director of Strategy and Policy, Ewen Macleod stated:

"The primary purpose in setting out minimum terms of cover is to ensure that barristers and BSB entities have adequate insurance to cover consumer losses, should a problem arise in relation to their practice. An absence of clarity about what is required could lead to insurers seeking to avoid liability. The amendments being made provide that clarity. Barristers and entities may wish to seek additional insurance to cover their own losses in the event of a cyber-attack."

New legal aid immigration fees will not undo years of underfunding

Increases in legal aid for immigration and asylum work are welcome but will not fix longstanding issues in the system caused by years of underfunding, **CILEX** (the Chartered Institute of Legal Executives) has told the government.

A Ministry of Justice (MoJ) consultation proposes increased fixed fees, but in response CILEX members – around 500 of whom work in immigration law – say they still do not cover the work they have to do when preparing cases or appeals.

The consultation recognises, for example, that the system of online appeals to the First-tier Tribunal – introduced in 2019 – requires significantly more upfront work by lawyers, but CILEX says this is not adequately reflected by the new fee.

Many respondents to an earlier call for evidence by the MoJ said fixed fees encouraged representatives to work within the fee, rather than do all that was required to prepare the case, and raised concerns about the financial viability of firms, the sustainability of the market and access to justice.

These fears were borne out by the comments of CILEX members. One said: "I've seen far too many cases poorly prepared because they are trying to bash through a complex case as quickly as possibly because the money isn't worth it. This means that appellants are being let down by negligent representatives."

CILEX says it is encouraging that the MoJ acknowledges the need to increase fees but, in doing so, it must take into account the years since the last rise as well as the present economic conditions.

Members say the guideline hourly rates (GHR) used in the civil courts should be the starting point to calculate legal aid fees. "Members felt that rates should reflect work carried out and an average of GHR would help to do that. CILEX is inclined to agree with such a suggestion, providing that GHRs are regularly kept under monitoring and adjusted to reflect the current economic climate."

In the same way that the MoJ has recognised unnecessary barriers put in front of CILEX's criminal practitioners, the response calls for it to examine the impact of accreditation schemes within immigration law.

The response says: "Whilst these schemes differ in their final delivery, the principle of alternative routes or an analysis of burden of cost should be undertaken by government to fully understand if such a scheme is appropriately balanced.

"CILEX believes that accreditation schemes need to reflect the equivalence of different forms of legal training. This inevitably has the potential impact of driving healthy market incentives by offering multiple recognised and tailored schemes. It will also further help prevent monopolisation of products available, setting an equal industry standard between legal service providers."

The response also highlights the need to monitor the impact of the reforms to ensure they deliver for clients, as well as the lawyers they need to support them.

CILEX President Matthew Huggett says: "We commend the MoJ's overall ambition to ensure legal aid providers are paid an appropriate level of remuneration. But the reality is that it has to go further and faster to achieve this.

"Immigration and asylum clients are often among the most vulnerable lawyers deal with and possibly the least politically popular. But ministers need to recognise what years of underfunding have done to the system and put justice ahead of headlines to ensure these people have equality of arms when facing the state."

In your head: How neurotech advances could change the law

Neurotechnological advances in decades to come could lead to lawyers grappling with the human rights implications of brain monitoring and manipulation, a new report commissioned by the Law Society of England and Wales has revealed.*

Launched (9 August 2022), *Neurotechnology, law and the legal profession* sets out the challenges and opportunities that developments in neurotech may bring for the law and the profession, the impact they may have on the way lawyers work and on their cognitive performance.**

Such technology is already being used to treat neurological conditions such as Parkinson's disease and to monitor employees' attention when they are working. Neurotech is also of great interest to the military – with the prospect of cognitively enhanced cyborg super-soldiers on the horizon.

The Law Society's report looks at the legal implications of neurotech developments including:

- As a neuro-protection bill makes its way through the Chilean legislative process, should human rights include 'neuro-rights'?
- Concerns about mental privacy and surveillance because of the large amounts of brain data that neurotechnologies are likely to accumulate. Such data may give rise to new powers to manipulate people, the report suggests
- Issues of equity and neurotechnological discrimination if some people in society are augmented with enhanced mental capacities and others are not
- In employment law, concerns around workplace brain monitoring
- In criminal law, could defendants claim their criminal behaviour is a result of having their neurotech device, or even brain, hacked? Could the state mandate neurotech solutions to the problem of crime? Could recidivism be reduced by brain monitoring?
- How strict should any regulatory environment be, given the potentially enormously valuable impact of neurotechnology in treating conditions such as dementia and depression?
- Rather than billable hours, might clients pay for 'billable units of attention' provided by augmented lawyers of the future?

"This thought-provoking report sets out some of the many opportunities that could arise from developments in neurotech," said Law Society of England and Wales president I. Stephanie Boyce.

"It also sets out some of the challenges that lawyers may need to grapple with now and in the future. As the report makes clear, neurotechnology could greatly improve the lives of many but also facilitate ethical failures and even human rights abuses.

"Individual lawyers and firms may wish to specialise in this field as neurotech advances lead to interesting new legal work. Law students may also benefit from studying this emerging technology during their legal education.

"With forward-thinking supported by this report, solicitors can help ensure the benefits of neurotech are maximised, and any negative consequences minimised."

Dr Allan McCay, who authored the report, said: "This tech is coming, and we need to think about regulation. Action is needed now as there are significant neurotech investors such as Elon Musk and Meta (Facebook). We need law reform bodies, policy makers and academics to be scrutinising these technological advances rather than waiting for problems to emerge.

"To take criminal law as an example, numerous questions emerge. One might ask which bit of conduct constitutes the *actus reus* (criminal act) where a person injures another by controlling a drone by thought alone.

"It seems easier to identify the relevant conduct where the defendant uses their system of musculature to control the drone by manually manipulating a controlling device such as a joystick. Moving to sentencing, would it be acceptable for criminal justice systems to monitor and perhaps even intervene on offenders' brains by way of a neurotechnological device while they are serving sentences in the community?

"This latter question of course raises human rights concerns and there is now an important debate as to whether existing human rights protections are fit for purpose, given the possibility of brain-monitoring and manipulation. The human rights issues extend well beyond the criminal law into other areas of law."

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kindly mentors, who could have put the time spent helping me to more fruitful professional or personal use. This year I have myself participated as a mentor in a scheme run by my chambers and five others from the planning, property and public law Bar, which aims to encourage undergraduates and postgraduates from groups that are not well represented at the Bar to consider becoming barristers. My experience of this has left me entirely convinced that such initiatives can make a real difference to fair access to the profession.

What then can members of the Bar offer to underrepresented groups via mentoring schemes?

First, we can help demystify the profession. Based on a recent Netflix drama, a layman's perception of a barrister's life may still involve us all talking in cut glass accents, being nannied by obsequious bow-tied clerks and spending our Friday nights sat in oak-panelled rooms, quaffing fine spirits from crystal glasses as we dissect our latest brief. In fact, such depictions simply do not resonate with the life many now find at the modern Bar, with its conferences and hearings by Zoom, flexible working and wellbeing policies and, increasingly, a more casual dresscode when working other than in court or with clients. A barrister mentor can also speak to the fact that, while issues remain to be tackled and will arise, any chambers worth its salt now strives to create inclusive working atmospheres, to support pupils and members from all backgrounds, and where discrimination does occur will take firm action to address it and and to support victims.

In addition to casting light on working conditions, we can illuminate the nature of the work itself. In my experience, applicants from all backgrounds often have misconceptions of what work at the Bar might entail, usually idealistic ones. Applicants from underrepresented groups may not have been able to access the sort of careers guidance and work experience that can help them understand what the role will in practice involve. Frank and honest insight from a barrister mentor can tick this box, and help a prospective candidate realise that in fact a career at the Bar is well within their capabilities, or that they are well suited to some practice areas and perhaps less so to others. This can only encourage those with the right qualities to apply, and increase their chances of success.

Secondly, mentors can help demystify not only the profession, but also the process of joining it. It took me four annual rounds of pupillage applications before I was lucky enough to receive an outright offer of pupillage. That has left me with a wealth of experience on what to do – and more importantly what not to do – when applying for a pupillage, which I am keen to share. In my view, mentees need honest, realistic and above all practical guidance on how to maximise the chances of a successful application. Such advice might include: an honest steer on which chambers might be targeted for applications; a frank assessment of how numerous and serious the present gaps in a mentee's CV are; where and how they can access opportunities to acquire work, advocacy and marshalling experience; and how they can get help in preparing for pupillage interviews.

Finally, on a human level, we can help support candidates through what is typically a stressful and lengthy process, where they will certainly suffer disappointments along the way and the prize itself is far from guaranteed. I know from personal experience – as both mentee and now mentor - that at times of doubt, a friendly word of understanding and encouragement can prove a real tonic.

I hope from the above I may have convinced at least some readers keen to help improve access to the profession that they should seriously consider mentoring. I can say also the time commitment usually required – a minimum of only 3 hours per year on the scheme I presently mentor on – is vanishly small when weighed against the potential benefits for mentees. From a learning perspective, over this past year I've gained a deeper understanding of the position of underrepresented groups and so hope I will prove a better ally for it. I'll add that mentoring is also fun. On a personal level, I have immensely enjoyed my mentoring sessions with the personable and intelligent mentee I have been allocated under the scheme.

If I have convinced you, there are plenty of opportunities to get involved out there. In addition to the scheme in which my chambers participates, a similar scheme is operated by several commercial sets, and there are organisations such as Bridging the Bar who operate mentoring programmes aimed at underepresented groups. If your chambers already participates in such efforts, please ask to get involved. If they don't, why not ask your management committee whether it should and in the meantime there is nothing to stop you searching out chances to help as an individual. Those who do are likely to gain a rewarding professional and personal experience and make a real contribution to making our profession more representative of modern society.

By Alistair Cantor, Barrister at Cornerstone Barristers

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Most recently, since 24 February 2022, more than 1.5 million children fled Ukraine as refugees and countless others displaced by violence inside the country.[8] As a result, the threat of trafficking and exploitation faced by children is growing. More than 500 unaccompanied children were identified crossing from Ukraine into Romania from 24 February to 17 March.[9] The true number of separated children who have fled Ukraine to neighbouring countries is likely to be much higher. Separated children are especially vulnerable to exploitation through trafficking.

Similarly, children have borne the brunt of the 11-year conflict in the Syrian Arab Republic with the scale of children in need of humanitarian assistance on the rise; increasing 27% from 2020 to 2021 with 6.1 million children now affected.[10]

Easy targets for exploitation

Children are notoriously easy targets for exploitation during periods of conflict and become particularly vulnerable to military recruitment. This is in part, due to their greater susceptibility to influence and coercion compared to adults. Some children are recruited by force while others may reluctantly volunteer, often to escape poverty or as a means of seeking safety. Such was the case for Dominic Ongwen who was recruited by the Lord's Resistance Army during the northern Ugandan conflict at around age 9 and grew up to become a notorious military commander responsible for war crimes and crimes against humanity.[11]

According to the UN office for the coordination of Humanitarian Affairs it is estimated that up to half of children involved with state armed forces and non-state armed groups worldwide were in Africa, including in the Central African Republic where between 2012 and 2015 as many as 10,000 children were used by armed groups in the nationwide armed conflict. In the Democratic Republic of the Congo thousands of children serve in the military and various rebel militias. Similarly, in Somalia, Sudan, Uganda and Zimbabwe children as young as 12 years old have been known to be recruited into militia groups and government forces. Whilst in Bolivia, the government acknowledged in 2001 that children as young as 14 years old, may have been forcibly conscripted into the armed forces during recruitment sweeps.

Girls on the other hand are less likely to be recruited into military roles. Instead, women and girls are at a greater risk than boys during times of conflict with regards to exploitation in marriages, forced child marriages, and sexual slavery.[12] The UN General Assembly has declared that "deep-rooted gender inequalities and stereotypes, harmful practices,

perceptions and customs, and discriminatory norms are … among the root causes of child, early and forced marriage".[13]

"Blue dot" safe spaces

UNICEF, in partnership with the UN refugee agency, UNHCR have established centres at the main refugee arrival border crossings of Ukraine and neighbouring countries. Sites are currently located in Poland, Moldova, Romania, Belarus, Hungary, and Slovakia.[14] The largest of which is situated in Siret on the northern border between Ukraine and Romania. These sites are known as 'Blue Dots' and serve to provide those fleeing the conflict with shelter, support, and information services.[15] According to UNICEF, the Blue Dot operation has the capacity to provide support to around 3000 - 5000 refugees per day, per location and is in the process of scaling up the operation to meet the growing demand.[16]

Blue Dots enable UNICEF to identify vulnerable and at-risk refugees, such as unaccompanied children, those separated from their families or those who have suffered violence or experiencing health conditions.[17] Once identified, refugees can be referred to specialist services to ensure their protection against the increased threat of exploitation and trafficking.[18] The aim is to share key information across the different sites as fleeing families and individuals continue in their journey to safety from one country to another.[19]

Impact of climate change

But conflict and poverty are not the only factors leaving children especially vulnerable to trafficking and exploitation, they have also been severely impacted by the effect of climate change, leaving them at even greater risk of abuse.

Although the two cannot be directly attributed, according to the International Organization for Migration (IOM), the first time the issue of human trafficking after a natural disaster was first observed following the 2014 Indian Ocean Tsunami.[20] This came to light when several child protection organisations began to notice an increase in child abductions for "adoption" in Indonesia.[21] Since 2004, organisations such as the IOM have been monitoring trafficking trends following natural disasters and have found that the rate of trafficking had increased in Bangladesh after Cyclone Sidr in 2007 and Cyclone Aila that also struck Bangladesh in 2009.[22] Bangladesh is one of the world's most vulnerable countries with regards to the impact of climate change. Rising sea levels have washed away farming opportunities for entire villages and in turn, their livelihoods, leaving the children of impoverished families desperate. Around 30% of girls in Bangladesh are married before the age of 15.[23] One of the largest brothels in the world, Daulatdia in Bangladesh was a community built upon sex work, with many of the sex workers in the town under the age of 18 and some as young as ten.[24]

Upholding rights

On 4 April 2022, the OSCE Alliance Conference against Trafficking in Persons, was held in Vienna[25] with the focus being on the risks posed to women and children in accordance with the Palermo Protocol.[26] Whilst the conference focused on the protection of, and assistance to, victims, it also highlighted the clear need for the application of a victim-centred approach to ensure that victims' rights were upheld while adhering to the principles of non-punishment and non-discrimination as well as discussing how protection systems need to promptly adapt to take into account the vulnerabilities of people seeking refuge from armed conflicts.

Children are largely unable to guarantee their own safety and as such are at the mercy of those charged with their protection. Despite continued efforts by international organisations and charities, children continue to be among the worst affected by trafficking and exploitation, with the threat increasing when coupled with the devastating impact of armed conflict. The true impact of the Russian invasion of Ukraine on children remains to be seen and quantified.

Where there is displacement or poverty caused by conflict or climate change, there will inevitably be those seeking to take advantage for personal gain at the expense of the innocence and

vulnerability of the children caught in the crossfire.

Christina Warner, barrister, Goldsmith Chambers and Luke Evans law student

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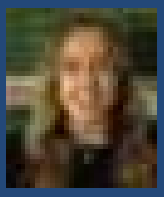


The promise of an inheritance: is it enforceable?

By Arabella Adams, Barrister at 5 Stone Buildings

It is well known that, in this jurisdiction, individuals enjoy a great deal of testamentary freedom. A testator may choose to benefit his family with his will, or he may equally choose to leave everything to his dentist, or to a charity. Moreover, the usual position of a will is that it is a document which has no effect until the testator's death. Once a testator has made a will, it does not usually bind him; he generally still remains free to deal with his property as he wishes during his lifetime. He might go on to revoke the will that he has executed; a threat that is often left ringing in the ears of younger generations!

What if, however, a testator has promised to leave something to a person in his will? Perhaps a grandson swears that his grandmother assured him that he would inherit her house, or her car, or a particular sum of money. Can the grandson's assertion, in its own right, lead him to a legal remedy? This article provides a very broad-brush look at this interesting and occasionally tricky area of the law.

Is it possible to contract to leave property by will?

A contract to leave property by will is, in certain circumstances, legally enforceable. So too is a promise not to revoke an existing will. At first blush, this is in total conflict with our notions of testamentary freedom and the nature of a will. Yet, where a valid agreement to leave property by will has been made, the rights of the promisee do not arise under the will, but contractually. The will remains intrinsically revocable, but the testator binds himself personally, such that after his death, his personal representatives must give effect to the agreement at the expense of any alternative beneficiaries under the will or upon intestacy. In this way, the rights of the promisee exist independently of the will.

As one might expect, therefore, contract law principles apply. Four specific principles are of particular importance.

First, there must be an intention to create legal relations: a positive undertaking, rather than an informal family arrangement. Crucially, the fact that a testator has made a statement as to his testamentary intentions is not necessarily sufficient. There must be more than a mere representation that the speaker intends to do something in the future. The question of whether the speaker's words have created a binding legal obligation upon him will largely depend on the language used by the parties and the surrounding circumstances, including the degree of formality.

Second – in a requirement that could sweep aside many potential claims – the promise must either be supported by valuable consideration, or be made by deed.

Third, the terms of the contract must not be uncertain. There might be a promise to leave specific property, such as the promisor's house, or a pecuniary legacy, or, alternatively, a specified share or the whole of the promisor's residuary estate. In case law, a testator's promise to make 'ample provision' has been deemed too vague to be enforceable.

Fourth, a promise relating to land (assuming it was made on or after 27 September 1989) will be void if it is not in writing, signed by each of the parties.

What duties are imposed on a promisor during his lifetime?

Once a valid contract has been made, it is clear that the personal representatives of the promisor are under a duty to give effect to the agreement after the promisor's death. At this stage, one might wonder to what extent the promisor is left free to deal with his own assets in his lifetime. The answer is that it depends on the precise nature of the promise that was made. All of the following examples presume that the promise amounted to a valid contract.

If Grandmother promised Grandson that she would leave him specific property in her will – for example, a particular diamond necklace – then she will repudiate the contract if she disposes of the diamond necklace during her lifetime.

If Grandmother promised Grandson that she would leave him a specific share of her residuary estate – let's say, half of it – then, provided that this is reflected in Grandmother's will, she remains at liberty to use any or all of her property for her own benefit during her lifetime, or to give it away before her death. The promise was to leave Grandson half of her residuary estate; there was no promise as to how much, if anything, would be left in her residuary estate.

If Grandmother promised to leave Grandson a specific pecuniary legacy in her will, such as the sum of £150,000, then the construction of the contract becomes important here. The construction might merely oblige Grandmother to make a will containing a pecuniary legacy of £150,000 to Grandson. Provided that Grandmother has done this, Grandson is no different in status to any other beneficiary of her will, and takes the risk that Grandmother's estate may turn out to be insolvent or insufficient to satisfy the gift. Alternatively, the contract might be construed as imposing an obligation on Grandmother to make the gift effective. In that case, there would be a breach of contract if her estate were insolvent or insufficient.

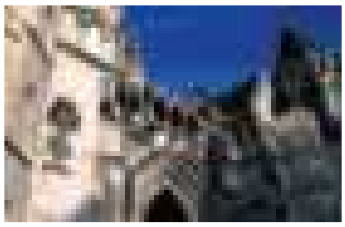
Taking a slightly different focus, Grandmother may have promised Grandson that she would not revoke an existing will of hers which left everything to him. A valid contract of this nature will prohibit acts of intentional revocation by Grandmother, such as destruction of her will, or execution of another will or codicil. What the prohibition will not encompass is automatic revocation of Grandmother's will by operation of the law: if Grandmother marries and her will is automatically revoked by the marriage, this will not amount to a breach of the contract. Moreover, any contract which attempts to prevent revocation of Grandmother's will by prohibiting her from marrying will be void on the grounds of public policy (unless the offending term is severable). Somewhat confusingly, this rule of public policy seems only to apply to promises *not to revoke a will*. It does not apparently extend to agreements *to leave property* by will, which might conceivably end up being breached by the automatic revocation of the promisor's will through marriage.

Conclusion

In answer to the opening question, therefore, promises to leave property by will can be enforceable in certain circumstances, and the disappointed promisee could be entitled to damages, specific performance, or other remedies, depending on the nature of the promise made and the timing of the claim.

It must be emphasised that a will made in breach of one of these contracts will remain a valid will. Probate of the will must be granted and it is unlikely that the Probate Registry will be concerned by the contract. Any redress should come in the administration of the estate. The property that is the subject of the contract should be held by the promisor's personal representatives for the benefit of the promisee.

It is common for family members to develop an expectation of inheriting from the estate of an elderly loved one. Clients frequently insist that the deceased promised them an inheritance or some specific property. Despite this, valid contracts to leave property by will are rarer than one might expect. Many of the promises given in a family setting will not have been sufficient – or, rather, will not have been sufficiently evidenced – to fulfil the requirements for the creation of a valid contract. It is comparatively unusual for promisees in a domestic context to have given valuable consideration for the promise, or for the promise to have been made by deed. A potential claimant might well consider whether it would be easier to bring a claim based on proprietary estoppel, the Inheritance (Family and Dependants) Act 1975, or the law of constructive trusts.



Where to start: reforming a legal system to attract foreign investment

By Dr Nicolas Kyriakides, lecturer on Civil Procedure at the University of Nicosia

Attracting foreign investment is absolutely key to any country's long-term economic prospects. Research FDI quotes: *Foreign governments encourage international investments by the political stability of a country. A business's prosperity is based on a government's favourable legislation and political goodwill.* And this modern world is smaller – it's easier than ever for businesses to explore new opportunities in far-flung destinations and expand into territories that wouldn't have been on their radar a few years ago. So, whilst opportunities are greater, so too are the risks and the competition. To be considered an attractive destination for foreign investments, countries must present a transparent, logical and consistent legislation and litigation regime. There can't be a whiff of corruption. But how do you go about reforming a legal system, to make it fit for the modern age? It's not just about reform either, but constant improvement. In today's fast-moving world, no country can afford to take its eye off the ball and risk their justice system stagnating and looking outdated.

In Cyprus, we faced such challenges and I believe our recent reforms could act as a blueprint for any jurisdiction looking to overhaul or even re-jig their legal system. Ultimately, we have seen a multi-pronged approach which is steadily considering all aspects of the country's legal system. Reports by the Institute of Public Administration of Ireland and a committee led by Lord Dyson in 2018 laid the groundwork for these reforms.

It began really, with court delays. The courts in Cyprus were notorious for both lengthy court proceedings and a growing backlog in civil and commercial cases. In particular, there are now approximately 5,000 cases pending in the Supreme Court and 42,000 cases pending in other courts while 25,000 of these cases have been pending for over two years. These figures sparked the need for reform, a move which was supported both domestically and in Europe. The first step was new civil procedure rules.

Elisa Ferreira, European Commissioner for Cohesion and Reforms commented: *"For decades, Cyprus' justice system has been suffering from lengthy court proceedings and an increasing backlog in litigious civil and commercial cases. I am pleased that the Commission is continuing to support Cyprus in its judicial reform, not least with the reform and adoption of the new civil procedure rules by the Supreme Court of Cyprus. Effective justice systems are essential for social fairness, mutual trust, a favourable investment climate and the sus*tainability of long-term growth."

1.Clear the Backlog

These new civil procedure rules, which will be implemented in September 2023, aim to improve the way courts handle disputes. Emphasis will be placed on the need for a better approach to civil procedure and an improvement on the current justice culture.

Obviously, court backlogs are not just a problem in Cyprus. To deal with the problem, we have recently introduced additional courts to help clear the backlog. Perhaps we could see a similar move in jurisdictions such as England and Wales, which are too struggling to clear a glut of cases, built up over COVID and down to a lack of judges and resources? In 2021, it was reported that the backlog in the crown courts in England and Wales had reached 54,000 unheard cases.

In Cyprus, the new Commercial Court will consist of five judges and will be primarily devoted to handling commercial disputes of claims exceeding 2,000,000 euros as well as matters related to competition law, intellectual property and arbitration. From the perspective of attracting foreign investment, this new court will also have a specific focus on settling international disputes.

The new Admiralty Court will consist of two judges and will be primarily devoted to handling cases related to a vessel. Also a new Court of Appeal was established, which introduces three tiers of justice for the first time.

A further reform, The Backlog Project, is also focused on clearing this delay, which can be as much as seven years in some cases – particularly civil.

2. Focus on Digital

Next, any country wishing to ensure its litigation regime stands up to international scrutiny needs to consider technology. In the UK, we have seen how the courts have begun on a journey to technological transformation and this is essential for any country to ensure its litigation regime remains attractive. Take the Supreme Court as an example, which has been on a four-year journey to digitise paperwork and ensure hearings can be carried out remotely if needed. Cyprus too has been on a journey recently to ensure its justice system is robustly prepared for the future. This has meant taking steps to introduce a new e-justice system, digitising court administration and providing users with some essential transparency to the system and enabling them to check on the progress of their case.

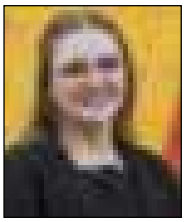
3. Clear our Corruption

Again, we've seen lobbying come front and centre in recent years in the UK, with the Greensill lobbying scandal for example, which saw *"the most serious controversy about government lobbying and cronyism for years"*, according to The Guardian newspaper. A solid regime of regulating lobbying is essential to ensure there's a transparent line of communication between civil society, the government and business. More transparency in this way can also account for less conflicts which will also lead to less cases needing to be brought to court.

In Cyprus we have seen a new law introduced (as of February 2022) to regulate lobbying and ensure any contact between lobbyists and policymakers or state officers will have to be made public along with the content of the conversations. Zenox Public Affairs, the first third-party lobbying firm in Cyprus, has also introduced Nomoplatform, an initiative implemented which further improves transparency by providing access to the policymaking process by monitoring pending legislation and informing interested individuals.

A modern, transparent and efficient legal system is essential for any well-functioning country which wishes to not just attract foreign investment, but keep up on the world stage. For England and Wales, this means maintaining its position as an international hub. For Cyprus, this means overhauling outdated systems to attract overseas investment. However, the steps are the same and these examples really do provide a blueprint for any jurisdiction looking at its own justice system.

Dr Nicolas Kyriakides, a lecturer on Civil Procedure at the University of Nicosia who also runs a research unit. He has been consulted by government on changing legislation and regulation in his home territory. He is Partner and Head of Harris Kyriakides' Banking & Finance and Insurance Law Departments.



Prosecutions for ''Non-fatal strangulation and non-fatal suffocation'' – A positive step?

By Holly Thompson, Pupil Barrister, Wilberforce Barristers

Too often in our courts, we prosecute and defend matters of domestic violence, committed by one partner against their significant other. When sentencing these Offences against the Person, such as s.47 or Assault by beating, Judges or benches of Magistrates' will often take into account in their decisions the domestic violence guidelines and specific aggravating features, such as strangulation, suffocation, and asphyxiation. However, as of 7th June 2022, two specific offences of "non-fatal strangulation" and "non-fatal suffocation" have been implemented into our justice system, as part of the government's introduction of the Domestic Abuse Act.

What does it say?

Section 70 of the Domestic Abuse Act 2021, which came into force on 7th June 2022, substituted s.75A into the Serious Crime Act 2015 - two separate offences of non-fatal strangulation or non-fatal suffocation. This legislation provides for someone (named person "A" for the purposes of the Act) to be charged with an offence if they:

> (a) Intentionally strangle another person ("B"); or
> (b) Does any other act to B that –
> i. Affects B's ability to breathe, and
> ii. Constitutes battery of B.

Therefore, s.75A(1)(a) constitutes an offence of "Non-fatal strangulation", and s.75A(1)(b) constitutes an offence of "Non-fatal suffocation". However, for the purposes of this article, the two have been grouped together.

As established under s.75A(2) and (3), it is a defence for the individual charged to show that B consented to the strangulation or the other act; to take into consideration situations where couples are consenting to acts of strangulation/suffocation either for sexual gratification purposes or otherwise. They must do so by providing sufficient evidence of the fact, and the contrary is not proved beyond reasonable doubt. This defence does not apply if B suffers serious harm as a result of the strangulation or the other act, and the individual charged either intended to cause B serious harm or was reckless as to whether B would suffer serious harm. This defence of consent does not extend to s.47, s.20, or s.18.

The offence is one to be tried either way. On summary conviction, the maximum sentence is one of 12 months (or 6 months if the offence was committed before 2nd May 2022, prior to the increase in the magistrates' court sentencing powers) and/or a fine. On indictment, the maximum sentence is a term of 5 years and/or a fine.

Is this a positive move?

At first glance, the enactment of these offences seems positive. In practice, prosecuting offences where strangulation and suffocation are alleged but cause no visible injury can be a difficult task. Especially in the domestic violence context, when complainants may withdraw their support of the prosecution either out of fear or a wish to continue with the relationship.

Campaigners for domestic violence reform urged the government to better protect victims of domestic violence, and the introduction of s.70 Domestic Abuse Act 2021 clearly intended to tackle the low rate of successful prosecutions for non-fatal strangulation in our country. Studies such as Glass et al's *"Non-fatal strangulation is an important risk factor for homicide of women"* confirm that if victims of domestic abuse were subject to non-fatal strangulation beforehand, then they are seven times more likely to be murdered by their romantic partner. The enactment of these offences, along with the Act in general, is therefore a positive shift to recognise the difficulties and complexities victims of domestic violence face on a daily basis.

However, to a legal mind, there are clearly flaws within s.70/s.75A. We are used to the legal definition of 'serious harm' including GBH and offences under s.20 and s.18 Offences against the Person Act 1861. We are also instilled to recognise the definition of actual bodily harm as being "any hurt calculated to interfere with the health or comfort of the victim, which need not be pertinent but must be more than transient and trifling" (R v Donovan [1934] 2 KB 498). Nevertheless, s.75A(6) defines "serious harm" as:

> (a) Grievous bodily harm, within the meaning of s.18,
> (b) Wounding, within the meaning of s.18, or
> (c) Actual bodily harm, within the meaning of s.47.

There appears to be a disconnect between the definition of s.47 as we know it and s.47 within the terms of s.75A(6). For 'serious harm', there is now a need to prove an intention or recklessness under s.75A to disprove the defence, instead of proving an application of unlawful force in s.47 cases. Additionally, the mens rea requirement for proving a defence under s.75A appears to make these two offences more difficult to prosecute than a s.47 offence – where the maximum sentence is also one of 5 years.

We have discussed the resemblance of s.75A to other Offences against the Person, but they share an even more striking resemblance to the offence of s.39 Assault by Beating – an offence triable only summarily with a maximum sentence of 6 months. However, under s.75A, if the defendant elects a Crown Court trial or the magistrates' do not believe they have sufficient sentencing powers to deal with the case, the maximum sentence is one of 5 years. Although it is important to recognise the difference between the strangulation of a stranger or a friend in the street and the strangulation of an intimate partner as a mechanism to gain control, it is unclear why there is such a disparity between the maximum sentences. Judges and benches across the country have for some time applied the domestic violence guidelines and the aggravating feature of strangulation when sentencing these offences, to take into account these differences. However, applying these aggravating features to the new offence of strangulation or suffocation could be classified as 'double counting'.

There are currently no Sentencing Council Guidelines in place for non-fatal strangulation or suffocation, and prosecutions for these offences are only just starting to trickle through the lower courts. Without seeing the updating Sentencing Guidelines for these two offences, it is unclear how they will be sentenced in practice moving forward. However, what is clear is that in some way, with the introduction of the Domestic Violence Act 2021 and the improved Victim's Code, victims of domestic violence will be one step closer to getting the justice and closure which they are searching for.

Holly Thompson, Pupil Barrister, Wilberforce Barristers

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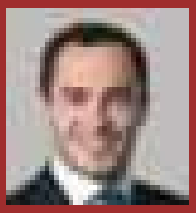


The (excessive) cost of a cashless society: the myth or MIF of 'pass on' issues

By Laurence Page, barrister, 4 Pump Court

WALTER HUGH MERRICKS CBE V MASTERCARD INCORPORATED AND OTHERS; (UM) MERCHANT INTERCHANGE FEE UMBRELLA PROCEEDINGS [2022] CAT 31

Introductory comment

In approximately 600 BC, King Alyattes of Lydia ordered the royal blacksmiths to mint small metal discs made from an alloy of gold and silver, onto which the royal crest of a lion was stamped. Since then, as any six-year-old waiting for the tooth fairy will tell you, money has meant cash. But cash did not prove costless. The minting, sorting, storing and distribution of cash has been estimated to cost about 0.5% of GDP in rich countries, before taking into account the effects of forgeries.

The electronic payment systems which were developed in the late 20th century, principally by Mastercard and Visa, aimed to eliminate this inefficiency. The dematerialisation of money helped shops tackle theft, governments track fraud, and customers to develop a credit history.

The promise was to streamline payments and for money to be saved by those using card technology. Yet, the shift to card payments resulted in many of the benefits being marginal after the collection of fees set by the major card scheme operators, MasterCard and Visa.

These fees have been the catalyst for an array of competition litigation. Were the prices paid by consumers inflated as a result of the anti-competitive default fees set by MasterCard and Visa? If so, had merchants passed on the overcharge to their customers?

The recent judgement handed down by the Competition Appeal Tribunal (CAT) in the mammoth Merricks v MasterCard umbrella proceedings seeks to shed some light on this question.

This judgment, issued on 6 July 2022, has served as a clear indicator as to how the Tribunal go about dealing with the issue of whether retailers "passed on" any higher charges, and has provided clarification on the threshold of evidence that must be adduced by both the retail and consumer claimant groups to prove their cases.

Background

Of principal concern in the recent judgment handed down by the CAT on 6 July 20222 was the issue of pass on. This concept essentially concerns questions of causation and quantum: notwithstanding a prima facie case against the defendants, has the claimant in fact suffered loss or has it passed on such loss to its consumers? 3 The CAT, at this stage, was seeking to establish the manner in which pass on damages might be calculated, rather than any findings of fact.

The CAT found three distinct difficulties in their analysis of pass on, namely: (1) the evidential difficulty, (2) the definitional difficulty and (3) the legal difficulty.

The definitional difficulty

The Tribunal stated that pass on is "extremely difficult to show", and recognised that it is not straightforward even to identify what constitutes evidence to prove this issue. The Tribunal provided a useful example illustrating the difficulties:

> *"If a direct claimant were to pay the overcharge, as the overcharge is part of the cost item, it is questionable as to how the direct claimant's reaction to the overcharge can be evidenced. If the direct claimant were to react by increasing their prices, would there be specific documentation to show this? Similarly, if the direct claimant were to reduce their prices, again would this reduction be documented? However, if the direct claimant were to absorb the overcharge, it would not be possible to evidence this without considering the previous two points first. Yet, even if documentation was to be provided, there will remain great difficulty in reliably confirming where the overcharge ended up."*

Thus, the Tribunal acknowledged the difficulties and how the framing of the question may help or hinder the answer, however ultimately the Tribunal found that parties to these proceedings must clearly understand what evidence they must produce.

The definitional difficulty

Under this second heading, the Tribunal sought to tackle how the claimants may have reacted to "the overcharge". In the Sainsbury's v Mastercard case, the claimants each had four potential responses to the overcharging (none of which are mutually exclusive):

1. Make less profit (i.e. make no changes to the business, and keep consumer prices unchanged);
2. Cut back on spending (i.e. reduce expenditure elsewhere in the business to compensate for these costs);
3. Reduce costs (i.e. reduce expenditure on the product in question); or
4. Pass on the increased cost (i.e. raise prices for consumers).

The boundaries between Options 2 and 3 are likely to be blurred in practice. For example, it is difficult to categorise marketing spend which encompasses both a specific product as well as the brand generally. But the Supreme Court commented in Sainsbury's, obiter dictum, that pass on may occur in Options 2, 3 and 4. If so, the obvious difficulty of categorising claimants' conduct between Options 2 and 3 may not prove critical to the outcome of the claims. However, the issue cannot be dodged entirely; the Tribunal accepted that it was still open for them to determine whether reactions under both Option 2 and Option 3 are actionable once it comes to assess the facts.

The definitional questions generated some tension between the claimant groupings. The consumer groups argued that the typical reaction by businesses was Option 4 (as this is essential for their claim to succeed). Mastercard and Visa agreed with this analysis. By contrast, the business claimants (the so-called 'direct claimants' who paid fees to Mastercard/Visa) adopted a more cautious approach as to which Option applied.

The legal difficulty

The third problem with pass on issues is that, as demonstrated by the tensions between the various groupings at the definitional phase, the concept can be relied upon as a claim (by the 'indirect claimants') but also as a defence (by Mastercard/Visa against the 'direct claimants'). The CAT acknowledged this complexity but held that there have already been clear legal findings identifying what constitutes pass on.

The question of who holds the burden of proof on a given issue will be a question for a later day.

Concluding remarks

Establishing how pass on claims and defences might be established is certainly a difficult task, and one that remains to be fleshed out by the courts. The CAT's judgment is to be welcomed as a frank assessment of the implications and difficulties arising from this issue, well in advance of any trial. However, much is still left to be decided, specifically when adducing the evidence required to prove such claims. It waits to be seen whether the payment system first devised by King Alyattes may, after all, have been just as efficient as that which the modern kings of the payment system devised.

Laurence Page, barrister, 4 Pump Court
With thanks to Matthew Tweddell for contributing to this article.

Ten things I've learned since moving to the civil Bar

By Bramble Badenach-Nicolson, Barrister, Hailsham Chambers

I moved to the civil Bar last year, having undertaken pupillage and secured tenancy at a criminal set. Whilst my civil practice is similar to criminal practice in many ways, I have been struck by 10 key practical differences at the junior end:

1. My wig and gown are almost exclusively reserved for fancy dress

At the junior end of the civil Bar, there is very little opportunity to robe, unlike my daily routine in the Crown Courts. When I attended my first multi-track case in the County Court I eagerly packed my wig, gown and bands, mindful that the Circuit Judge may have required everyone to robe. However, the reality is that unless you are being led by a senior member of Chambers, you are unlikely to need a wig and gown for a good few years.

2. There is less camaraderie between counsel in court

My first pre-trial meeting with an opponent in the civil courts was surprising in that they were fairly brusque and did not give anything away. At the criminal Bar, I was used to discussing all issues with the prosecutor or defence counsel before trial in an attempt to minimise court time (and make your colleague's life as easy as possible). This was, I suspect, in large part due to the severe lack of court time in both the Magistrates' and Crown Courts, but there was generally a mutual understanding that the more information was shared between the parties at Court, the more likely a hearing was to be effective and a fair outcome reached. Of course, civil barristers are ethically bound to adhere by the same principles, but I have found there is far less compromise between parties until a judge makes their views crystal clear on a particular issue.

3. There is more client contact

There is the obvious point that you (generally!) do not have to visit the cells and/or prison to speak with your client in a civil case and so conferences are more straightforward. I have found that there is also less concern in relation to sharing one's email address or mobile numbers with parties in a civil claim, especially on the small claims track, where it is very common for a witness to turn up with helpful photographic evidence on their phone the morning of trial. This proximity is borne out by the fact that the claimant or defendant (and/or their witnesses) will often sit beside you in what tends to be a fairly small District Judge's court room.

4. Even minor matters can be fraught with emotion

At the criminal Bar, I became accustomed to the sad reality of representing defendants who turned up to court on their own, prison bag packed and resigned to their fate. Perhaps that was unsurprising given many of my clients had far more court experience than I did! Surprisingly, there was often very little emotion involved, at least when dealing with relatively minor crimes. I have found the opposite is true in the civil courts: most clients have not stepped foot inside a court room before and no matter how small the sum of money involved; someone will be emotionally invested in the outcome. I wonder if that is another reason why counsel at the civil Bar, at least when acting for a client in court, are conscious not to seem overly friendly with their opponent.

5. Money is involved

This did not come as a surprise, but I am continually struck by the very different way in which matters are dealt with in so far as money is concerned, both by the courts and legal professionals. A colleague at the criminal Bar once joked that a client facing criminal proceedings (and indeed the judge) would be grateful if counsel turned up, let alone did a good job. Whilst that is probably inaccurate (clients were rarely grateful), it does illustrate the key difference between the two practice areas: my experience of the legal aid system was that underqualified and overworked solicitors would (mis)manage a client's case and very often it was my job to stand before a judge and make a silk purse out of a sow's ear, making far-fetched submissions as to why a stage date had not been complied with, or why CCTV evidence was being served on the day of trial. Whilst deadlines are missed in the civil world, parties will not get away with it (at least not without any form of sanction). I can count on one hand the number of times the Criminal Procedure Rules were genuinely relied upon in my cases in the Magistrates' and Crown Courts. My experience was that the system was so overstretched and under-resourced that it was a miracle if everyone turned up at the right place at the right time and with the right documentation.

6. Junior civil practitioners can be in court everyday

Unlike their colleagues at the criminal Bar, civil juniors are rarely expected to be in two or three different courts (in person and/or virtually) on the same day. However, it is a myth that civil second six pupils and juniors are not in court as much as their criminal counterparts. I can have four to five small claims and fast track trials in my diary each week, most of which are now taking place in person. Therefore, although the style of advocacy required for a road traffic civil trial may be different to a road traffic trial in a criminal court, I think the assumption that civil juniors' advocacy skills are less refined than those of criminal juniors is unfair.

7. (Paid) written work forms a significant part of civil practice

Perhaps an obvious observation, but this practical reality makes life at the civil bar very different to other practice areas. At the legally aided criminal Bar, I found I would attend court (sometimes in two different locations) every day, and would spend most of the working week either travelling, having a conference with a client or appearing in court. This left very little time for paperwork, such as drafting defences, skeleton arguments and appeals, and providing written advice, for which I was not remunerated. Conversely, at the civil Bar, there is an expectation that court time will decrease as one becomes more senior, and paid paperwork will increase. The upshot of this is that people for whom travelling is difficult and unpredictable hours are unworkable can still have a successful practice.

8. Contact with colleagues

In what is hopefully now a post-pandemic world, one of the most enjoyable aspects I have experienced since moving practice areas is that colleagues will regularly come into Chambers when they are not in court. This collegiate working environment reminds me of university, where fellow students would carry out research and work together in the library. As a very junior tenant, I benefit immensely (and learn a great deal) from being able to knock on someone's door and ask for their advice on my own cases and discuss colleagues' work over a cup of tea in the corridor.

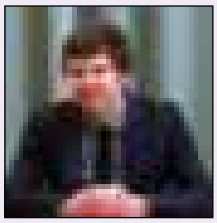
9. Marketing and events are important

Whilst all sets of Chambers must obtain work from, and ensure that they sustain relationships with, their instructing solicitors, I have noticed there is a marked difference between marketing strategies in other practice areas. At the risk of stating the obvious, when clients (lay or professional) are actually paying for services, they want to ensure they are getting the best. In my experience, the legal aid structure is such that whilst solicitors generally approach Chambers with whom they work frequently, fewer resources are dedicated to networking with those clients. At the civil Bar, there are regular events, organised by both Chambers and professional organisations such as PIBA, PNLA, ChBA, all of which give juniors like me the opportunity to approach and speak with junior solicitors and senior lawyers who are leaders in their field.

10. Pupillage is structured differently

In my experience, civil pupils are required to practice drafting under supervision and attend court with their supervisors during their first six months; they are then required to complete assessed pieces of written work which will be placed before the tenancy committee approximately three months before the end of their pupillage. This, with the intention that pupils who are unsuccessful in securing tenancy will be able to apply for third sixes elsewhere during the summer months when other Chambers often advertise. In my opinion, this structure provides enhanced stability and predictability, which is especially important for young, recently-qualified lawyers weighed down by student debt and the ever-increasing cost of living.

Bramble Badenach-Nicolson, Barrister, Hailsham Chambers



The severe pressure to get work done in litigation

By Jack Brett, Future Pupil Barrister at Guildhall Chambers

You're a junior solicitor in a busy litigation firm in London, toiling at your desk on a late Friday afternoon, emptied of any hope of evening respite. Vying for professional success in the big city, you have foregone your right to a full night's sleep and fully embraced the intense spontaneity of the contentious world. The ambition of securing your 'big break' powers you through fatigue. More work creates more opportunities, and more opportunities yield greater recognition, leading to better work and opportunities…But little do you know how fragile this investment is in such a fastidious world. As Warren Buffett once said: *"it takes 20 years to build a reputation and five minutes to ruin it."*

There is an update in one of your cases – an acrimonious dispute between former business partners who, following their unsuccessful venture, played the *"fraud"* card on each other. As the defendant, your client is employing all possible means to slow the proceedings. He was recently ordered by the High Court to provide six figures worth of security for the claimant's costs of defending his counterclaim. He is now just hours away from breaching this order. Truth be told, he never had the intention of providing the security because his counterclaim is baseless and was only advanced in order to create delay.

To bring about said delay, you make a request to the other side's solicitors for an extension of the deadline with the aim of pushing back the rest of the timetable to trial, along with a threat of a last-minute application to secure this extension from the court. As you know, the threat usually persuades the opposing party to consent to an extension even where there is no real justification. But the extension ordinarily comes with a catch, what is known as an *"unless"* sanction: unless the security for costs is provided by the new deadline, the claim advanced by the party is dismissed or *"struck out"*. So much for a frivolous counterclaim. Once the extension is secured, it will have served its purpose and could safely be laid to rest. But in this instance, things did not go entirely to plan.

As we know, security for costs is designed to secure a party against the costs incurred due to the claim brought against them. If the other party chooses to not provide this security, the law stops him from forcing his claim on the other with a court-ordered *"unless"* sanction. This creates a fork in the road: either one maintains the claim and transfers the funds, or one drops the claim. That is the basis on which parties agree to the sanction outside of court by way of consent order. If the other party refused to agree to it, the

former party could simply go to court and the other would bear the costs of the application. However, nothing prevents them from agreeing on things outside of the parameters of what a court would grant. Anything can be proposed and there is no obligation to warn the other beforehand (though, of course, one cannot be misleading). Yet, it would be inconceivable for anyone to insist on something which he could not obtain by applying to the court, because the other will only agree to what he will inevitably be required to do by the court.

In this case, claimant's solicitors advanced an offer of an *"unless"* sanction applying to the defendant's *"Defence and Counterclaim"*. The dismissal of the *defence* was a borderline insulting suggestion, an illogical sanction which no court would grant. As the defendant's counsel later put it, if this had been brought to a judge, *"the claimant would have been laughed out of court"*. The security for costs was only required to maintain the counterclaim, so the *"unless"* sanction should have been limited accordingly. That was obvious. The claimant had every right to ask for more, but it faced almost certain rejection. Knowing this, one could be forgiven for not suspecting an attempt at such a convoluted and practically hopeless course. Faced with what should be a straightforward matter in the final hours of the working week, a junior solicitor may succumb to the temptation to presume and omit to double-check the proposal. Thus, you agree to the order without properly reading it, before unwittingly leaving your station. Unfortunately, the momentary satisfaction of skimming off one's workload before the weekend doesn't compare with the lasting grief for the mistake.

As lawyers we are pestered with small yet time-consuming tasks of seemingly little significance. It is easy to think that what we do will have no bearing on the future and fall into obscurity. Sure, we are paid for it. But this is not what we signed up for. Permission to serve claim forms, modes of service, limitation periods… many are the arid and technical provisions of the Civil Procedure Rules. Yet, rushing the work can have devastating consequences, something which we are reminded of from time to time. Inaccuracy is punished more harshly than accuracy is rewarded. Fortunately, in many cases there are saving provisions allowing for a recovery with a second bite of the cherry. However, not every mistake can be reversed, and even when it can, the law must eventually draw an uncompromising line, as in this case.

The junior lawyer in question mistakenly agreed to and executed an order which would dismiss his client's

defence to a multi-million-pound fraud claim, thus allowing the claimant to obtain judgment in default. The order was then sealed and could no longer be amended informally. Moreover. there was very little room to interpret the conceptually distinct terms used in the order of *"Defence and Counterclaim"* as just "Counterclaim" and effectively erase half of the sanction. Its meaning was certain and set in stone. After the new deadline to transfer the funds came and passed, the point of no return was reached. The sanction it provided had kicked into action and the defence was struck out. The only hope was an application for relief from sanctions, but the first two criteria for such applications were not met: the failure to pay security for costs was a serious breach and there was no good reason for it. A desperate plea for such relief was nevertheless made to the High Court, in vain.

Evidence was filed on behalf of the poor solicitor, explaining that he was *"feeling unwell"* at the time and didn't appreciate what he had agreed due to tiredness. His supervisor was also on holiday and unable to review his work. Other lawyers in the team who were able to double-check what he was doing were preoccupied with other matters and trusted he could handle a relatively simple affair. Whilst we may feel some sympathy, these excuses have little to no meaning in the eyes of the law. The client will have a claim for professional negligence for the value of his defence. This will most likely be settled confidentially out of the firm's professional liability insurance. In the end, the client will be fine and so will the business. However, the same may not be said of the junior solicitor, who was in fact named in the public judgment rendered by the High Court. The circumstances in which he was placed are not uncommon at all. Firms take on a superabundance of litigation work, much of which is treated as a matter of urgency. Work schedules are crammed with sensitive tasks and can seldom be properly organised. There is never a convenient time to take holiday without overburdening one's colleagues. Lawyers end up slogging long hours, and occasionally significant tasks are handed down or left to earnest but uninitiated new recruits. There isn't the time nor the resources to check every detail before the final piece must be submitted. Errors will slip through the cracks and, every now and again, cause problems. But for whom? There is good reason to question the propriety of this culture. Whilst overstretching lawyers may in the end be more profitable for some firms despite liability costs, does their gain not entail professional costs for the reputations of unfortunate employees?

Jack Brett, Future Pupil Barrister at Guildhall Chambers

Lockdown Eviction: Law Centre's Crucial Role

The case described in this article is a graphic example of why our society needs proper funding of Law Centres and civil legal aid

By Tom Russell, head of the Civil and Family Group at KCHGS barristers

During the evening of Sunday 10 May 2020, Martin Gunn and Fiona Launders were in the bedroom of their rented home. They were in bed feeling unwell. Both had been doing agency work as cleaners in a hospital but had not worked for the previous few weeks due to illness.

These were difficult times in Lockdown Britain. The memory fades, but it is worth casting our minds back. On 23 March 2020, the government had mandated the population to stay at home, save for one hour of solitary exercise per day. Our television screens were filled with people in hospital beds, but the streets were deserted. Shops, restaurants and bars were closed. Fear and anxiety loitered on every corner.

Martin and Fiona had rented three rooms on the ground floor of their rented property since the previous August. It had suited them well, being close to the city centre and reasonably comfortable. In recent times, life had not been so kind to them. They were behind with their rent and in April had received a handwritten letter from their landlord giving them 30 days to leave the property. Doubtful as they were as to this purported legal notice, the tenants were unable to leave the property due to illness and lockdown.

Matters escalated dramatically following service of the landlord's letter. One evening in April, the landlord visited the property and persuaded Martin that there was some damage to the exterior which required inspection. Martin left his sick bed, still in nightclothes, to inspect the alleged damage, whereupon he was locked out of the property until a police officer attended. Even at that point, the landlord insisted that he was within his rights to exclude Martin from the house. However, common sense prevailed.

Back to Sunday 10 May. Just after 6pm, Martin and Fiona were startled by the noise of someone trying to open their bedroom door from outside. A moment's silence and then the banging of a fist. Martin turned the latch and three men pushed past him into the bedroom. The men were heavily built and casually dressed. One was masked. Another demanded that Martin and Fiona pack their bags and leave. Fiona was assaulted when she tried to use her phone. Eventually, faced with screams for help from the tenants, the intruders departed.

The following day, Martin contacted Nottingham Law Centre and spoke to Sally Denton, Senior Solicitor. The Law Centre was operating on skeleton staff due to the pandemic. Sally recalls the difficulties which faced her:

> *"There was a lot of uncertainty and confusion. Only one person was allowed to be in the office at any time, so I was working at home without access to a printer or scanner. I was working at the coffee table because the children were using the dining table for their school work. The clients were frightened and angry. I phoned the court to ask how to make an application for an urgent injunction; usually I would go the court office and have the application issued by hand. The court staff were uncertain. We agreed that I'd email the application and it would be referred to the duty judge."*

On 15 May 2020, District Judge Hale made an ex parte injunction forbidding the landlord from making any further attempt to evict his tenants without a Court Order. The injunction provided for service by posting through the letter box at the landlord's residential address and gave a return date the following Tuesday, 19 May.

Following the hearing on 19 May, Martin and Fiona returned to the property to find that the lock to the external door had been changed. They called the police, who gained entry to the property where a locksmith was in the process of changing the internal lock to the ground floor accommodation. The landlord was upstairs, where he claimed to have been asleep.

In the chaotic atmosphere which followed, Martin and Fiona employed a locksmith to gain re-entry to their rooms to gather some possessions and rescue their cat, who had been locked inside. They contacted Nottingham City Council's Safer Housing Team, which was thankfully able to provide emergency accommodation for the evicted tenants. Meanwhile, the landlord was arrested, taken into custody and later released. Sally explains:

> *"Martin and Fiona were absolutely terrified. They couldn't get into their home. All their stuff was in there and they did not know where their cat was. The locksmith employed by the landlord was being really unhelpful and they had no idea where they were going to go. In normal times they would have had any number of friends who they could have stayed with, but this was the early days of covid and everyone was scared of coming into contact with people and getting into trouble for breaking the rules."*

On the same date, Sally issued an application to commit the landlord to prison for contempt of court. This in turn triggered a series of procedural applications on behalf of the landlord and no fewer than six hearings took place between the date of the eviction and the end of 2020, culminating in a hearing before the Court of Appeal on 17 December 2020, at which the landlord was represented by two QCs and a junior. By this time, the

landlord was serving a 6-month sentence for contempt of court.

In the Court of Appeal, the landlord's primary procedural argument was described as *"entirely misconceived"* by Lady Justice Macur and "misconceived from the start" by Lord Justice Underhill *(Gunn v Khan [2020] EWCA Civ 1905)*.

There was a great sense of relief on Sally's part when the committal proceedings were finally over. Her recollection of the committal proceedings 18 months on: -

> *"This was a very nasty eviction and hence would be a difficult case at any time. Other factors made it the most stressful case I've ever been involved with. The landlord was potentially dangerous and verbally abusive when I spoke to him on the phone. When you take the context of covid and the pressure to get an injunction really fast to keep the clients safe whilst operating in a home working environment and also with no real idea as to the procedure that the court was going to adopt, the pressure was enormous. It is easy to forgot how scary those times were; I could not meet the clients, no solicitors were open and we had to swear affidavits in the street with a friend of mine, when we went to court we were scared to be walking through town and then the trauma of the eviction."*

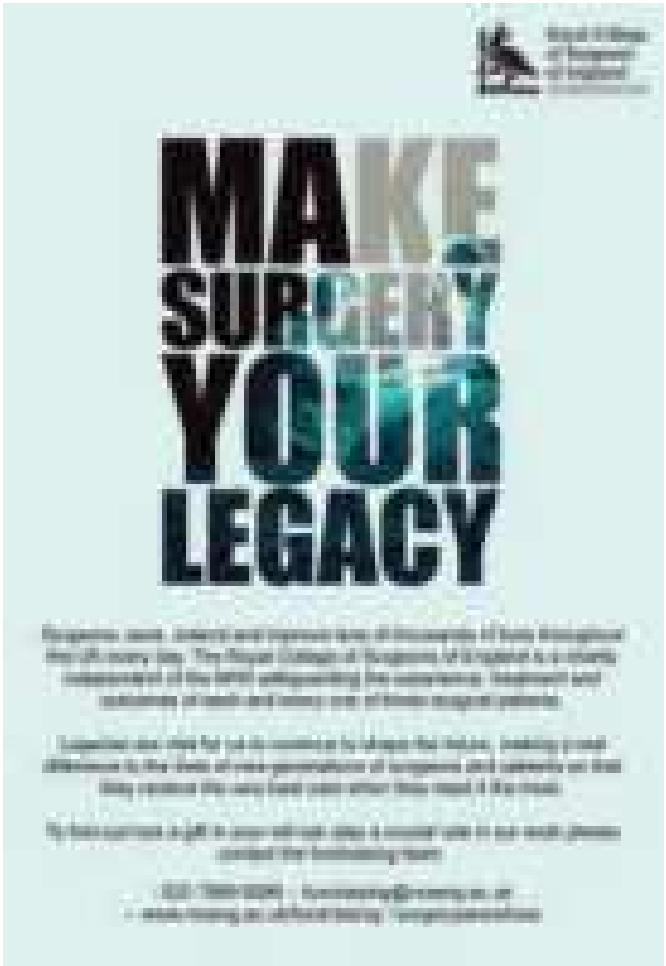
It is worthwhile to consider how the case may have turned out if the Law Centre had not been available to assist the tenants. Martin and Fiona may have been forced onto the streets during lockdown without recourse to the court for an injunction. The landlord may have escaped punishment for his unlawful behaviour. Without legal representation, it is at least possible that tenants may have given up the fight, particularly when faced with intimidating procedural arguments from the landlord's legal team.

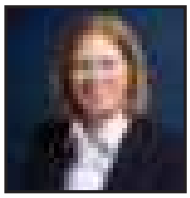
Law Centres are independent and operate on a not-for-profit basis. They are accountable to their communities, with local people acting on their management committees. Law Centres have existed since the early 1970s and work within their communities to defend the legal rights of local people. Specialising in social welfare law, they have an in-depth knowledge of the issues communities face. They use this knowledge to help people save their homes, keep their jobs and protect their families.

Funding for Law Centres has diminished in recent years – much of the work that they do (benefits, debt, employment and immigration) was removed from the scope of Legal Aid when LASPO came into force. Securing funding to enable them to employ staff to address clients' needs is a constant challenge with an ever-growing client base, as other providers give up legal aid work.

Tom Russell

Tom has over 25 years of experience in litigation, first as a solicitor and since 2004 as a barrister. His practice encompasses property-related disputes, contentious probate and commercial litigation. He has been head of the Civil and Family Group at KCHGS since 2016.





Shareholder Disputes and the Art of Share Valuation

By Lisa Linklater QC, Exchange Chambers

The friction created by the uncertainty and disruption of the last two years has led to a significant number of disputes between shareholders in privately owned companies. Tensions that have been bubbling under the surface have reached breaking point, leading to an irreconcilable breakdown in the relationships between shareholders. Minority shareholders may feel driven by boardroom feuds to sell their shares. How can we, as advisors and advocates, best advance our client's case on the price payable or to be received for shares in privately owned companies?

It has often been said that share valuation in such companies is an art not an exact science. Unlike companies that are listed on a stock exchange, there is a very limited market for shares in privately owned companies. Unless the company or its business is being sold to a third party, the primary marketplace for shares in such companies is usually the other shareholders. The lack of voting control that a minority shareholder has in a company and the very limited market for such shares is usually reflected in price by a very significant minority shareholder discount. This is to be contrasted with a "pro rata" valuation of a shareholding, where the shareholding is valued as an equivalent percentage of the value of the company or companies in question with no discount.

There may be little appetite amongst other shareholders to purchase a minority shareholder's shares for a variety of reasons, some of which may include financing the purchase. How can a shareholder force the other shareholders or the company to purchase their shares? If there is no satisfactory solution under either the articles of association or any shareholder agreement, the focus for advisors is likely to be on the prospects of success of an unfair prejudice petition under s994 Companies Act 2006 (previously s459 of the Companies Act 1985). There are a number of reasons for this.

First, as emphasised by Lord Hoffmann in the leading House of Lords' case of O'Neill v Phillips [1999] 1 WLR 1092, unfairly prejudicial conduct has to be established in order for a petition to succeed under s994 of the Act; this is not "no fault divorce". The breadth of allegations that are likely to succeed in establishing unfair prejudice are wider where a quasi-partnership can be established because unfairness can include equitable restraints stemming from agreements and understandings between the quasi-partners. For those who frequently act for family-owned businesses, many such companies are often quasi-partnerships, although this is not always the case. Equally, quasi-partnerships are not limited to family-owned businesses and may be established in other situations.

The leading case and guidance on what is a quasi-partnership remains Lord Wilberforce's judgment in the House of Lords in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 in which he identified three factors, not of all which need be present, when equitable considerations will be imposed: (1) An association formed or continued on the basis of a personal relationship, involving mutual confidence, which will often be found where a pre-existing partnership has been converted into a limited company; (2) An agreement, or understanding that all, or some, of the shareholders shall participate in the conduct of the business; (3) Restriction upon the transfer of the members' interest in the company so that if confidence is lost, or a member removed from the management of company, he cannot take out his stake and go elsewhere.

The availability of and likely success in an unfair prejudice petition by a shareholder is also important because a petition by a shareholder to wind up a company on the just and equitable ground under s124 of the Insolvency Act 1986 is available on relatively limited grounds and does not lead to a purchase of shares but to the winding up of the company.

If unfair prejudice in the conduct of the company's affairs is proven, the court has a very wide discretion to do what is considered fair and equitable on the facts of the case. In exercising its discretion on remedy, the court is seeking to put right and cure for the future the unfair prejudice which the petitioning shareholder has suffered at the hands of the other shareholders: see per Oliver LJ in Re Bird Precision Bellows Ltd [1986] Ch 658. This broad discretion gives the court considerable flexibility in the remedy that it may order in any particular case and also as to how it fixes the price of shares that it orders to be purchased.

An order that the shares of the petitioning shareholder be purchased by the majority or the company is the remedy most often sought by Petitioners and ordered by the court under s996(2)(e) Companies Act 2006 ("the Act"). The reason for such an approach was explained by Patten J in Grace v Biagioli [2005] EWCA Civ 1222 where he stated that "nothing less than a clean break is likely in most cases of proven fault to satisfy the objectives of the court's power to intervene."

However, a recent example of the court using its wide discretion and deciding not to make a purchase order is Re Macom GmBH (UK) Ltd [2021] EWHC 1661 (Ch). HHJ Hodge QC sitting as a High Court Judge held that it was disproportionate to the unfair prejudice established to order the director to buy out the Petitioner's shares because no financial loss was suffered by the Petitioner. Instead, he made orders regulating the future conduct of the company's affairs. This case underlines the importance of being clear as to what the unfairly prejudicial conduct that is likely to be established in any particular case is and how that may be reflected in the remedy that the court orders.

The Act does not give any guidance to the court or include any presumptions as to the calculation of price in making an order under s996(2)(e) of the Act and the court has a broad discretion. Instead, the court, guided by expert forensic accountancy evidence, determines the purchase price of the petitioning shareholder's shares.

Aside from the merits of any unfair prejudice petition, the time when forensic accountants value the shareholding and the information that they are given to value the shareholding is likely to have a significant impact on price. This is not just because of how the forensic accountant values the business but wider factors that may influence both seller and purchaser and may be of a commercial or personal nature. These may include the cost of legal proceedings and the plans for the business.

Therefore, thinking through the strategy on when to instruct forensic accountants to value the shareholding, the instructions to experts and the questions to experts is important for the legal team. However, it is also important to keep in mind whether a forensic accountant is being instructed as advisor or to give expert evidence in court proceedings (or may be so instructed in due course). When the forensic accountant is instructed to give or prepare expert evidence for the

purpose of legal proceedings, it is to be recalled that their duty is to help the court on matters within their expertise, which overrides any obligation to the person from whom they have received instructions or by whom they are paid (see CPR 35.3).

Moreover, whether or not a minority shareholder discount is to be applied is a matter for judicial discretion. The draftsmen of the Act did not adopt the recommendation of the Law Commission in its report on Shareholder Remedies in 1997 that there should be a statutory presumption that shares were to be purchased on a pro rata basis in certain circumstances. Since Re Bird Precision Bellows Ltd and more recently Lady Justice Arden's judgment in Strahan v Wilcock [2006] EWCA Civ 13, there has been broad judicial consensus that where there is a quasi-partnership, there is a presumption that there should be no minority shareholder discount. Therefore, understanding the strength of the case on whether or not there is a quasi-partnership and advancing that case is important for advisors and advocates not just in establishing unfair prejudice but also in the fixing of the amount payable for shares.

However, courts are also focussing not just upon the seller but also the purchaser. A notable and influential decision is *Re Edwardian Group Ltd [2018] EWHC 1715 (Ch)*. Fancourt J having held that there was no quasi-partnership, applied a minority shareholder discount and then provided that the valuation was to take into account the marriage value of the Petitioners' and purchaser's shares.

The valuation of shares in privately owned companies and the route to achieving a purchase will continue to present many key junctures for both sellers and purchasers of shares and those who advise and advocate for them.

Lisa Linklater QC is currently instructed on a number of unfair prejudice petitions under s994 Companies Act 2006, brought by minority shareholders in the Companies Court of the High Court in London and the North of England, as well as shareholder disputes that are pre-action. These cases involve high value, privately owned businesses in a wide range of sectors. Lisa regularly receives instructions on novel and technical legal issues in corporate insolvencies, as well as high value and complex insolvency litigation (often against directors). In addition, her practice includes high value and complex contractual disputes.

Lisa was a guest speaker on the topic "Shareholder Disputes: Unfair Prejudice Petitions" at the Leeds Business and Property Courts Forum hybrid event on 5 July 2022, which was chaired by specialist Business and Property Courts Judge, Her Honour Judge Jackson. The discussion covered topical issues in share valuation, including minority shareholder discounts and was attended in person by the Chancellor of the High Court, Sir Julian Flaux, the Vice-Chancellor of the County Palatine of Lancaster, the Honourable Mr Justice Fancourt, His Honour Judge Gosnell, Her Honour Judge Kelly and District Judge Bond.

Technology as a Driver to Expand and Improve Legal Services

By Joanna Toch, Barrister, Founder of Family Law Cafe

In about 2012 after working in family law as a barrister and within solicitors' offices for over 20 years I began to think about how family law assistance could be offered in a modern, more efficient and agile way. Fast-forward to 2022 and I now run Family Law Cafe to offer the public a way to get resolution to their family legal problem without losing their sanity and the shirt off their back.

It is a technology driven service and I want to talk about why technology, properly applied, should be the focus for providing a fit-for-purpose family law system. And how it should further be applied across the entire UK legal system. Unless we wake up to this soon, the family justice system, indeed our entire justice system, will cease to offer any credible function. It has simply failed to innovate in any meaningful way over the past 10 years.

The second point is that we should be looking at improving our systems starting from the user's point of view. If we fail to do this, we will become increasingly irrelevant.

Whilst an email can be sent around the world in seconds and a video call can happen from our phones, it currently takes a family court in England and Wales 8 months to issue an application and offer a first hearing. This week I will try to explain to a customer how his application, sent to the court in May, got issued in June, the cover letter from the court was dated July and it was sent to him arriving August requesting he serve the other party for a first hearing in January 2023.

I will have to tell him that the directions for the first hearing will be routine and could be agreed now, the case will then go over for at least another 6 months. There will be a court led mediation when a Judge will tell the parties they should not spend so much money. If the other side does not want to agree to the Judge's suggestion for settlement it will go to a further final hearing maybe another 9 months hence.

After a couple of years, the costs will be around £150,000 between them, maybe double that or more and their lives will have been drastically affected by the uncertainty, tension and worry that comes from being involved in a court case. Once they have the final order, if one party doesn't comply with it, they will have to try to enforce using the same slow and ineffective process.

I want to stress that this is not the exception, every case we assist with works in this hopelessly unfocused and tragically slow way if it is in the family court system and the users never get any apology for it. In fact they are often lectured by the Judges about why they should not be there. They appear not to understand that at least one party will not want to be in court but there will no other way of resolving their dispute.

It is a mark of a functioning and civilised society to have effective, fair and organised dispute resolution and the family law system, going to the core of everyday life does not function. There are good people within it but their work is masked by a system that leaves its users angry and frustrated.

I offer the model I use at Family Law Cafe as a way the family law system could work. We have one online case space for every matter we handle. This has a case line so that progress can be seen with time dated comments. There is a calendar with all important dates put on it. There is a messenger section for messages to be left and answered. There is a documents section with all the documents in folders and easily searchable. Documents can be easily uploaded and downloaded to and from this section.

Each matter has an Expeditor, a lawyer that assists with strategy and decision making, answers queries, makes sure everything happens in a timely way, and all the documents are organised. There is a Hosting team to provide reassurance if the customer is feeling anxious or unsure of the process and any telephone calls are noted and placed on the case space timeline.

We look at a family law problem as a project and try to move customers from problem to solution in an organised way. We use technology as our tool. Once the matter is finished the documents are stored securely in the cloud.

There should be one person responsible nationally for re-vamping the system with regional heads and heads of each court. The skills required are knowledge of technology, systems and with business skills. This work should not be left to the Judiciary because their job is to judge. Their skills are not in administration or technology. Their views are essential but the public needs to know the named administrative heads who will ensure they do not get stuck in the system for years.

The family court could adopt a system as we do, of having one online portal for each matter and a lawyer overseeing the matter from the time an application is made until the matter is concluded. The court already delegates case management to clerks so there is a cadre of responsible people there to do this work. If the case comes back the portal could be re-opened.

Once an application was made, which should now be online, a portal would be opened and the parties informed and given secure two stage login details once they are on record for a case. Each court should have a staffed help centre to deal with enquiries as to how to do this and should also offer a telephone service Mondays to Fridays and one late evening to deal with any non-legal queries throughout the case.

A lawyer should be allocated to manage each portal. The court already allocates many aspects of case management to clerks and this should be extended so they manage the movement of the case forward from beginning to end. Any legal decisions can be referred by them to a Judge who would log onto the portal unless an attended hearing were required.

The lawyer maintaining the portal would ensure that deadlines in orders were put on the calendar and would be responsible for actively monitoring the portal to ensure no deadlines were missed.

Parties would file papers onto a documents section of the portal and would have no need to serve them as the other party would simply log in to see the upload. Bundles could be uploaded and be available to the judge who would log in if a case were listed before them.

If both parties agree to vary deadlines this could be raised in the messaging section and recorded on the timeline. The clerk could agree this if it did not affect the listed hearing. If deadlines were missed without agreement the court should have an automatic fine of, say, £500, to be paid by the defaulting party within 14 days. Experts could be given access to upload reports direct with permissions set so they do not view any documents.

The clerk would be responsible for actively managing the case. This would include collating the views of the parties as to whether hearings should be attended or virtual and any special measures. The matter should remain with one Judge with a reserve judge nominated, if possible. The clerk would send a message to the Judge to log in and give a decision on case management decisions that remained with the Judge such as the type of hearing.

The management of the clerks on all cases should be monitored weekly by one responsible person for the court, such as the court manager. The service of all the courts in the regions should be monitored so that if one court is performing slowly, consideration should be given to moving cases. The parties can be asked if they agree.

The regional process should be monitored nationally and the whole system should be standardised. This would include making decisions about what sort of video platform is used as currently different regions use different platforms and what sort of hearings might be heard virtually as a default option.

There needs to be much more accountability to the users. If a court manager notes that a clerk is taking 3 months to start a case then questions need to be asked about whether there is too much work in that court and to see if cases need to be moved.

Technology reduces costs and a more efficient system does not mean a more expensive one. Our system works using mobile phones, laptops and tablets and most people have access to these tools.

Barristers have always innovated and provided cost-effective solutions. We work in a fluid way and find ingenious remedies. There is no reason why technology should not be a driver to offer an accessible legal service. With lower overheads more people should be enabled to have access to expertise and, where it is necessary, to litigate. This should expand opportunities for professionals.

The average age of barristers has increased during my years at the Bar, last year it was reported that 39% were over 50 with pupillage reducing by 30% since 1990 (BSB report https://www.barstandardsboard.org.uk/uploads/assets/12aaca1f-4d21-4f5a-b213641c63dae406/Trends-in-demographics-and-retention-at-the-Bar-1990-2020-Full-version.pdf). A younger Bar, being digital natives, could thrive if technology were harnessed. It feels that we are sticking to an outmoded system because that is what is comfortable for the profession. In my view we need to think of our offering from the user first.

Family law often leads other areas of the law. Because family law affects the public in a very personal way then it is the prime area to make a change to the system and see if we can start to offer something useful and world leading.

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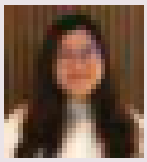


Raising the Bar in Mental Health

By Chloe Narcis, Paralegal & Aspiring Barrister

The stresses of 'making it' is no stranger to any individual who dreams to one day step foot into the legal sphere. The constant pressures of doing well in your professional exams and eventually securing pupillage or a training contract constantly weighs down on young legal eagles who strive on a daily basis to be the 'cream of the crop'. I, myself, understand this being in the same situation myself. Over the last few years, I have attended numerous pupillage events and although most were enlightening, a handful only heightened my anxiety in terms of my ability to actually become a barrister. My mind was plagued with thoughts of the barriers I face in order to put myself in the position to be the 'cream of the crop' in order to be offered an interview, let alone a pupillage. I have gathered that most Chambers only offer pupillage to the most outstanding individuals from traditional backgrounds, or so they have made it to seem. Being an individual from a non-traditional, international background, I am made to understand that I have to work thrice as hard to even be noticed by chambers during pupillage season. Though I have been successful in obtaining interview opportunities, my mental health has not made the journey a smooth one.

This article is targeted at aspiring and young lawyers who struggle with mental health whilst trying to progress in their legal careers. It is so easy for us to deprioritise our mental health when it comes to achieving our short- and long-term goals. After the pandemic, I started to become more career-oriented and pushed myself to my limits by taking on legal roles, constantly looking for legal opportunities, being on LinkedIn for at least 6 hours per day, studying for ridiculously long hours without giving myself a break and sleeping for 5 hours daily to maximise my time doing other productive activities. Although this all sounds very productive, I failed to realise the impact it had on my mental health and overall health. Considering my experience, I would imagine that there are many in a similar position who are unaware of the implications of pushing yourself beyond your limits because it has become part of your 'routine'.

Does this all sound familiar to you? If your answer is yes, then here are a few helpful tips to helpful you move forward in your career while you prioritise your mental health.

Addressing the problem

As legal professionals, our entire lives revolve around addressing and dealing with problems. However, due to the nature of our work, we tend to easily neglect our own. During my early stages of my journey to the Bar, I was convinced that I had a healthy routine that kept me on my feet on a daily basis. I was always under the impression that if failed to complete a task on my planner, it would ruin my entire week, as well as my productivity streak. However, I began to realise that the slightest deviation from my plans impacted me in the most negative ways. My anxiety immediately flared up, I suffered bad heart palpitations and struggled to breathe as I had no idea what to do if things didn't go according to plan.

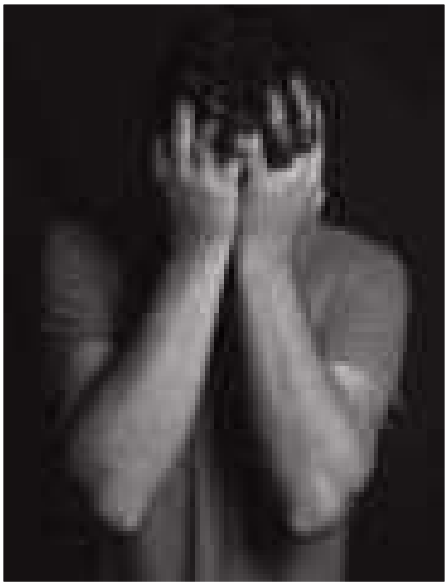
Reaching Out

It was truly difficult for me to do this as I was in denial and in fear that my mental health would delay my plans or sidetrack me from my career development. The first step I took was to speak to some of my peers and mentors about the struggles I was facing, and they advised me to speak to a professional about it as it was not normal. I took their advice and made an appointment with my GP to speak about what I was going through. I was then referred to a therapist and continued to go to therapy for a few months. It certainly helped me understand my symptoms and come to terms with the fact that I was burnt out, anxious, and was also experiencing high-functioning anxiety on a daily basis. It was relieving that my therapist suggested methods to work on my mental health as it had also affected my physical health severely.

Finding a mentor

Whether you are a junior or aspiring lawyer, it is important to have the advice of an experienced practitioner regardless of whether it is career related or mental health related. Due to their time in the legal field, they are capable in acting as counsel not just at Court, but to you as well. Just think of it as having a friend who knows way more than you do in the profession!

Now, the most frequently asked question I receive from peers is "How do you get a mentor?" Well, there are a few ways to get yourself a mentor in the field. Personally, my favourite



approach is through networking. I enjoy building a repertoire with people in the legal industry, regardless of profession. LinkedIn is truly a gift to aspiring lawyers as you can connect with just about anyone you wish to connect to, start conversations, receive updates from the biggest firms or the firms of your interest, and even improve your commercial awareness. So, you've started a LinkedIn account, now what? It's time to put yourself out there by connecting with legal professionals and asking them literally just about anything about their profession – of course keep in mind not to overstep (Make sure it does not involve anything that is private and confidential!)

LinkedIn is not only the perfect tool for networking, but also a goldmine of resources. If you keep your eyes peeled throughout the legal year, you will find that a number of chambers host mentorship programs for students, as well as the Inns of Court and other NGO's. My favourite initiative is by Bridging the Bar, where they aid aspiring barristers of non-traditional backgrounds by linking successful candidates with mentors. In addition to such opportunities, you will also find fantastic resources to aid in your mental health whilst being in the legal industry!

Comparison

Have you ever heard of the saying that comparison is the thief of joy? Well, it truly is and I am almost certain that people at any level of the profession can relate. We are all aware of the disproportionality of pupillage opportunities to unregistered barristers, and this does not make the pupillage hunt a breeze. If you find yourself scrolling through LinkedIn and comparing your achievements to others, you need to stop that right now. Yes, this is a competitive profession, and yes, you have to be the best of the best out of thousands of pupillage applicants. You will come across people who repeat this one sentence in your journey and that can either be motivating or leave you extremely demotivated – *"It only takes one 'yes'."*

Many a time I have questioned, where is my 'yes'? Will I ever get a 'yes'? Is there enough 'yes-es' to go round? It does get frustrating to hear this, time and time again. I understand that anyone who has ever uttered this to me only has the best intentions at heart, but it can have the opposite effect when nothing is going your way. I have questioned if I am suited for this profession and have thought of alternative career options in the event I don't 'make it', and it was very embarrassing for me to have these thoughts at first. But after some deep thinking and internalising, I have become more open to where the future leads me. This is only possible as I have stopped comparing, and have made the conscious effort to do what is best for me. I will always be an advocate, who is equipped with a multitude of transferable skills that will be extremely useful in just about any job, and that is the best part of the journey to becoming a lawyer.

My suggestion is simple. If you find yourself comparing, make sure you only compare your current self to your past self. This will help you become the best version of yourself and not anyone else!

Do the things you love!

Whether it is making a trip to Greggs to get a sausage roll, or enrolling yourself in puppy yoga – do what you love! Give yourself time to breathe and enjoy life. A good work-life balance is what we all aim to have, but due to the nature of our work and studies, this is sometimes not possible. It is so important to learn how to compartmentalise your time and thoughts. Make sure you don't take work stress home for the weekend and just head to your local park for a nice stroll with the family, or treat yourself to that expensive steak you have been thinking of for months on end.
To conclude, it is so important that everyone at the Bar starts to prioritise their mental health. I am grateful that a number of organisations within the Bar are taking the initiative to advocate for this, and I do hope that the efforts continue. I do encourage all readers to take into consideration my advice and hope that most of you will find it useful.

*Please note that these are merely my opinions, experiences and thoughts about an aspiring barrister's journey to the Bar.

Chloe Narcis,
LL.B(Hons) graduate from the University of Hertfordshire & aspiring family barrister. Passionate about equality & diversity in the legal industry

Her Bar: Providing a community for Women at the Bar

Rachel Bale is a Pupil Barrister at 3PB Barristers, Oxford, specialising in commercial, chancery and property law and the co-founder of herbar.co.uk.

Her Bar was founded in October 2021 by then pupil barristers Rachel Bale of 3PB Barristers and Nasreen Shah of Great James Street Chambers.

Her Bar is the go-to Hub for aspiring and practising women barristers, providing a service that "should have existed a decade ago". The online Hub combines useful guidance for key issues affecting women at the Bar, promotes opportunities which are often underrepresented by women and offers a private online chat community for members to discuss.

Her Bar was designed to follow and support the trajectory of a woman barrister's career whether the user is Entering, Building or Progressing their career at the Bar. We discuss tricky topics such as the following:

- financial difficulties.
- unfair work allocation.
- how to prepare for career breaks
- harassment.
- menopause at work.
- applying for silk and judicial appointments.

Choosing to incorporate a self-funded limited company, Her Bar has the autonomy to comment and critique certain practices failing women at the Bar away from any conflicting interests which can arise when funded through donors. Her Bar also partners and refers trusted brands at offering bespoke services tailored for their community. Our advertising services are deliberately created to be affordable for all.

Why do we need Her Bar?

There have been many triumphs since the admittance of women to the Bar 103 years ago and there is a clear appetite for women to practice law. In 2021 69% (107,085) of all law applicants at graduate level were women[1]. This year 52% of accepted pupils were women.[2]

However, after 5 years in practice steadily, we see large proportions of women leaving the Bar. This culminates in only 16.8% of Queen's Counsel being women in 2021[3] and 34% of all court judges being women as of 2021[4].

Whilst generally there is no longer such an issue with recruitment at the junior levels some practice areas are still very far behind with recruiting women, with only 24% of Chancery Bar Members. Further, factors such as poor work-life balance, lack of employment benefits, 'macho' cultures within court and chambers leading women to feel excluded, disparity in pay and unfair allocation of work are influencing many women's decisions to leave the Bar a short time after admittance.

But there is also a much more positive reason for Her Bar's existence. It provides a platform where advice can be shared by one individual and yet reached by thousands.

Personally, having commenced pupillage last year I have already faced issues such as loneliness at the Bar, tricky ethical situations and using my judgment as to personal safety when being alone with clients. There have been times when I just don't know the answer to a practical issue, but when I have asked, I have been provided with golden advice by those more established who have been through identical situations. The Bar truly is a collegiate profession, but often it can be daunting for junior practitioners to ask and time constraints mean busy practitioners cannot always be on hand to help.

Her Bar exists to provide that accessibility and guidance between junior and silk, aspiring and practising barrister, colleague to colleague all through a digital online Hub and community.

What have we achieved so far?

Since its creation a year ago, Her Bar has achieved a growing following of over 2000 members in their community, actively engaging with the site and features.

Early this year we ran a highly successful Mock Interview Scheme for pupillage and Inn scholarship seekers, interviewing over 100 candidates with many going on to achieve their desired goal, praising Her Bar and their detailed feedback policy for aiding their success.

We feature monthly blogs including guest authors such as Mark Neale, Director General of the BSB, Felicity Gerry QC of Libertas Chambers and Serena Varatharajah, Pupil at 1 High Pavement Chambers.

We have also partnered with many bespoke service providers such as Westgate Wealth Management, ComBar, and coaching services like Judicial & Silk. We only advertise work with trusted brands that share our values, in order to genuinely endorse to our network.

We have also very recently included a 'What's On' page to showcase all upcoming events related to women at the Bar, run by chambers, solicitor's firms, charities and existing networking groups.

Looking to the future?

So far, Her Bar has had an overwhelmingly positive response from its community and engagement with schemes offered, mainly from aspiring barristers seeking guidance. We would like to continue to build our network out to engage more established practitioners with our site, looking to Build and Progress their career. One focus we are working towards to achieve this is creating in-person 'mixer' and 'roundtable' events to cater for those who prefer discussions in real life as opposed to online.

We are also focussing on expanding our Opportunities page, including job vacancies, internships and work experience schemes, especially advertising the areas which are underrepresented by women, such as Tax, Commercial, Property, Chancery etc…

Finally, our main goal to be achieved by the end of 2023 will be brand recognition. We want Her Bar to be recognised as the go-to Hub for all women barristers in England & Wales.

If you are interested in partnering or advertising with Her Bar, please contact us at contact@herbar.co.uk

Rachel Bale is a Pupil Barrister at 3PB Barristers, Oxford, specialising in commercial, chancery and property law and the co-founder of Her Bar.

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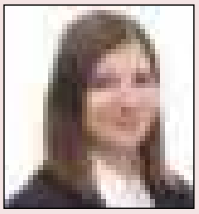
[1] hÀps://www.legalcheek.com/2022/02/over-two-thirds-of-law-applicants-are-female/

[2] hÀps://www.barstandardsboard.org.uk/news-publicaÊons/research-and-staÊsÊcs/staÊsÊcs-about-the-bar/pupillage.html

[3] hÀps://www.barstandardsboard.org.uk/uploads/assets/88edd1b1-0edc-4635-9a3dc9497db06972/BSB-Report-on-Diversity-at-the-Bar-2020.pdf

[4] hÀps://www.gov.uk/government/staÊsÊcs/diversity-of-the-judiciary-2021-staÊsÊcs/diversity-of-the-judiciary-2021-staÊsÊcs-report#:~:text=34%25%20of%20court%20judges%20and,the%20High%20Court%20and%20above).



Piercing the corporate veil and third party debt orders

By Nora Wannagat, Barrister, 9 Stone Buildings

Since *Salomon v Salomon* (1897) AC 22, it has been clear that as a matter of law, a company is an entity separate from its directors. However, corporate vehicles can be misused by those who wish to avoid personal liability. To achieve a just outcome in that type of situation, it is sometimes necessary to disregard a company's separate legal personality. This is known as piercing or lifting the corporate veil. In this article, I will explain why the principle is particularly useful in the context of third party debt order applications under Part 72 CPR, by reference to a case in which I was recently involved.

The principles applicable to piercing the corporate veil

The doctrine has been famously summarised by Lord Sumption as follows (Prest v Petrodel Resources Ltd and others [2013] 2 AC 415, at [35]):

I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.

There are indeed many situations which can be resolved without recourse to this concept. However, for reasons explained further below, it is necessary to pierce the corporate veil if one has a judgment against a company director and wishes to obtain a third party debt order in respect of funds held in an account in the name of the company. The application I describe below was unopposed and the judgment of Chief ICC Judge Briggs was not reported (Re Grosvenor Property Developers Ltd, 24 January 2022, High Court (ChD), ICC Interim List), but the case may be an interesting example for those who find themselves facing similar procedural difficulties.

Background to the application

The hearing concerned an application for a third party debt order by the joint liquidators of Grosvenor Property Developers Ltd ('**GPDL**'). The judgment debtor, Sanjiv Varma, had been the de facto director of GPDL. He was found to have misapplied millions of company money (see the judgment of Deputy ICC Judge Agnello QC (*Re Grosvenor Property Developers Ltd* [2020] EWHC 1114 (Ch)). Subsequently, he was found guilty in respect of several counts of contempt of court (*Atkinson v Varma* [2020] EWHC 1868 (Ch)) and, following an unsuccessful appeal (Varma v Atkinson [2021] Ch. 180), a custodial sentence of 21 months was imposed. Mr Varma disappeared after the sentencing hearing.

The third party debt order application concerned funds held by a law firm ('**Singhania**') in the name of a company called My Casa PBSA Ltd ('**My Casa PBSA**'). The funds in question represented what was left of the proceeds of sale of a property ('**the Property**'). Mr Varma was, at all times, the sole shareholder of My Casa PBSA. Save for a period of one month in early 2019, he was also the sole director. He had once referred to My Casa PBSA as a single purpose vehicle for the acquisition of the Property. My Casa PBSA was dissolved on 17 November 2020.

Mr Varma's son had purchased a leasehold interest in the Property in January 2018. Some of GPDL's money had gone towards the purchase. Pursuant to a declaration of trust executed around this time, Mr Varma's son held the Property on trust for My Casa PBSA. A year later, he transferred the legal title to My Casa PBSA for nil consideration. On 12 June 2019, My Casa PBSA sold the Property to a third party. The net proceeds of the sale were paid to the law firm dealing with the conveyance. At Mr Varma's request, they were then paid to Singhania (who in turn paid out everything save for £38,575.87 to third parties at Mr Varma's request). When Singhania was informed of a freezing injunction in respect of Mr Varma, it refused to pay out any further funds at his request and kept them in its client account.

The Court's decision

It was submitted on behalf of the Applicants that the criteria formulated by Lord Sumption had all been met. First, the Property was purchased after

the misappropriations had taken place (and, in fact, using misappropriated funds), but before the proceedings against Mr Varma began. Mr Varma was already, at that time, under an existing legal obligation to repay that money to GPDL, as a result of his fiduciary obligations as a *de facto* director. From the timing, and the fact that Mr Varma was the sole director and shareholder of My Casa PBSA at the relevant times, and given that My Casa PBSA seemed to have carried out no legitimate business, it could be inferred that Mr Varma's only reason for using My Casa PBSA rather than conducting the transaction in his personal capacity was to evade liability. When he sold the Property, a freezing injunction against him was already in place. Further, there were some communications in which Mr Varma had treated the funds held with Singhania as available to settle costs orders made against him.

Turning to the necessity of piercing the corporate veil, I submitted that it would not be sufficient for the Court to find that My Casa PBSA held the funds on trust and the ultimate beneficiary was Mr Varma. This was because r.72.2 CPR made clear that third party debt orders could only be made in relation to funds 'due to' the judgment debtor from the third party. There is an authority, namely *AIG Capital Partners Inc v Republic of Kazakhstan* [2006] 1 WLR 1420, at [30] to [32], which says that money is not 'due to' (within the meaning of r.72.2) a beneficiary under a trust, but only the trustee.

If the criteria were met, the Court had a discretion. Neither Singhania nor the Crown objected to the application (the latter having been informed of it because the funds would have been bona vacantia if they truly belonged to the dissolved My Casa PBSA). Mr Varma had, unsurprisingly, not responded or attended. There was no compelling reason not to make the order.

The application was granted. In particular, it was found that (1) the duty to repay the misappropriated money to GPDL was an existing legal duty or obligation within the meaning of the *Prest* test, (2) Mr Varma interposed My Casa PBSA to put a wedge between the funds and GPDL, the rightful owner of the monies, (3) Mr Varma had tried to obtain an advantage because of My Casa PBSA's separate legal personality, and (4) it was necessary to pierce the corporate veil because there was no other legal relationship on which the liquidators could have relied in the circumstances.

There have been various cases demonstrating that piercing the corporate veil is not something the courts will do lightly. For instance, Lord Neuberger addressed the problem at some length in *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 337, from [120]. In *VTB*, it had been argued that the principle did not truly exist and each reported instance of 'piercing the corporate veil' was an occasion on which other mechanisms were at work. Lord Neuberger said he was not convinced every case could be explained in that way, but he also refused to extend the doctrine beyond its present scope, particularly given the extent of criticism that had been levelled against it over the years.

Where one has a choice, it is almost certainly easier to argue that the company in question is holding money on trust for its director(s). However, applicants for third party debt orders do not have that choice, because of *AIG Capital Partners Inc v Republic of Kazakhstan* [2006] 1 WLR 1420. Therefore, third party debt order applications are situations in which the possibility of piercing the corporate veil should be much more at the forefront of applicants' minds. While such an application will require much more detailed evidence than a standard third party debt order application, it can succeed in the right circumstances and should be considered in cases where fraud is involved.

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Proving Coercive and Controlling Behaviour in the Family Courts

By Rebecca Thomas, barrister, 5SAH Chambers

Since the offence was introduced in the Serious Crime Act 2015 the words 'coercive and controlling behaviour' have gained considerable resonance both in the Family Courts and the public sphere. The judgment in Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448 demonstrated the total sea-change that has occurred in recent times. The Court of Appeal made clear that consideration of coercive and controlling behaviour was likely to be "the primary question in many cases" [51].

Earlier this year the Court of Appeal returned to the issue in Re K [2022] EWCA Civ 468, providing further guidance regarding the approach the Court should adopt where coercive and controlling behaviour is alleged.

This article will examine the extent to which the original guidance has been implemented and the approaches practitioners might adopt in the interim.

Definitions

Practice Direction 12J (PD12J) is used by the Family Courts to define domestic abuse and it includes very similar concepts to the criminal offence. Expanded in 2017, its definitions of coercive and controlling behaviour are as follows:

'Coercive behaviour' means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;

'Controlling behaviour' means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

The Court of Appeal declared these definitions fit for purpose and cited with approval guidance provided by Mr Justice Hayden in F v M [2021] EWFC 4. In that case Hayden J observed that:

"key to both behaviours is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation" [4]. The Court of Appeal added that "a pattern of coercive and/or controlling behaviour can be as abusive as or more abusive than any particular factual incident that might be written down and included in a schedule in court proceedings" [31].

Fact-Finding Hearings

In Re *H-N* the Court provided guidance to assist in deciding whether a fact-finding hearing is necessary once allegations of abuse are raised. It is not

the case that factual disputes of abuse between the parties will automatically result in a fact-finding in proceedings concerning the welfare of children.

The Court of Appeal suggested that the proper approach is essentially to focus on the extent to which allegations are relevant to determining child arrangements. In *Re K* considerable emphasis is placed on the importance of the parties exploring out of court resolutions at an early stage.

The judgment in Re *H-N* sets out at length the pressures on Family Courts and repeats the observations made by Sir Andrew McFarlane in The Road Ahead (June 2020) that:

"should the Family Court have any chance of delivering on the needs of children or adults… there will need to be a very radical reduction in the amount of time that the court affords to each hearing"

[43][1]. This advice has been repeated in 2021 and 2022 guidance.

In Re K the Court of Appeal arguably goes further, observing that the nature of fact-finding hearings is likely to have "a negative impact on [parents'] ongoing relationship and ability to cooperate" [42].

It is clear that the Family Courts must now distinguish between allegations which if proved could, for example, affect the recommendations of Cafcass, and allegations which serve simply to turn the Court into an arena for adults to litigate their grievances.

Scott Schedules

Having constricted the scope of fact-findings in one way *Re H-N* simultaneously advocated a more holistic, expansive approach to the way they are conducted.

For many years the Courts have encouraged the use of Scott Schedules as effective ways to organise and structure pleadings. The Court of Appeal acknowledged the limitations of an approach requiring parties to list numbered allegations where findings of coercive and controlling behaviour are sought, first because isolating each incident runs counter to the aim of identifying patterns of coercive and controlling behaviour which have had a cumulative effect on an individual and secondly because inevitable attempts by efficiency-minded judges to trim down the number of allegations risks distorting the Court's view of a relationship.

During the course of submissions in *Re H-N* it was suggested that a 'threshold' type document, similar to those used in public law proceedings, might be a better way to show a pattern emerging from a narrative. In *F v M* the Mother's legal team used an 'umbrella schedule' whereby allegations were set out under thematic headlines and examples of the behaviour alleged were provided under each headline.

In *Re K* the Court observed that allegations ought to be considered

"in the context of the contention that most fundamentally [affects] the question of future contact, namely whether the father was demonstrating coercive and controlling behaviour" [10].

The Court went on to note that generally this focus should make it unnecessary to determine "subsidiary date-specific factual allegations" [68].

Scope of coercive and controlling behaviour Whilst Re H-N does invite Courts to consider a broader set of behaviours as amounting to coercive and controlling the judgment also strikes a note of caution:

Not all directive, assertive, stubborn or selfish behaviour, will be 'abuse' in the context of proceedings concerning the welfare of a child; much will turn on the intention of the perpetrator of the alleged abuse and on the harmful impact of the behaviour. [32]

In *Re L* (Relocation: Second Appeal) [2017] EWCA Civ 2121 Peter Jackson LJ observed that where conduct does not meet the bars imposed by the definitions contained in Practice Directions it is unlikely to be in the interests of the child for the court "to allow itself to become another battleground for adult conflict" [61].

Whilst more innocuous-seeming behaviours may now be considered by Courts as indicative of coercive and controlling behaviour, parties will need show either that behaviour is being "used to harm, punish or frighten the victim…" or that the behaviour is "designed to make a person subordinate". It is not the case that parties who have behaved in mean-spirited or unedifying ways in conflicts throughout a relationship will necessarily be labelled as an 'abuser' in the Family Courts.

The way forward

The judgments in both Re H-N and Re K anticipate that further guidance will be necessary to clarify the approach practitioners should take – particularly regarding the use of Scott Schedules. We are yet to see any such guidance materialise.

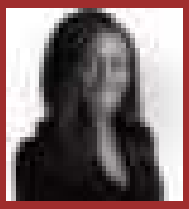
In the meantime, the judgments pose several dilemmas. Fact-finding hearings are to be limited to matters which are relevant to the welfare of the children, but Courts should be wary of restricting allegations where coercive and controlling behaviour is being alleged to avoid distorting a cumulative picture. In many cases this may well involve exploring the history of a relationship which would otherwise be irrelevant to the children.

In *F v M* the Court welcomed the use of an umbrella schedule approach – pleading by way of examples under headings of behaviour – but at the same time allegations plainly must be properly particularised in order to be responded to. In reality, it is challenging for a Respondent to tackle allegations that they are e.g. holistically financially controlling and are likely to need to tackle the factual basis of examples provided.

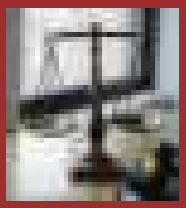
In the interim practitioners seeking to draft allegations of this nature need to be creative and consider carefully the best way to present their factual matrix. Responding parties and the Courts should be alerted to the overarching themes of allegations at the earliest possible stage.

One year on from Re H-N, the problem the courts – and practitioners- continue to grapple with is that by its very nature, coercive and controlling behaviour may well be comprised of a number of fairly innocuous-seeming incidents. There is no simple way to distinguish this form of abuse from a dysfunctional but non-abusive relationship.

Rebecca Thomas, barrister, 5SAH Chambers



'Letting Sunlight into the Family Court': Gallagher and Transparency in Financial Remedy Proceedings



By Stephanie Coker, barrister, 5SAH Chambers

Financial remedy practitioners will be aware of the recent and ongoing developments that have been taking place on the transparency front. In recent financial remedy proceedings decisions,[1] Mostyn J has challenged the assumption that judgments in financial remedy cases should be routinely anonymised. This article examines a further Mostyn J decision, namely *Gallagher v Gallagher (No.1) (Reporting Restrictions) [2022] EWFC 52.*

Background

The substantive judgment is reported as *Gallagher v Gallagher (No.2) (Financial Remedies) [2022] EWFC 53*. Within those proceedings, the Husband applied for a reporting restriction order (hereinafter 'RRO'), alternatively an anonymity order. The Husband sought anonymisation of the parties throughout the proceedings, and prohibition of reporting of any part of the proceedings which would identify the children, the parties, the children's school, the property where the children were residing or the companies in which the Husband was a director.

The Husband relied on five grounds in support of the RRO he sought. The first ground was that Article 8 ECHR which deals with the right to private and family life was engaged by disclosure of information obtained under compulsion in financial remedy proceedings. Second, a significant proportion of the final hearing focused on the valuation of a construction business in which he was a joint and equal shareholder. It was argued that dissemination of this information 'could sour existing relationships and enable his competitors, all of whom bid and compete for the same work, to obtain a significant advantage'.[2]

'could sour existing relationships and enable his competitors, all of whom bid and compete for the same work, to obtain a significant advantage'.[2] Third, reporting of the construction business information would affect the commercial interests of third parties including his business partner. Fourth, aspects of the Husband's evidence and his approach to prospective liability arising from an Irish lawsuit against him could be exploited and prejudice his position in those proceedings. It was also argued that nature of the allegations was such that the Husband could be exposed to potential criminal sanctions, including imprisonment. Finally, the Husband argued that most of the evidence filed by the parties was done with a reasonable expectation that their anonymity would be preserved.

Decision

In considering the Husband's application, Mostyn J elucidated those principles governing the openness of financial remedy proceedings not falling within s.12 of the Administration of Justice Act 1960, which are heard in private under FPR 27.10 but which the press and legal bloggers are able to attend under FPR 27.11. Mostyn J explained that the correct interpretation of FPR 27.10 and its reference to financial remedy hearings being heard in 'private' was to do no more than provide partial privacy at the hearing. The rule does not impose secrecy as to the facts of the case. In essence, 'private' means open court.

The judge challenged the assumption that family proceedings should remain secret because this is how proceedings have always been conducted. In response, he stated:

> The resistance to letting sunlight into the Family Court seems to be an almost ineradicable adherence to what I would describe as desert island syndrome, where the rules about open justice operating in the rest of the legal universe just do not apply because "we have always done it this way". In my judgment the mantra "we have always done it this way" cannot act to create a mantle of inviolable secrecy over financial remedy proceedings which the law, as properly understood, does not otherwise recognise. I do acknowledge, however, that the tenacity of desert island syndrome is astonishing.[3]

The above suggests that arguments that 'we have always done this' are unlikely to succeed (certainly before Mostyn J). Rather specific facts are likely to succeed and will be required when carrying out the Re S balancing exercise.[4] The judgment does not go into detail about what the Re S balancing exercise entails, and such a discussion is beyond the scope of this article. For the present purposes, it is sufficient to note that the case of Re S outlines what should be considered by a judge where there is a dispute over what should and should not be published.

According to Mostyn J, a RRO amounted to a derogation from the principle of open justice, and therefore may only be permitted in circumstances where a focused Re S balancing exercise of the various rights protected by Articles 6, 8 and 10 leads to the conclusion that the privacy right should overreach the principle of open justice. In this case, a RRO was justified and ordered to prevent the naming of the minor children, publication of photographs of them or identification of their schools or where they lived. A RRO was also made to prevent reporting of material which could expose the Husband to serious jeopardy or unfairness. This included advice regarding the degree of risk the Husband faces from action by HMRC against him, and an opinion from a lawyer regarding his prospects of success in defending other litigation.

Other arguments advanced by Husband's counsel in support of a RRO included that 'to allow more sunlight into the Family Court will allow some litigants effectively to blackmail the other party into settling the case at an unjustly high price in order to avoid a public hearing and the unwelcome exposure of skeletons in cupboards, and that this possible practice, of itself, would be a good reason to ordain anonymity generally'.[5] Mostyn J firmly disagreed with this argument and expressed that 'the constitutional principle of open justice obviously cannot be put aside by anecdotal gossip about the motives of some litigants who have settled their cases'.[6] A comparison was made with the civil courts including TOLATA proceedings which are heard in open court and yet the courts are not empty. Mostyn J also disagreed that anonymity would provide enough transparency if the media were able to report the facts of the case.[7] Mostyn J also concluded that indirect identification of minor children of the litigating adults, and distress to the parties were not good reasons to ordain anonymity generally.

Reflections

Overall, this is significant change, and there are mixed responses to this. Mostyn J's approach appears to be that anonymity will not be a general rule to litigants in financial remedy cases wherein their judgments are published. If anonymity is sought litigants will have to make an application on notice and provide specific facts and not generalities as to why there should be anonymity. An expectation by litigants that their case will be anonymised is unlikely to succeed. However, fear not as interim RROs can be made pending full analysis. Will this be the end? Highly unlikely.

Stephanie Coker, barrister, 5SAH Chambers

Guardianship: its relevance for the 21st Century lawyer

By Stuart Barlow, Solicitor, Family Law Specialist

Family law as a whole has been bombarded with change over the last 35 years. Those practising children law, in particular, will testify to grappling with not only the revision of law and practice but periodic changes in terminology. For example, Custody and Access existed for countless years but changed to Residence and Contact in 1991. After about 23 years a further change took place, welcoming in the new Child Arrangements Order (living with or spending time with). Arguably, these are essentially the same in substance, but different in title. When we add Placement Orders and Special Guardianship Orders plus many others we are left wondering how we have coped so well with the changes.

One title, however, that has not changed is Guardianship. How much do family lawyers know about it?

To the man in the street the term Guardian has had a wide variety of meanings. In popular culture, for example in literature, we have a depiction of a guardian as a mean and cruel individual. Such characters feature, for example, in 'Jane Eyre' and recently in 'Harry Potter'.
In modern times for the lawyer the term Guardian has been limited in law to a parent or a person who takes over a parent's responsibilities after their death and thus has a valuable and responsible role in the care of a vulnerable child.

Until 1991 parents and guardians had similar but not identical powers. The Law Commission recommended that the distinctions should be abolished so that guardians could be brought within the scheme for parental responsibility and that the term 'guardian' should be restricted to non parents. This was enacted in the **Children Act 1989** which came into force on 14th October 1991. Under this Act, Guardians have parental responsibility.

The term 'Parental Responsibility' (PR) is a creation of the Children Act. Put simply, it is the concept that gives a carer the right and responsibility to make decisions for a child who is under 18 years of age. PR is defined by **section 3 of the Children Act 1989** as:

"...all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property and also includes the rights, powers and duties which a guardian of the child's estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property."

Those who have parental responsibility are :

- The parents of a child who are married to each other or marry after the child is born
- Parents who are not married to each other but the father is named on the child's birth certificate
- Parents who are not married to each other but the father has acquired parental responsibility by way of court order or parental responsibility agreement
- A mother in any event.

These are some key points, but I suggest some possible gaps in our knowledge which I would like to illustrate with an example.

A client is sitting in a lawyers office discussing the making of their will. The client tells the lawyer he/she has a number of children. The lawyer asks the client about their plans for the appointment of a guardian and the client responds with a number of questions.

Is the lawyer ready with the answers ?

1. What is a Guardian ?

A guardian is a person whom you may appoint in your will to look after any minor children you have at the event of your death. A guardian can only be appointed for a child who is under the age of 18 years.

2. Why appoint a Guardian?

If a person has minor children or is a guardian to minor children they should consider appointing guardians in their Will. This will allow them to choose people they trust and ideally who already have a relationship with the children to look after them in the event that they die while the children are still minors. Considering who to appoint as guardians in the Will also gives a testator the opportunity for their chosen guardians to be consulted to make sure they would be happy to take on the role. A guardian doesn't have to accept the appointment and can decide that they don't wish to act. When appointing a guardian, a testator may also include their wishes as to how they would like their children to be brought up. They may want them to be brought up in a religious manner, or be educated at a named school. These wishes are not binding on the guardian and are merely a statement of wishes by the parent.

3. Who can appoint a guardian?

A guardian may only be appointed in accordance with the provisions of the Children Act 1989. More than one person may be appointed as a child's guardian. The person appointing the guardian must be:

- A parent of the child who has parental responsibility (PR) or
- Someone already appointed as a guardian for the child or
- A special guardian

This means that a parent without PR for the child cannot appoint a testamentary guardian. This would be an unmarried father, whose name is not on the child's birth certificate, has no court order or parental responsibility agreement in place.

4. What is the effect of appointing a Guardian?

A guardian is given parental responsibility in the event of the death of the person appointing them and has the same rights and responsibilities as a parent when it comes to matters such as a child's health, welfare and education

5. Who can be a guardian?

You can appoint anyone you wish to be a guardian for your child, as long as they are 18 or over. This could be a family member, a close friend or anyone else you feel is appropriate to look after your child in the event of your untimely death.

You can appoint more than one guardian, and sometimes it is useful to do so in the event that your chosen guardian is unable or unwilling to act.

6. How are Guardians appointed?

By Parents or Guardians
The appointment of a guardian may be made by Will. This is a testamentary guardian.
A simple clause would suffice to appoint a guardian in the event of both parents death.
The appointment does not have to be made by Will and may be made informally as long as the requirements of section **5 of the Children Act 1989** are met. The appointment must be made in writing, dated, and signed by the person making the appointment. If the appointment is made by Will then the signing must comply with all of the requirements of **section 9 of the Wills Act 1837**.

By the Courts
An application can be made to the Family Court by a person willing to be appointed as a guardian. Before an application can be made, the proposed guardian must attend a family mediation information and assessment meeting. This is a requirement under section 10 Children of the **Children and Families Act 2014**. Even if no one comes forward to apply to be appointed as a guardian the court may make an order appointing a guardian if it feels it is appropriate to do so. Alternatively the court may make a Child Arrangements Order to decide who the child should live with. When deciding who to appoint as a guardian the court's paramount consideration will be the best interests of the child. If the court appoints a guardian it would consider the following:

- The child's own wishes and feelings taking into account the child's age and understanding
- The child's relationship with the prospective guardian
- How capable the proposed guardian is of meeting the child's needs
- The recorded wishes of a deceased parent and the wishes of the child's nearest relatives

7. When does the Guardianship appointment take effect?

If the testator dies and there is no other person surviving with PR then the guardianship appointment will take effect immediately on the testator's death.
If the testator dies and a Child Arrangements Order was in force in which the testator was named as a person with whom the child was to live or the testator was the child's only special guardian then the appointment will take effect immediately on their death even if the surviving parent has PR. In this case the guardian will share PR with the surviving parent.

The appointment will not take effect immediately if the surviving parent with PR was also named in the CAO as a person with whom the child is to live. If there is a dispute about who the child is to live with, either the surviving parent or the guardian can make an application for a CAO. The parent may also apply to have the guardianship terminated. The child's welfare is the courts main concern when dealing with these issues.

A common example of the above situation would be where the testator is divorced. Mr. Jones and Mrs Jones have been divorced for 3 years and there is a CAO in force which states that the children will live with Mrs Jones. Mrs Jones dies and has appointed Mr. Smith as guardian. Mr Smith will become guardian on the death of Mrs Jones and will share parental responsibility with Mr Jones. In these circumstances Mr Jones may apply to the court to terminate Mr Smith's guardianship.

If the testator dies and the child has a surviving parent with PR and there was no CAO in their favour then the appointment of the guardian will not take effect until the surviving parent with PR has also died.

8. When does Guardianship end ?

Guardianship ends automatically when the child turns 18 or if the child or sole guardian dies while the child is a minor. Under section 6 of the Children Act 1989 a guardian may end their guardianship early by disclaiming their appointment. This must be done within a reasonable time of them discovering their appointment has taken effect, must be in writing, and must be signed by the guardian disclaiming. A guardian may also be removed prematurely by court order. Where an application is made for a removal of a guardian a mediation information and assessment meeting must be held before the court will consider the application. The application can be made by anyone with PR for the child concerned, or by the child themselves if the court has given them leave. The court may also remove a guardian in family proceedings without an application if it considers it appropriate to do so. Where the court removes a guardian it may appoint a replacement.

9. Who should be considered as a Guardian?

A guardian must be over the age of 18 and mentally capable. Apart from these requirements a testator may appoint anyone they wish and who they think would be suitable to care for their children after their death. More than one guardian can be appointed.
A testator should consider the following about their proposed guardian:

- What is their relationship with the child and are they already close?
- Are they physically capable of caring for the children? An elderly relative may not be an appropriate guardian for very young children
- Are they financially stable?
- Do they have children of their own?

Conclusion

When dealing with clients with young children it is important that they consider guardianship and who they would trust to care for their minor children in the event of their death. It is important to make enquiries into the client's family situation especially where there are step-parents involved, as a client may assume their new spouse would take on the care of their children automatically but this may not be the case where the step-parent has not acquired PR. In the case of **Re E-R (a child) [2015] EWCA Civ 405**, the parents had been in a relationship from 2007. Their daughter was born in 2009 and the father appeared on the birth certificate and therefore had parental responsibility. The parents separated in 2011 when the child was 20 months old. The mother was 44 years at the time and had been diagnosed with terminal breast cancer. The separation was acrimonious and it is fair to say that the father had very little to do with the child from 2012 onwards following the making of a restraining order against him. During the course of her illness the mother had been supported by two friends ("the carers") and she and the child had moved in with them for the 10 months leading up to her death. Prior to her death she had appointed them as testamentary guardians and they had applied for a Special Guardianship order. In the lower court the Judge had concluded that the status quo (in favour of the carers) could not displace the proposition that the natural parent (the father supported by his girlfriend) should assume care for his daughter who was by then 5 years old. The carers appealed. Sadly the mother had died one week prior to the hearing of the appeal. Lady Justice King gave the leading judgment and examined the earlier case law. She said that the welfare of the child is the paramount consideration. Of course, biological parenthood is an important factor but one of many. She concluded that it was not "an elevated presumption" in favour of the surviving parent but neither was maintaining the status quo an elevated factor. She stressed everything depends on the unique facts of each case. The carers appeal was allowed and remitted for a re-hearing.

Guardianship is an important subject which affects all areas of our society and our legal expertise. It behoves family lawyers and probate lawyers alike to be aware of the issues raised above and be prepared to give an appropriate and informed response.

Stuart Barlow

Stuart Barlow is a Solicitor and has over 40 years experience in Family Law. He conducts most of his own advocacy. He is a member of the Law Society Children Panel. He was previously Chief Assessor of the Law Society Family Law Panel and an Adjudicator for the Legal Aid Agency. Stuart is also a former external examiner of the Nottingham Law School.

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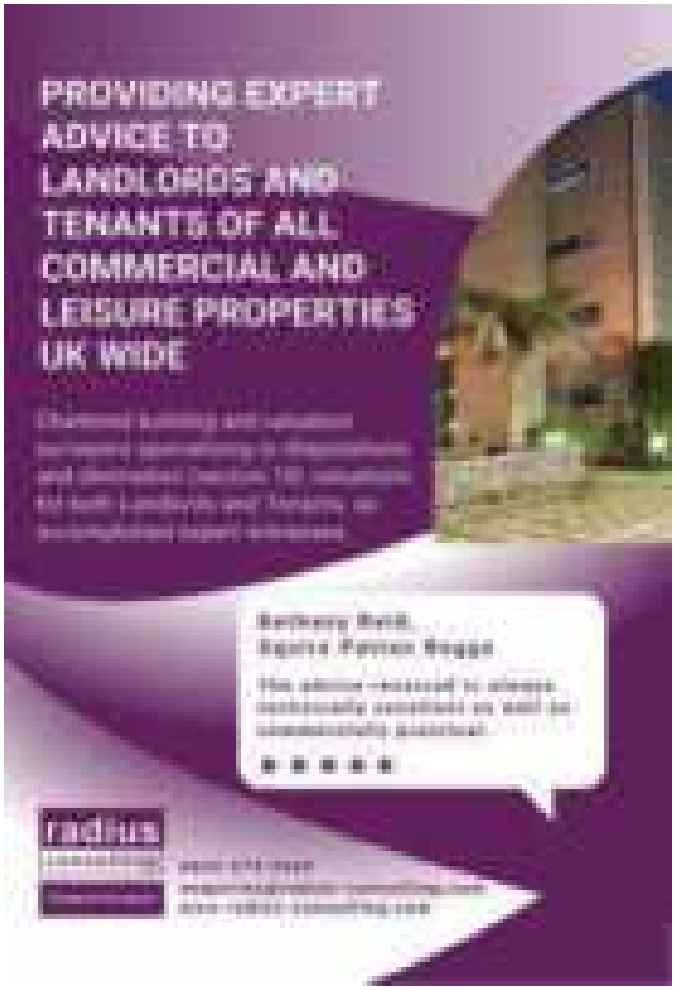
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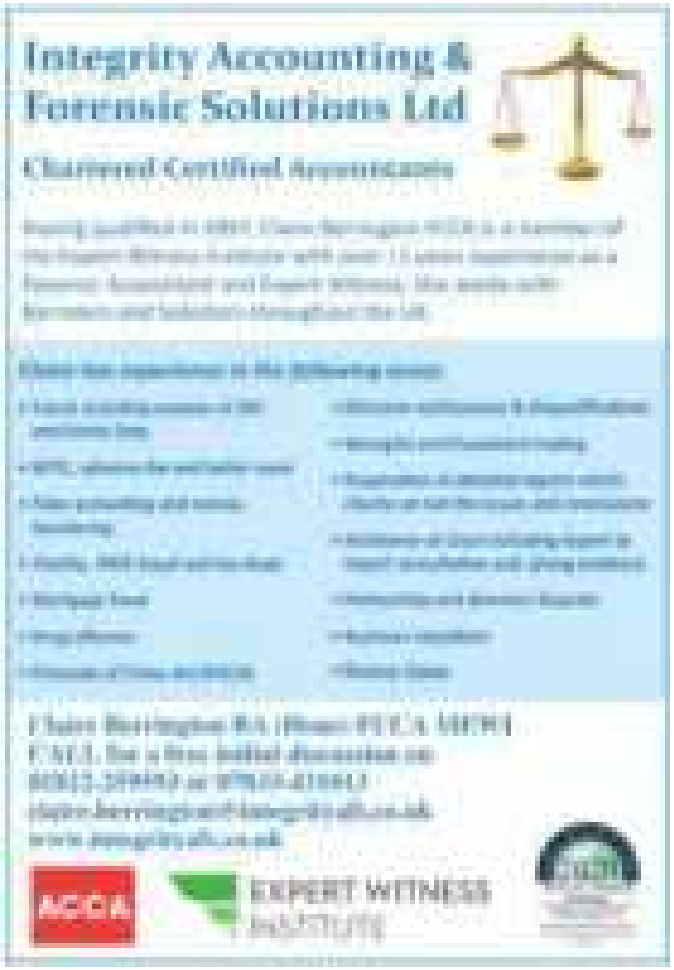
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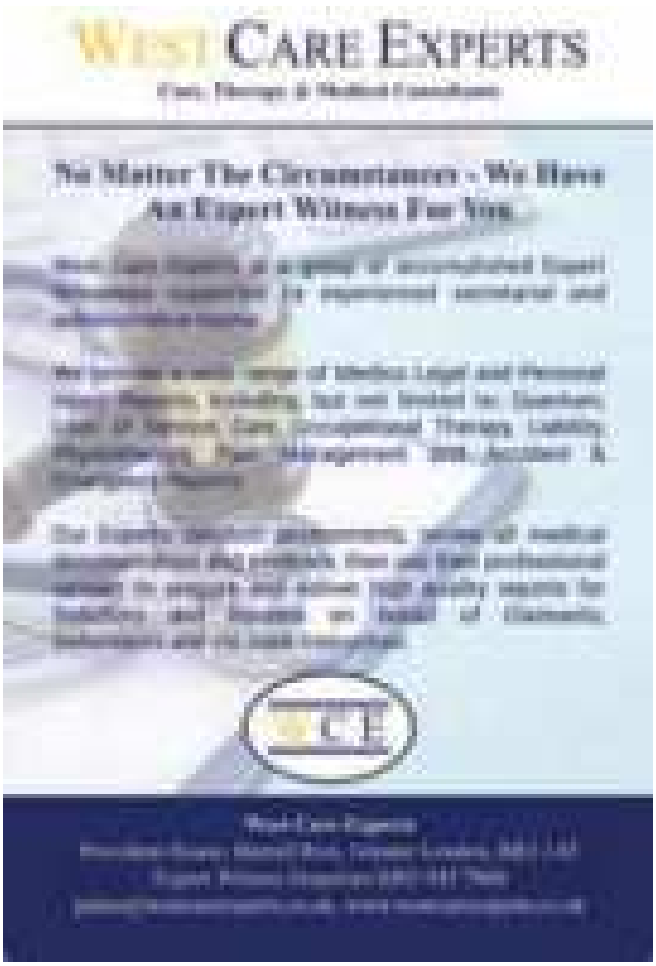
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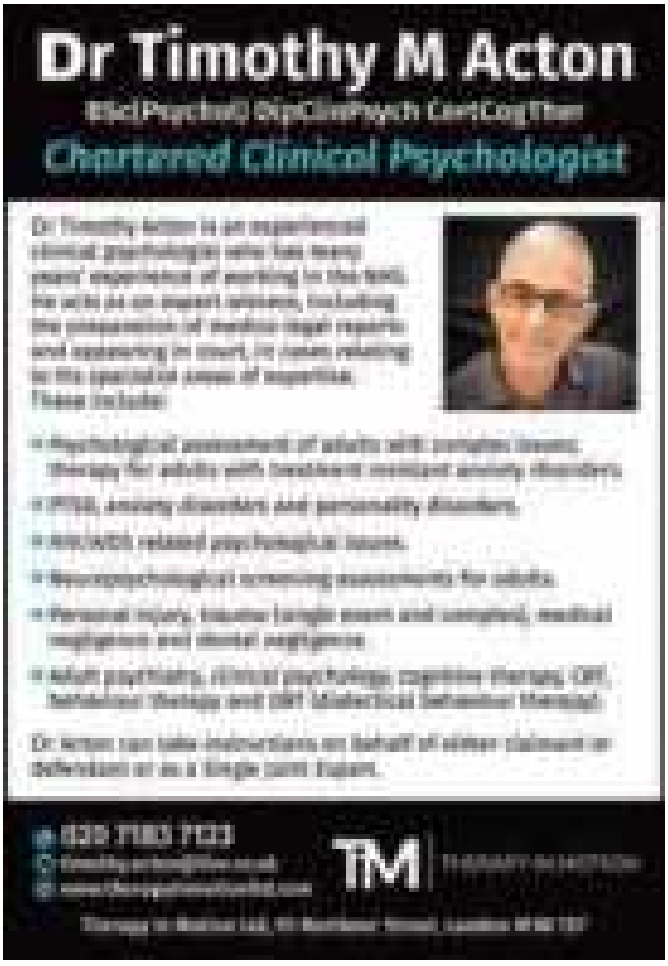
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