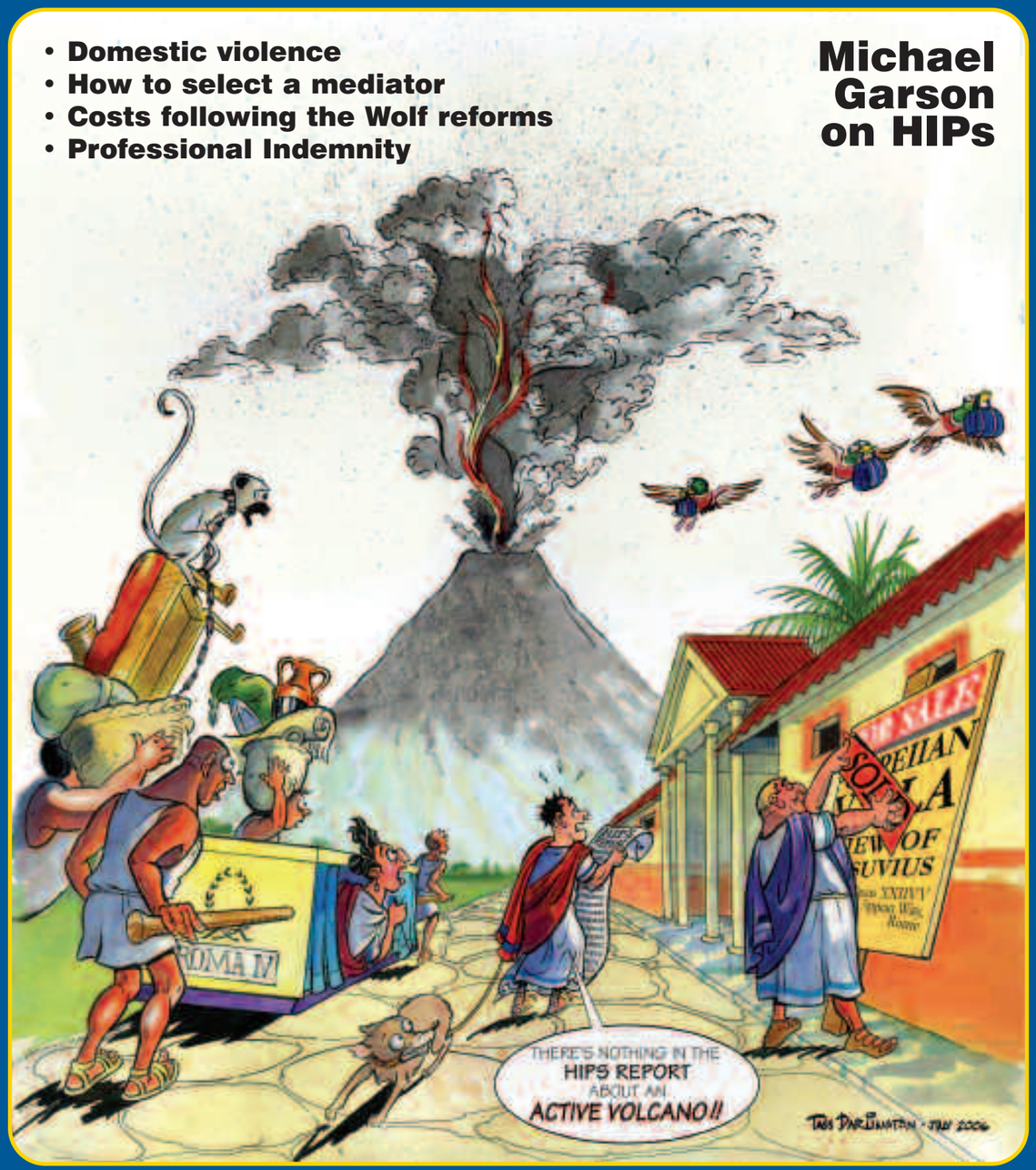
Summer 2006

The Bill of Middlesex

Official magazine of Middlesex Law Society

- **Domestic violence**
- **How to select a mediator**
- **Costs following the Wolf reforms**
- **Professional Indemnity**

Michael Garson on HIPs



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3. A solicitor qualified more than three years has a subscription of £25 per year.

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Alternatively complete the membership form on line at www.middlesex-law.co.uk

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FUNCTIONS 2006/07

Housing Dinner 17 May 2006 – Ramada Jarvis
Criminal Law Dinner 9 June 2006 - Ramada
Family Law Dinner September 2006 - Ramada
Professional Property Dinner 28 September 2006
Charity Quiz Night 16 November 2006 – Ealing
Annual Dinner 19 January 2007
See Newsletter for ongoing events
Lunches for specialised interest groups will be ongoing throughout the year.
Contact Administrator or Hon. Social Secretary for details or visit our website

EDUCATION & EVENTS PROGRAMME 2006-2007

2006

20 September VAT Update - Robert Killington (don't think this will go ahead not many tax specialists in our area!)
28 September Professional Property Dinner – Ramada Jarvis Hotel
18 October *Costs Seminar and Dinner – DJ Gurlis
Maximising Costs - Felicity Carson
25 October Crime Update Tony Edwards
15 November Personal Injury Update – C Harmer

2007

17 January HIPs/Conveyancing – M Garson/ C Tate
14 February Commercial Law Update
21 March Client Care – The Law Society
** indicates non - TVU venue*

The venue for the lectures is the Thames Valley University, St. Marys Road, Ealing. Each seminar commences at 6.00pm and includes 2 CPD points. Light refreshments are provided from 5.30pm onwards. For further details to the actual times for each seminar please contact Peter Hesom on 07930 386798.

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2006
24 April, 15 May, 19 June, 17 July, 18 September, 16 October, 20 November.
2007
15 January, 19 February.

AGM

Wednesday 14 March 2007

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Middlesex Law Society (est. 1958)

2006-2007 PROGRAMME

www.middlesex-law.co.uk

Presidents Letter

Dear member,

I hope you enjoy the new Bill of Middlesex as we have now entered into a contractual relationship with our publishers to utilise their services for the next 3 years. One of our obligations under that agreement is to provide at least ten pieces of good quality editorial with high-resolution photographs and as much news and press releases as possible for each edition.

Our committee members have been dragooned into agreeing to provide at least one article each per year in order to meet this requirement. But it would ease their burden if other members of the society could assist. The articles should preferably be legal, but not necessarily so if otherwise of interest to our readers. Please contact our editor Samir Dathi if you can help.

If you would like to write letters, provide a legal cartoon or crossword, provide news of appointments, marriages, moves, retirements, new firms, new babies, anything that might be of interest to our members this would be equally welcome.
As a starter could I announce with pleasure that Ken Sheraton, a long-term criminal practitioner in our area, has been appointed as District Judge.

May I also remind you that recruitment vacancies and sale/ wanted notices can also be included in our columns.

I am pleased to report that our Housing Dinner was another success. We are especially grateful to Robert Drepaul for organising it and the London Borough of Ealing in particular for giving it so much support.

I am afraid that we had to cancel the criminal law practitioners' dinner because of lack of support but we learnt a valuable lesson we will not forget. Never, ever, organise a function during the same fortnight as the world cup.

In the last edition I wrote about our programme for 2006/2007.

I now wish to turn to the second phase of our development programme, which involves the creation of a subcommittee structure for our decision making.

Last year we had committee meetings when sometimes we struggled to reach a quorum with only 7 or 8 members attending most of whom were past presidents.

This year we frequently have 15 or 16 committee attendees and we are bursting with new talent. We are proud and delighted to announce that our most recent committee acquisition is Professor Malcom Davies, Head of the Law School at Thames Valley University, as an alternate to Rachel Sojka, also of T.V.U. when she is not able to attend.

But the natural result of a full committee is that everybody wants to make their contribution and therefore frequently there is insufficient time to complete our deliberations in the two hours we have available to do so.

Accordingly we have now developed a sub committee structure. The subcommittees and their conveners are on our website.
The detailed work is now carried out by the subcommittee who make recommendations to the main committee and act as a filter to it. Normally we would expect the main committee to endorse the recommendation of the subcommittee and this should only take about five minutes. But the purpose of the main committee is to have an overview and if it disagrees with the recommendations there will be a full debate.

In May we had just that situation after the General Purposes committee made a recommendation about the website. The main committee asked for a rethink. This is not being regarded as a "defeat" for the GP committee but as democracy in action and the system working.

Subject to that the subcommittees have full autonomy and ample scope for imaginative projects with only one basic rule – do not put forward projects that will make a loss.

It is important that members should feel free to approach the convener of the appropriate subcommittee direct if there are matters they wish to be considered. For some issues – parliamentary liaison, public relations, diversity we do not have a subcommittee. Instead we have authorised representatives whose names are on the website and can also be approached.

The General Purposes committee deals with the website, finance, recruitment complaints handling and other matters. It is essentially an executive committee and so its members are senior committee members and are chaired by Senior Vice President Santokh Chhokar.

Ever reliable stalwart Robert Drepaul remains chair of the social subcommittee.

Michael Garson himself the chair of an influential HIPS committee chairs the conveyancing and property committee. This committee has much on its plate with the introduction of HIPS. We are very fortunate to have someone as knowledgeable as Michael to chair this committee and equally fortunate to have Colin Tate Land Registrar at Harrow Land Registry available to assist him.

Michael Garson has another important task as Chair of the subcommittee formed to liaise with the National Law Society during these vital months when it is essential that any transitional arrangements be handled with tact, good sense and due regard for the need to ensure that the achievements of a great institution are not unnecessarily thrown out with the bath water.

Neeta Desor and the Education and Training committee has been very diligent in revamping the programme and particularly active in encouraging a programme that will be of interest to our younger members who we so much wish to become involved with our activities.

Maria Crowley has similarly been active with the young members committee. She was specially selected for the post of chair, as she is forever young. We have three universities we are very anxious to strengthen our links with TVU, Middlesex and Brunel and she is working very hard on this.

Sundeep Bhatia had had his hands full as both a committee members of the Society of Asian Lawyers and chair of our Criminal Law subcommittee. In both capacities he has been very active in promoting our members' interests with regard to the Carter proposals. Many of you will have read his excellent article in the Bill of Middlesex last quarter and seen references to him in the national press.

(continued overleaf)

Presidents Letter (continued)

(continued from previous page)

Our other subcommittees are all chaired by very experienced practitioners.

Simon Hobbs has recently been appointed by the National Law Society to act as an agent for an intervened firm and is a member of the litigation committee.

In May I attended a meeting in Cockfosters arranged by Michael Singleton our North London representative. Michael is attempting to reconstitute the former North Middlesex Law Society. Quite apart from achieving a boyhood ambition of one day reaching the end of the Piccadilly line I am very pleased I attended that meeting. Michael has done an excellent job and fully deserves his success if he achieves his objective and has my full support.

Although this society is now known as the Middlesex Law Society we have always recognised the difficulties involved in trying meet the needs of a constituency that is so vast that it stretches from Twickenham in south west London to Enfield in north east London.

This society is not into empire building for its own sake but was very happy to incorporate the North London constituency into its own because at the time it was moribund and without representation as a local law society. If however, with Michael's help, it can rise like a phoenix from the ashes of the old North Middlesex Society we will be delighted to give it all the help we can.

If however, and despite Michael's best efforts, there is not sufficient support in his area we will continue to do what we have always done and that is to welcome the North London members into our fold.
In that unlikely event however could I suggest that this society continue to retain the membership records but appoint a North London sub-committee with delegated powers to act in that area.

Finally you may recall that last year I promised, and succeeded in completing three charity cycle rides on behalf of the society. This year, and in order to celebrate my second term as your President and my seventy second year, I have decided to increase the target to four. The first ride, already completed and some 60 miles was the classic Oxfordshire ride – beneficiary "Against Breast Cancer." On the 18th June there is the London to Brighton bike ride – beneficiary the British Heart foundation. On the 9th July the London to Southend – beneficiary the British Heart foundation. And finally on the 3rd September the London to Windsor – beneficiary Bowel Cancer. If any members would like to sponsor me, on behalf of the Society, for all or any of these events, would they please let me know?

Yours Sincerely

Alured Darlington
President.

The President's competition

As you know we are seeking new material for the Bill of Middlesex including news items, crosswords, letters, competitions etc. My increasingly desperate entreaties for contributions have unfortunately fallen on deaf ears and virtually the only persons to respond have been one "disgusted " of Hanwell W7 and one Bridget Jones also of Hanwell W7. Please see the summer edition of last year.

Accordingly, and solely in order to set the ball rolling, I set out below my competition Can you do better than this? It should not be difficult because the competition could hardly be worse. On the assumption that you can please contact our editor, Samir, as soon as possible with your superior contribution.

I have to say that I was mortified by the number of pictures of myself in the last edition. In order to make some form of recompense to the long suffering membership I am offering a consolation prize of one Mars Bar to the first member to correctly identify the number of such pictures without looking at the solution which is on page 38 of this magazine. I am actually quietly confident that my Mars Bar is safe…

Can you prove me wrong?

Yours enigmatically
Alured Darlington, President.

Invitation to the President's Garden Party

The President and his wife Tass invite all members and their families to a garden party at their home at 110 A Grove Avenue Hanwell W7 3ES on the afternoon of Saturday 26th August from 2PM onwards in aid of the three charities referred to in the Presidents letter. RSVP to that address please.

New format Housing & Property Law Update Dinner a success

London Borough of Ealing Legal Services.

District Judge Jenkins (left), District Judge Plaskow (middle) and Samuel Waritay (right).

District Judge Plaskow (left). Social Secretary, Robert Drepaul (right).

The *Middlesex Law Society's* Property & Housing Law Update dinner on the evening of the 17 May 2006 at the Ramada Jarvis Hotel, Ealing Common W5 was a resounding success. It was the second in a series of working dinners, following on from the recent Family Law Dinner.

Social Secretary **Robert Drepaul** introduced the speaker **Samuel Waritay**, a barrister and author specialising in Property and Housing Law. Mr Waritay's excellent lecture raised a number of questions from the floor. His lecture was followed by a buffet style dinner when attendees had an opportunity to mingle and discuss some of the finer legal points raised in the lecture and the accompanying notes.

President **Alured Darlington** chaired the second part of the evening, introducing **District Judge Plaskow** and **District Judge Jenkins** from Brentford County Court. **District Judge Plaskow** gave an entertaining talk on the judicial perspectives on this area. **Alec Atchison** was also present in what would have been his final local law society event after four years serving as its Law Society's Council Member.

After the seminar some of the attendees retired to the hotel bar to see the second half of the European Cup final when unfortunately, Arsenal could not serve up a win. It was still a splendid evening for all those who attended!

Home Information Pack Regulations "The end of the beginning"

Michael Garson, experienced property law solicitor, gives a lowdown on Home Information Packs.

On 14 June the Home Information Pack Regulations (SI 2006 No.1503) were laid before Parliament. When read with their guidance notes and positioned within the framework of Part 5 Housing Act 2004 these put in place the content for Home Information Packs. After 1 June 2007 a Home Information Pack (HIP) must be available for every residential property marketed for sale with vacant possession. The duty to have a pack and make it available to prospective buyers applies to a home owner or his selling agent and can only be avoided where the home is sold privately and not marketed to the public, or if it is a tenanted investment property.

The definition of residential property has now been considerably refined so as to clearly exclude property in commercial use or homes sold with and forming part of a business. Exclusions for some boarding houses and farms over 5 hectares (over 12 acres) are exceptions along with portfolios and properties for redevelopment so long as the marketing makes it clear that the purpose of the sale is not to attract a private buyer of a single lot who will occupy the property as his home. These are complicated provisions that deserve closer reading and are to be found at regulations 22-29.

The general policy of the regulations as finally published is to reduce the number of documents that must be assembled in a pack to a minimum and confines the list so far as possible to documents available from registers open to public inspection. Box A contains a list of the essential elements in the case of a sale of a freehold property. Additional requirements for leasehold properties are set out in Box B. In addition to the bare essentials a pack may contain optional components and these are set out in Box C with additional items for leasehold property in box D. There are further detailed provisions for a commonhold property and for new property interests.

The basic requirements of a pack include local authority searches. These must be produced with minimum statutory terms that involve changes to the way in which searches are carried out and indemnity insurance to provide redress for mistakes. It is likely that personal search companies will increase in popularity provided they are able to maintain low prices and at the same time comply with the new rules for transparency.

A requirement for a Home Condition Report is a radical reform, as it requires the seller to arrange for a physical inspection and obtain from a qualified Home Inspector a report primarily for the benefit of buyers. There are provisions enabling buyers and their lenders to enforce the terms of contracts for the provision of both search reports and the Home Condition Report. Another feature of the Home Condition Report is the inclusion of an Energy Performance Certificate. This is a major objective for government and is being introduced not only for residential property sold with the Home Information Pack but also, by 2009, for rented and commercial property. There is much debate about the role of Home Inspectors and this debate will move from the current concern as to the numbers in training and likely bottlenecks for carrying out inspections to questions of conduct and conflicts of interest.

For new properties, there are special provisions both relating to the title information that must be produced and also the type of report that is required in place of a Home Condition Report.

Regulations contain numerous provisions requiring the pack to be compiled with official or true copies of the documents and to be updated rigorously and kept separate from prohibited material and advertising. An index in the pack must reflect all changes and the up-to-date composition of the documents.

A late change in the final regulations is the option to include a summary and explanation of the pack or any of its documents. This may be particularly useful for advisers and to enable buyers to obtain some benefit from the pack when they are negotiating their terms of a purchase. The pack does not contain a draft contract and does not displace the doctrine of caveat emptor. No forms are now prescribed but there is ongoing consultation on this aspect.

The pack must be available on the date when the property is first put on the market. There is a relaxation for any missing documents that have been delayed and will be available for inclusion, but only if a rigorous procedure is followed. The pack must be available and accurate. It must not be misleading. These matters are all the responsibility of the seller or the estate agent. The simple obligations can give rise to more complicated issues and repercussions. This is of particular relevance because estate agents will have to belong to a complaints and redress scheme.

Many complaints are foreseeable in an industry which has little in place at the present time by way of compliance structures. Ultimately responsibility may be passed on to pack providers or solicitors who will need to ensure that they have in place the relevant indemnity cover. The saving grace is that at this stage of the reforms ultimate liability will still be determined by the terms of the sale and purchase agreement. Buyers' advisers are unlikely to rely upon the pack and will still need to pursue their own searches and enquiries as they and their clients and their clients' lenders see fit. In that respect the government's desire to cut waste seems destined to fail.

Overall this is still work in progress and the regulations are not the last word on the likely changes which could well see the residential property market in turmoil from January next year even before the announced date for compulsory implementation of 1 June.

The Law Society pack developed with MDA is presently undergoing trials and many other organisations are also piloting schemes as part of a dry run. The government will review the results from the dry run later in the year. They may then prescribe particular forms for dealing with certain elements of the pack and practitioners will need to keep the position under constant review as they prepare for the new regime.

(continued on page 10)

Michael Garson
Contact at info@PerPro.org
Chair of Law Society Property Section www.propertysection.org.uk
To join Law Society dry run hips@lawsociety.org.uk

Home Information Pack Regulations "The end of the beginning" (continued)

Box A

Required

- Pack Index
- Sale statement
- Title documents and lease of any part
- Registered land – official copy entries and title plan
- Unregistered land – official index map search and root of title documents with epitome
- Search reports of local land charges register, local authority enquiries and drainage and water authority enquiries
- HCR Schedule 5; or new home warranty with cover note
- EPC for property
- If sold with new home warranty schedule 6 then separate EPC
- Schedule 7 Report if 'not physically complete' at FPM
- Unexpired home warranties
- Other HCR's for the seller within last 12 months

Box B

Leasehold

Additional Documents

- Official or other copy of the lease (or edited information version)
- Rules and regulations for managing the property
- Statements or summaries of service charge supplied to the seller (s21 LTA1985) relating to the 36 months preceding the first point of marketing
- Request for ground rent, service charge or insurance relating to the 12 month period prior to the first point of marketing

Information

- Name and address of current or proposed landlord, appointed or proposed managing agents,
- Any amendments proposed to the lease, the rules and regulations
- Summary of works being undertaken or proposed that affect the property or the building

Box C

Authorised documents and information all properties

1. An accurate translation into any language of the documents in the HIP – whether 'required' or 'authorised';
2. An additional version of any document in the HIP in another format such as Braille or large print;
3. A summary or explanation of the pack or any document in the pack;
4. A note of the source or supply of any pack document or information or the pack or any complaints or redress procedures available from the source;
5. Additional search reports giving additional local authority information and other matters such as ground stability, hazardous substances utilities transport or chancel repairs
6. Reports of interest to buyers relating of other premises in the vicinity prepared in similar form
7. Official copies of any documents referred to in the resisters of title including any edited information documents (as defined in the Land Registration Rules 2003)
8. Documents of safety building repair or maintenance work carried out since the HCR
9. Any warranty policy or guarantee for defects in the design building or completion or conversion of the property
10. Official copies of any documents referred to in the title to the property being sold
11. Relevant information of matters similar to preliminary enquires as specified in schedule 11

Box D

Authorised information – leasehold

- Any lease relating to the property (superior or inferior)
- Any licence or tenancy affecting the property
- Any freehold estate linked to the property being sold including any plans to buy such an interest
- Rights and obligations of the tenant and landlord under the lease or otherwise including whether there has been compliance
- Information about the landlord including any that might affect the leaseholder's relationship with the landlord including any that might affect the leaseholder's relationship with the landlord, manager or agent
- Status or memorandum and articles of association of any company related to the management of the property or the building
- Membership of any entity involved in managing the property
- Rent payable and whether payments are outstanding
- Service charge payable including whether payments are outstanding
- Any reserve fund for works to the property or the building of which it forms part and whether payments to such fund are outstanding
- Any planned or recent works to the property or the building of which it forms part
- Insurance information including who is responsible for insuring, the terms of insurance and whether payments are outstanding

E-conveyancing: Making conveyancing easier for all

This article examines the innovation of e-conveyancing and, in particular, chain matrices and e-signatures.

Tranche 1 Prototype chain matrix
(the screen is still in the process of development and may look different from the one shown)

The driving force behind e-conveyancing is the desire to develop an electronic system of conveyancing that makes buying and selling houses easier for the general public and conveyancing professionals. The intention is to retain the good parts of our existing conveyancing system and build on those to make a better system.

Most people in England and Wales are able to co-ordinate their sale and purchase. However, this does inevitably mean that there are chains of transactions. It is particularly in this area that e-conveyancing can improve on the existing system. A 'chain matrix' service will enable all the parties in the chain to see the current state of play and which stages have or have not been completed. Are searches satisfactory? Have finance conditions met?

Where are we now?

Having obtained HM Treasury approval last year, Land Registry is now proceeding with the development and procurement of new services, including the first stage of the chain matrix and the vital e-signature solution. IBM has been appointed as IT support partner to Land Registry's in-house experts.

The range of services to be provided by e-conveyancing and how these will be accessed has been defined. These services fall into three main categories:

- registration unrelated to buying/selling, such as change of name by deed poll, remortgage work
- buying/selling, this will be managed through the chain matrix
- related services including training and support packages.

E-lodgement of many forms, where no fees are payable, is now well-established.

The Tranche approach

The component parts of the e-conveyancing service are being developed in stages, known as 'tranches'. This will ensure that each component has been carefully tested before additional components are added.

Tranche 1, to be launched in autumn 2006, will introduce a prototype, information only, chain matrix.

The chain matrix will show all the participants in a chain of transactions and, for each of those participants, their progress in passing the key stages. For example, when a buyer obtains his mortgage, the field showing the status of the finance arrangements will be updated.

Participating conveyancers will be able to see other parts of the chain in which their client is involved, and will be able to update the matrix as key stages are achieved in both pre-exchange and pre-completion phases. The chain matrix will be able to display information about more complex arrangements, such as contract races and branched chains when two sales are required to finance one purchase or a divorcing couple each acquire a new property.

At this early stage the chain matrix will only give information. Later developments will allow it to be used as the mechanism for exchange and completions, ultimately linked to the passage of funds through the Electronic Funds Transfer (EFT) service including all completion moneys, Land Registry fees and stamp duty land tax.

Useful features in Tranche 1 are:

- a completion calendar in which all parties will be able to identify available dates for completion
- a notepad facility enabling conveyancers to give supplemental information about the transaction and its progress
- an alert messaging service which can generate an automatic message to the conveyancer so that they are aware of key changes to a matrix.

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E-conveyancing: Making conveyancing easier for all

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Are you in Portsmouth, Fareham or Bristol?

Land Registry will be conducting a trial involving up to 80 firms in the Portsmouth, Fareham or Bristol areas in 2006 to test the information only version of the chain matrix. These areas have been chosen because they have:

- a high percentage of registered land, where freehold dealings predominate among the registered transactions
- a balanced mix of urban and rural land
- a variety of residential conveyancing practices.

You are not in one of these areas, but please be assured that there will be other opportunities for participation in the future.

Tranche 2

Tranche 2, to be launched in late 2007, will test the basic elements of most of the components of e-conveyancing with the major exception of EFT. It will extend the e-lodgement facilities and will enable the submission of e-contracts, other e-documents and e-fees. Land Registry is also looking at integration with case management systems as part of Tranche 2, and is currently researching this with industry representatives.

A central feature of Tranche 2 will be front end validation, the checking of data contained in e-documents against records already held by Land Registry. This will enable the preparation by Land Registry, using a combination of manual and automatic processes, of a notional register. It will also mean that many requisitions can be raised before exchange of contracts. The notional register will be viewable only by the parties to the transaction and their advisors and it will provide reassurance that title issues have been properly and fully addressed.

Tranche 2 will also provide an interim stamp duty land tax solution. The responses to the EFT service consultation last year indicated that our preferred solution needed to be looked at again. Land Registry is now working on the solution and intends to include the EFT component in a later tranche.

Secondary legislation will be required to regulate the use of Tranche 2 services and a formal consultation paper will be issued to enable practitioners to comment on the proposals. The format of network access agreements, permitting conveyancers to participate in the e-conveyancing system, will be finalised as part of the legislation. Land Registry is also planning a range of training packages and support services to assist users of both Tranches 1 and 2.

E-signatures

This issue raises many questions and concerns. E-signatures are crucial to the success of e-conveyancing and the solution we adopt needs to be both secure and affordable. Various mechanisms that fulfil these criteria have been identified, including smart cards and USB tokens based on public or private key infrastructure. Land Registry recently tested a prototype system with a small number of firms, using forms submitted through the e-lodgement service. The trial was designed to test which system works best for clients and conveyancers and to compare the costs and practicalities of the alternative systems. Lessons learnt from this test have enabled Land Registry to move forward towards formal procurement of the final solution.

Earlier consultation exercises indicated that practitioners would be reluctant to sign on behalf of their clients. This is likely to be necessary in the pilot phase and recent anecdotal evidence suggests that conveyancers are becoming more comfortable with that suggestion. The signing of the document is not the 'committing act' as it is the exchange of contracts or completion that gives rise to legal responsibility and conveyancers already carry out these acts on behalf of clients.

Fees

Land Registry is currently working on the charging strategy for the new services. The aim is to revise the existing fee structure so that the overall cost of transactions remains about the same as they are now.

Preparations you can make at this stage

You can use the electronic services that are already available eg Land Registry Direct, NLIS, e-requisitions and e-notices. Use of electronic services raises new issues, such as how to store information. It will also help to identify training and equipment needs within your office, and, dealing with these issues is part of the preparation.

For more information see:

- Practice Guide 23 – *Electronic lodgement of applications to change the register*
- Practice Guide 45 – *Receiving and replying to notices by email*
- Practice Guide 59 – *Receiving and replying to requisitions by email.*

Have a look at the e-conveyancing website www.landregistry.gov.uk/e-conveyancing for information and the latest news. If you want to consider how your firm or organisation stands with regard to preparation for e-conveyancing, you can consult 'Planning Book 1 - Where are you starting from?' which is also available from the website.

You can also join the e-conveyancing forum by logging onto **http://communities.e-conveyancing.gov.uk** and participate in online debate and future consultation exercises or read records of live debates at past events.

If you are interested in attending a presentation and there is not one proposed in your area, contact the E-conveyancing Team at **enquiries@e-conveyancing.gov.uk** to see if one can arranged for you.

Best of all, participate in one of the pilots and consultation exercises.

Training and support

Within Land Registry, alongside the E-conveyancing Team, the Education and Training Group is working on plans to support the introduction of both the limited chain matrix service and the fuller pilot service. The group is also developing presentations and online packages.

E-conveyancing will not appear overnight. But, in consultation with you, we will build a service that will ultimately transform the way in which conveyancing is undertaken and takes full advantage of the electronic age. A service which, with your help, will make conveyancing easier for all.

HIPs, a search providers opinion

Home Information Packs seem to have been with us for a very long time. Last weeks publication of the HIP detail by the DCGL clearly shows that whatever your stance on the matter, Home Information Parks are very definitely on their way.

The stated intentions behind HIPs are:

- To reduce the cost of entering the housing market for first time buyers.
- To reduce the millions wasted on failed transactions.
- To improve the quality of information provided to the buyer at the outset.
- To reduce the time between acceptance of an offer and completion.
- To reduce the fall-out rate.
- To improve the quality of our housing stock.

We're not going to debate the rights and wrongs of these intentions and the chosen Government solutions but we will try to provide you with information and a set of questions that will enable you to select the right HIP partner.

Conveyancing Searches has been working closely with our Surveying and IT partners over the last two years to put together multifunctional HIP systems that will provide the options and flexibility that you have told us you want. Flexibility has been a necessity in our planning because we know that all parties are different so will be the services and elements you require of the HIP.

As conveyancers, you are the only ones who can deal with the legal aspect of the HIP, but will you require a HCR and searches, just an HCR or just searches? Do you want to use an HCR from you local HCI or Chartered Surveyor? Do you want to provide 'branded' or 'white labelled' HIPs in partnership with your local estate agents and surveyors? Do you want to provide HIPs for third parties as a separate service or fee earner? And most importantly, who is going to pay and when?

There are already over a 100 HIP 'providers' to be found via Google, so how can you be sure that any will match your expectations and requirements? All HIP providers are suggesting that they can provide all the answers, more often than not they are offering one solution to fit all, only time will tell. We suggest you ask yourselves a number of questions when considering these providers:-

- How many have an established track record of providing conveyancing data efficiently and accurately?
- Will they provide HIPs on a nationwide basis?
- Can they offer existing and proven business capacity?
- How many already produce hundreds of thousands of search results every year?
- How many have a surveying partner who already provides nationwide coverage with over 500 practices within their network and on target to have 1000 by June 2007?
- How many systems will allow integration with your existing CMS without the need for expensive IT upgrades?
- Will the system enable you and existing long-standing professional partners to work together?
- Will the system enable you to work with new professional partners, offering 'branded' HIPs?
- Can they offer a number of flexible payment options, including 6-month interest free credit period?
- How much will you be charged to install or use their system?
- Will you be able to retain your independence?
- Will it be secure, easily and readily accessible for your clients and professional partners?
- Will it enable you to maximise your hard earned reputation and independence to your advantage?
- How will it enable you to compete with the Nationals?
- Will they provide tailor-made solutions?
- Will they actually produce a HIP for you or are they just providing you with the software?

Not all HIP solutions will be the same!

Are HIPs a revolutionary change to conveyancing? In reality, the only new component is the Home Condition Report. The fundamental change is that the conveyancing process will now begin before a property can be marketed.

So how and when will solicitors get to see prospective clients? Their own existing client bank for starters, however, it would seem that the majority of the work would have to be directed to them by the Estate Agents. As Estate Agents will have a choice of solicitors, how will you ensure that they will use your services? You may well have good relations with a number of agents in which case you would be able to work with them to provide an appropriate HIP and be able to offer legal advice on the completed HIP, hopefully leading onto instructions to exchange and complete. A recent survey of solicitors and conveyances responses relating to their business plans for the introduction of HIPs, highlighted the urgent need for them to become proactive in marketing their services and abilities, and to build strategic local and regional links with estate agents, surveyors mortgage brokers and search providers. With the support and backing of the CS multifunctional HIP this process becomes considerably simpler. If conveyancing is an important part of your business, you cannot afford to be left at the starting blocks.

Finally, if any one component needs to be seriously considered, it is the searches and survey capacity. Much has been made about the shortage of Home Inspectors, in reality there could also be a severe shortage of genuine nationwide search providers, unless solicitors and estate agents align themselves with a search company now they could be left at the starting line in June 2007.

The Conveyancing Searches HIP will provide all the relevant solutions, conveyancing search data and home condition reports backed by a robust flexible system, a proven track record and technological capacity. It will efficiently deliver branded results whilst offering flexible payment options and enabling local partnerships to be maintained, thereby promoting and retaining your independence.

Euan McCrindle
National Sales & Marketing Coordinator
Conveyancing Searches

Land Registration Fee Order 2006

A new Land Registration Fee Order comes into force on Monday 7 August 2006. The scale fees for the main registration services remain unchanged. There are some important changes to fees for information services, which are the services relating to searches and inspections, and official copies of the register, title plans and other documents.

Land Registry fees have been decreasing steadily for over a decade and the 2006 Fee Order is the first to increase fees since 1993. As a government agency with trading fund status, we are obliged to cover our entire operating costs from fee income and without these increases, we would be unlikely to cover our costs in 2006/2007. The costs include significant investment in our services, many of which are now available electronically and are therefore quicker and more cost-effective to use. The new Fee Order retains a general discount for those services that are accessed electronically.

The main changes made by the new Fee Order are:

- There will no longer be a special fee, currently £40, for an official copy of an unedited version of an exempt information document. The general provisions relating to fees for official copies will apply instead.
- The fees for personal, telephone and paper searches, inspections and official copies of the register will increase from £4 to £6. Where applications for these services are delivered electronically the fee will increase from £2 to £3. The fee for a certificate of inspection of a title plan will be £6.
- For an inspection of all or any documents referred to on an individual register, apart for leases, using a remote terminal the fee will be £5. When the inspection is personal the fee will be £10.
- Apart from leases, the fee for providing official copies of any or all of the documents referred to in an individual register will be £10 for paper copies and £5 for electronic copies. The fee for an official copy of a document relating to an application but not referred to in the register will be £10 per document for a paper copy or £5 per document for an electronic copy.
- For leases, the fee for an inspection, using a remote terminal, will be £10 per document, and for a personal inspection £20 per document. An official copy will cost £20 in paper form or £10 in an electronic form. The increase reflects the higher handling costs involved.
- The fees for searches of the index map, index of proprietors' names, supplying the name and address of the proprietor of a registered title (313 applications) and official copies of historical editions of the register remain unchanged.

Full details of the changes can now be found on our website by visiting www.landregistry.gov.uk/fees/ further information will be sent to all our account customers in July. Any specific enquiries can either be referred to a local Land Registry office or by email to fees@landregistry.gsi.gov.uk

Costs – who is the real winner?

Glenn Newberry and Victoria Hopkins, members of the Association of Law Costs Draftsmen's Council, take a look at the courts' treatment of the powers afforded under CPR 44.3 from the inception of CPR to the present day, the different types of costs orders being made, the criteria the courts apply, and the advice you should be giving to clients in respect of potential costs orders.

For those of you who were involved in litigation prior to CPR, the phrase "costs follow the event" is no doubt engrained on your psyche. A win was a win and, as long as you won, your client could confidently expect to recover costs.

A claim for £10m compromised for £300,000 was a win even if the matter was concluded at trial. Issues such as unsuccessful heads of damage, exaggerated claims and conduct, considered as closely by the courts as they are now. As a result, you could readily advise your clients that they would recover costs if successful.

CPR 44.3 retains the principle, but gives various circumstances in which the Court is encouraged to make an alternative order. How has this provision been applied in practice?

Post-April 1999, the Courts were keen to exercise "new" powers in relation to costs orders. In *Universal Cycles -v- Grangebriar Limited*, Court of Appeal, 8 February 2000, the Court, including Lord Woolf, overturned a first instance decision that the Claimant pay half of the Defendant's costs following service of the defence.

The case centred around the supply of bicycles which the Defendant, Grangebriar Ltd, argued

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were defective. The Claimant was owed in excess of £100,000, the balance of unpaid invoices, a contractual claim to which there was effectively no defence. Therefore, very little time was spent on that issue. However, a large amount of time was spent after the service of defence in relation to the counterclaim, namely that the bicycles were defective and/or not fit for the purpose for which they were intended.

At trial, the Claimant was awarded outstanding invoices of just over £100,000; the Defendant was partially successful on counterclaim and was awarded £25,000. Considering the provisions of CPR Part 44.3, the Trial Judge made an order based on the fact that the majority of time had been spent dealing with the counterclaim.

The Court of Appeal recognised that the methodology adopted by the Trial Judge was consistent with the new rules. However, the end result was to impose upon the Claimant, the party who had recovered net £75,000, an adverse costs order which would have wiped out the damages. Not fair, said the Court of Appeal, and the order was amended. The Court of Appeal drew a distinction between, on the one hand, depriving a partly successful Claimant of costs and, on the other hand, ordering payment of the opponent's costs. The latter can often be seen as a step too far. What message does that send to the client? Forget the merits of the case?

Let us move on to the much-quoted case of *Ford -v- GKR Construction*, 1 All ER 2000 page 802.

Mrs Ford rejected a payment into Court and proceeded to trial. During the course of the trial, Mrs Ford was called to the stand to give evidence. Previously, her medical evidence had been supportive of her claim of a serious and debilitating back problem. As she made her way to the witness stand and spent a considerable amount of time giving evidence, it became clear to the watching Defendants that her back problem may not have been as bad as she had contended.

Fortunately for the Defendants, the trial was adjourned part heard and, during the break, they obtained video surveillance evidence which confirmed their suspicions. Albeit late in the day, the Trial Judge allowed this additional evidence to be relied on, as a result of which damages were awarded at an amount less than the earlier payment in. However, the Judge awarded the Claimant all of her costs and was heavily critical of the Defendants for not obtaining video evidence earlier. This approach was upheld by the Court of Appeal.

Lord Woolf commented that parties should make full and proper disclosure, and when making or considering whether to accept offers to settle, the parties should have available to them all relevant documentation. Try explaining that logic to a Defendant client. You made a payment in, the payment was not bettered, yet you still have to pay the Claimant's costs in full!

Ironically, this judgment, although under-used, is also good news for Defendants. The failure to provide proper evidence in support of claims for damages often delays offers of settlement. Thus by relying on *Ford*, Defendants can argue that until such time as the evidence is available, the Claimant should not be entitled to recover costs as the Defendant was not in a position to make an informed offer to settle.

We now jump forward five years and the Court of Appeal is at it again in the case of *Yvonne Painting -v- University of Oxford* [2005] EWCA Civ 161.

In this case, a payment into Court of £184,442 was rejected and the matter was set down for trial.

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Costs - who is the real winner? (continued)

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Shortly before trial, some three weeks before in fact, the Defendant's solicitors stumbled across video evidence that they had sat on for three months. This evidence suggested that Yvonne Painting had been exaggerating her symptoms. The video showed her moving freely just three days after a medical examination with her own expert which produced a report confirming her condition as severely debilitating.

Having discovered this evidence, a hasty application to withdraw the payment into Court was made and was ultimately successful, together with an order to adjourn the Trial. £10,000 was left in Court and the evidence passed to Yvonne Painting's expert who withdrew his evidence claiming that he had been misled by the Claimant.

At Trial, the Claimant recovered £23,331; £13,000 more than the payment in, thus comfortably beating it. The Trial Judge awarded her all her costs, commenting that the Defendants could have made a greater payment into Court, £10,000 being the minimum the Claimant would have received had she been exaggerating her symptoms from the outset. The Court of Appeal, while recognising that the Trial Judge had taken the question of exaggeration into account, found that he had failed to take into account three important issues. The first was that, following the finding that the claim had been exaggerated, every point argued was determined in the Defendant's favour. Secondly, the Trial Judge had failed to take into account the probability that, were it not for the exaggerated claim, the matter would have settled at an earlier stage. Thirdly, the Trial Judge had not taken into account the Claimant's conduct, ie the intentional exaggeration of the claim.

In the circumstances, the costs order was overturned and substituted with an order that the Defendant pay the Claimant's costs up to the payment in, the Claimant pay the Defendant's costs thereafter. This, said the Court of Appeal, being an order in the interests of justice.

Contrast the *Painting* case with the decision of the same court in *Malloy v Shell UK Ltd* [2001] EWCA Civ 1272 (which, incidentally, was considered in the *Painting* case) in which a Claimant, who had intentionally exaggerated his symptoms and thus his claim, recovered nothing by way of costs.

The most recent example of the Courts considering 44.3 was in the Court of Appeal decision of *Day -v- Day* [2006] All ER (D)184. The Court below has made no order as to costs inter partes, believing the matter should have been dealt with by agreement. The Court of Appeal's view was that the Claimant had been successful, had been forced to bring proceedings to recover what was rightfully hers and as such should be entitled to costs. The onus was on the Defendant, in the first instance, to make use of payments into Court or Part 36 offers. In *Day,* the Defendant could have made payment into Court to reflect the position ultimately reached. However, the Claimant had been successful and was therefore the winner and entitled to costs.

Where does all this leave you poor solicitors advising clients in relation to costs orders? Put quite simply, anything goes! You need to be, or encourage Counsel to be creative in costs arguments and, further, to be instructing costs draftsmen at an early stage to advise on potential costs orders. In-house draftsmen tend to get involved at an earlier stage than many of their independent colleagues, particularly in relation to submissions prior to judgment.

Once the order is made, there is little costs draftsmen can do. The Court's decision in *Aaron -v- Shelton* to deny the paying party the opportunity to raise conduct at detailed assessment having not raised conduct at trial, is proof of that!

Glenn Newberry FALCD, Victoria Hopkins FALCD

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Mediation: Practical tips for a Practical Process Part 4 – Settlement and the cost consequence of refusing to mediate

This is the last in a 4-part series covering the practicalities of mediation. Parts 1, 2 and 3 covered preliminary considerations, preparations and attendance at mediation respectively. This Part covers issues arising from success or failure in mediation and the treatment of costs in subsequent litigation.

The End Game: the need for a written settlement agreement

A written settlement agreement signed by the parties is an essential part of the successful mediation. It ensures that the settlement achieved through mediation can be enforced and gives meaning to this form of alternative dispute resolution. Given human nature, it is never wise to leave performance up to the goodwill of the parties, however strong the bond between them built up under the protection of the confidentiality and 'without prejudice' conditions of the mediation agreement.

It is part of the 'lore' of mediation that they frequently continue into the wee small hours, when cold reality and fatigue finally sink into the parties. Whenever agreement can be reached, it is essential – however late in the day, however tired everyone is – that it be committed to paper and signed there and then, before the mediation breaks up and the parties go their separate ways. We all know the temptation that follows success, once the initial euphoria has worn off: when you have done a successful deal, you wonder, "Perhaps if I had insisted a bit longer, I could have got a better deal!" and, if the agreement is not completely nailed down, even though the deal that was hard negotiated was perfectly fair in all the circumstances, we are tempted to try to reopen the negotiation.

The contents of a settlement agreement struck at the end of a mediation are the same as those of any settlement agreement, except that the recitals at the beginning usually describe the dispute, outlining the reference to mediation, and referring to the fact that the settlement results from a mediation. The parties need to consider whether the settlement agreement should include provisions relating to the responsibility of each party to apply for a stay of existing legal proceedings, the return of property and the legal costs of such proceedings and the mediation itself.

There are no 'conventions' particular to mediation as to the form or wording of the written settlement agreement. The parties can agree whether it is to be executed by the parties as a simple contract or as a deed, or in the form of a draft Consent/Tomlin order or arbitration award, and/or whether the mediator should counter-sign it.

Consequences of refusing to mediate – the threat of costs sanctions.

Some of the more contentious publicity surrounding mediation relates to the Courts' encouragement of mediation, both in the CPR and in judicial decisions (including the 'robust encouragement' – 'stopping short of compulsion, but only just' in the words of Rix L.J. – of judges' orders to agree a mediator by a set date, or 'to take such serious steps as they may be advised to resolve their disputes', and to report on the outcome to the Court), as discussed in the first article in this series.

The usual bone of contention is that one party refused to mediate when invited to do so by another party or by the Court, or failed to do so pursuant to a pre-action protocol, and that such refusal was unreasonable.

One very important question which has recently been clarified by the Court of Appeal's decision in **Halsey v. Milton Keynes NHS Trust** [2004] 1 WLR 3002 is: upon which party does the burden of proof lie to prove the reasonableness or otherwise of a refusal to mediate. The Court of Appeal decided:

> *"...the burden is placed on the unsuccessful party to show that there was a reasonable prospect mediation would have been successful. This is not an unduly onerous burden to discharge. He does not have to prove the mediation would in fact have succeeded."*

The point is reinforced in the judgment of Rix LJ in **Burchell v. Bullard** [2005] EWCA (Civ) 358:

> *"...I agree that mediation here would have had a reasonable prospect of success and that a party cannot rely on its own obstinacy to assert that it would not."*

In the **Burchell** case, the Court of Appeal held that the unsuccessful litigant had discharged the burden of proof that there was a reasonable

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Mediation: Practical tips for a Practical Process Part 4 – Settlement and the cost consequence of refusing to mediate (continued)

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prospect that mediation would have succeeded, and that therefore the successful party's refusal of mediation, even before the issue of formal proceedings, was unreasonable.

In the **Halsey** case, the Court of Appeal discussed a non-exhaustive list of factors which *may* be relevant to the question of whether a party has unreasonably refused mediation, including:

- The nature of the dispute – few cases (not even those involving fraud, or complexity or simplicity, or huge or tiny gaps or evidential disputes) can be said to be inherently 'unsuitable' for mediation;
- The merits of the case – the fact that a weak party might be in a position to put pressure in a mediation on a party with stronger merits and possibly greater resources (such as insurers or the NHS) is not sufficient, because large bodies can look after themselves in mediation, and, their decision to make a nuisance value offer only is governed by their view of the risk of wasted costs and not by anxiety about the mediation process *per se;*
- The extent to which other settlement matters have been attempted;
- The additional cost of mediating - although that cost is invariably a drop in the ocean compared with litigation costs;
- The prejudice caused by the delay involved in setting up and attending the mediation – mediation is hardly ever responsible for delays of the length encountered commonly in litigation.
- The prospects of success of a mediation – see **Halsey** *supra.*

The penalties of an unreasonable refusal to mediate.

The risks run may be summarised as follows:

- An unsuccessful litigant, who has refused mediation, may face indemnity costs (**Virani v Manuel** Revert [2003] EWCA] (Civ) 1651)
- A successful litigant who has refused mediation may be deprived of the costs that would otherwise follow the event (unless the invitation to mediate was accompanied by unjustified threats to compel participation) – and costs sanctions are likely if the successful party has ignored a judicial recommendation (**Halsey**, *supra*)
- Where both litigants are successful in part, costs sanctions may be imposed on the one who refused an offer to mediate (**Burchell**, *supra*).

Hugh Caldin is a retired solicitor who was accredited a mediator in 1996 through CEDR and has been selected as the mediator representative for the Mediation Awareness Week at Brentford County Court.
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FIRST CATCH YOUR RABBIT – how to select a mediator

So, you've managed to persuade your particularly litigious opponent to mediate. Now what? Jonathan Dingle, Barrister and mediator gives valuable tips on how to select the best mediator.

The morning post that you look forward to each Monday has brought a bizarre letter. Your opponent has written under the heading "without prejudice save as to costs" to invite you to mediate that nightmare long running claim you had hoped would hide in the filing cabinet for ever. Or at least until you become a District Judge. The letter concludes with the seemingly dire warning:

"In inviting you to mediate, we have in mind the principles espoused by Ward LJ in ***Burchell v Bullard & others*** *[2005] EWCA Civ 358 (8th April 2005) as well as the relevant paragraphs on conduct in CPR Parts 44.3 and 44.5. We are sure that the costs judge would see the point we would make if you refuse to engage in the process".*

Of course you know about *Burchell*. And **Halsey v Milton Keynes NHS Trust.** And you are particularly aware that the senior partner is not likely to celebrate a discovery that you were in effect working *pro bono* for three years as a result of the costs judge taking away your otherwise copper-bottomed entitlement to his 06 –registered Brabus.

So you want to agree to mediation and you have read the excellent articles in this organ in the past months which mean that you understand the process. But how do you select a mediator? Are they all in the Temple? Or do you phone that most trusted of sources, the Usher at the Regents Park palais de justice?

The aim of this article is to offer some insights into how to choose a mediator, where to get one from and how to ensure that they provide the best prospects of success.

Who are you going to call?

There are at least 2,000 people practising as mediators, or at least holding themselves out as willing to take instructions to mediate. Many of them are excellent, some newly trained and a few (and the author speaks from personal observation in a recent matter) somewhat less than impressive, combining the patience of Inspector Regan with the self-deprecation of Chelsea's manager and the tact of George Galloway.

Such a Jurassic throwback is

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rare, but until January 2006, in the absence of personal knowledge or recommendation, there was no objective means of being reasonably sure that the mediator would be sound.

The Civil Mediation Council (CMC) has sought to address this by working with the Department for Constitutional Affairs and HM Court Service. The driver has been growth of court based schemes and the National Mediation Helpline (http://www.nationalmediationhelpline.com, telephone 0845 60 30 809).

The Helpline was the brainchild of the DCA's Better Dispute Resolution supreme, Robert Nicholas and is a government funded operation which puts all those in need of a mediator with a suitable mediation provider organisation. It is used by judges and litigants in person, by solicitors and professional organisations to locate the perfect mediator with just one call.

A pilot scheme for 12 months, it had very good independently audited feedback and success rates and has been extended for a further two years. One of the main recommendations, however, was that the providers supporting the scheme should be objectively assessed. Accordingly, the CMC set up its own two-year pilot scheme to accredit mediation providers.

Full details can be found at www.civilmediation.org but it can be summarised in this way. After a year of work, the CMC (which draws on the skills of leading mediators who are elected to the Board by the members, and who range from Judith Kelbie of Leeds firm *Lyons Davidson* to Dr Karl Mackie of *CEDR* under the direction of former Lord Justice Sir Brian Neill) concluded that there were certain characteristics of a mediation provider (and hence its mediators) which should be apparent.

These were:

(a) Adequate mediator training – the method by which the provider has and will continue to admit mediators to membership of its panel, list or group: this includes the minimum training requirement it sets for candidate members, the means by which it assesses whether that training is sufficient and whether the candidate has a sufficient understanding of role and duties of a mediator to be appropriate for admission. The CMC has based its initial criteria on practice within the civil mediation community in the UK and abroad and requires a mediator to have undertaken at least 24 hours of formal training with assessment, plus at least two observerships.

(b) Code of Conduct – whether the provider has instituted or adopted, and implements, an appropriate Code of Conduct for its members to follow: the CMC endorsed and adopted the EU Model Code of Conduct for Mediators in 2004 and expects that the Code should be embraced by an accredited mediation provider.

(c) Supervision and monitoring – the means by which the provider provides adequate and appropriate supervision, mentoring, monitoring and pupillage for its mediators; the provider's CPD policy and programme or requirements; the scheme the provider adopts for handling complaints and feedback; and the opportunity for peer review.

(d) Insurance – whether the provider can demonstrate that it has adequate insurance in place for the activities it and its members undertake.

(e) Efficient administration – whether the provider can demonstrate that it has a suitable and sufficient efficient administration proportionate to and for the work and workload it undertakes, including the handling of enquiries, the recording of calls, the accurate accounting for fees and the proper rendering of bills to the consumer.

(f) Allocation of mediators – the method by which the provider can demonstrate that it ensures (save where the parties decide their own choice of mediator) that an appropriately trained, experienced and skilled mediator is allocated to each case with which it deals.

These characteristics were then embodied into criteria against which applicants have been assessed in order to become accredited.

So who has been accredited?

To date (17th March 2006) there

(continued overleaf)

FIRST CATCH YOUR RABBIT – how to select a mediator (continued)

(continued from previous page)
have bee some 27 applications and 7 accreditations (set out at the end of this article, and on the CMC web-site under "Providers"). It follows that these will be a very good place to look to find a mediator.

Anyone else?

Well so far as providers are concerned every major and medium sized provider appears to have applied for accreditation so it is difficult to recommend anyone else. Do bear in mind, however, that there are many individuals or partnerships out there in resolution-land who are too small to be providers and yet may be very sound indeed. Personal recommendation is one source of these individuals until (and the author privately suspects that it will be until) mediators are eventually able to apply for personal accreditation by an overarching body akin to the FRICS, the Law Society and the Bar Council.

What do I ask for?

The first point is that you don't necessarily need to have a lawyer. Some of the very best mediators and trainers have never been to law school. The majority probably have been legally trained, however, but do remember that a mediator is not a judge and is not there to determine the issues or hand down a decision. The mediator's role is almost always restricted to facilitating a resolution through reflective listening and fostering principled negotiation against a reality checking process.

Tact, diplomacy and patience, combined with listening skills and an understanding and belief in the process far outweigh any cognisance with *The White Book*, *Archbold* or the Uxbridge Magistrates. If, however, you can combine both legal skills with these seminal qualities, many people argue that the best of both worlds can be obtained.

So do not be afraid, once you have a short list of mediators, to telephone them and ask them to describe their approach, their style, and their manner. Most are very happy to enter a "beauty contest" and provided you don't attempt to discuss the case itself, will answer happily all your questions. If they won't, or offer you a time to do so when they are not running for the 1945 to Harrogate, then look again.

The question that is objectively unresolved is whether a mediator needs to be a specialist in the field in dispute. The author's personal view is that the answer depends on the character of the mediator and the number of mediations they have done. The more skilled and experienced in the surprising range of issues that emerge in mediation the practitioner is, the less important professional specialism becomes.

For mediators just starting out, however, the author tends to advise them to stick to the comfort zone whilst they learn the process and how to deal with a LIP who tells them that "my toaster talks to me". This is borne out by some research in a local county court scheme that suggested that experienced mediators, or those who were specialists in the discipline of the dispute, settled cases three times more often than non-specialist novices.

Should I only seek the most experienced mediator?

The answer to this is a bit like choosing counsel: we would all like to have instructed Perry Mason for that small claim in the Islington County Court but the costs are prohibitive. Besides, just like many trainee solicitors and pupil barristers are wholly competent, newly qualified mediators can often be (with good training) very effective indeed – especially when inside their comfort zones.

Any key questions to ask the provider?

Ask how many mediations the mediator has done and if you want, the success rate. Neither should be regarded as determinative as very often the mediator has little control over the prospects of success, but there are mediators out there with hundreds of cases to their name who have a better than 90% success rate. It cannot always be through luck.

Make sure that you are certain what fees are being charged, whether there is an additional fee for any room hire and refreshments, whether the mediator will also charge for reading the papers beforehand over and above the fee for the day and what happens if the mediation runs later than planned.

So, in summary?

The author suggest that you:

(a) choose a mediator from an accredited mediation provider – see below
(b) don't necessarily choose a lawyer
(c) obtain CVs and ring up the candidates to get a feel for personality
(d) look for specialists in junior mediators with few mediations behind them
(e) not be concerned as to specialisation if the mediator is very experienced
(f) do check what you are paying for and get the quote in writing; and
(g) relax – statistics show that you have a 70% chance of settlement and fees!

Who are the accredited mediation providers so far?

Do check www.civilmediation.org and click Providers for details but as of 17th March 2006 they included:

* Clerksroom (www.clerksroom.com)
* Solent Mediation (www.solentmediation.com)
* Specialist Mediators LLP (www.specialistmediators.org)
* Midlands Mediation (www.midlandsmediation.com)
* Lamb Building ADR (www.ladr.co.uk)
* Intermediation (www.inter-resolve.com)
* ADR Group (www.adrgroup.co.uk)

Jonathan Dingle is a barrister and mediator at 199 Strand (0207 520 4000) and is the Hon. Secretary of the Civil Mediation Council (cmcadmin@clara.co.uk)

Developments in Equal Pay Case Law – The Genuine Material Factor Defence

Richard Benny, solicitor, discusses the employers' enigmatic 'genuine material factor' defence, in sex discrimination disputes over salary

Recently, there have been a number of interesting developments in equal pay case-law, several of them over the last few months. Essentially, equal pay law is an aspect of sex discrimination law, in that it seeks to eliminate sex discrimination from pay and pay structures, and enshrines the principle of equal pay for equal work as between men and women.

Equal pay law in this jurisdiction is derived from legislation and case-law, both domestic and that emanating from the European Union (EU). As to the former, at domestic level the primary legislation is the Equal Pay Act 1970 (EqPA). At EU level, the key legislation comprises: Article 141 of the EC Treaty and the Equal Pay Directive (75/117/EEC).

The GMF Defence

In an equal pay claim, the employer has a defence under s. 1(3), EqPA, i.e. that the pay differential is "genuinely due to a material factor which is not the difference of sex…" (the GMF defence). The House of Lords in *Strathclyde Regional Council v Wallace* [1998] 1 WLR 259 held that "genuine" in this context meant not a pretence or a sham, and "material" meant "causally relevant". In *Wallace*, the House held that, where there was no sex discrimination tainting pay, the employer did not have to go on to establish objective justification of the pay differential. The House adopted the same approach in *Glasgow city Council v Marshall* [2000] IRLR 272. This approach has been followed by various divisions of the EAT over the years, most notably in *Parliamentary Commissioner for Administration v Fernandez* [2004] ICR 123).

However, in *Sharp v Caledonia Group Services Ltd* [2006] IRLR 4, the EAT took a different approach, following a line of ECJ cases culminating in *Brunnhofer v Bank der Österreichischen Postsparkasse AG* (Case C-381/99) [2001] ECR I-4961, [2001] IRLR 571, in which the ECJ ruled on the standard applicable to the employer when justifying unequal pay. In *Brunnhofer*, the ECJ ruled that, "an employer may validly explain the difference in pay… in so far as they constitute objectively justified reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality" (para 79).

The domestic case-law since *Sharp* has been conflicting. The EAT in *Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437 supported the *Marshall* approach, holding that Sharp was wrongly decided and that *Brunnhofer* meant "no more than that grounds which the employer relies upon to rebut the presumption [of sex discrimination] do exist in fact" (para 175). A few weeks after the *Sharp* judgment was handed down, the Court of Appeal restored the pre-*Sharp* approach and followed *Marshall* (see *Armstrong v Newcastle upon Tyne NHS Hospital Trust*, [2006] IRLR 124).

However, *Armstrong* must be treated with caution, not least because *Sharp* was not referred to and *Brunnhofer* received only a brief mention. Both *Sharp* and *Villalba* are due to heard together by the Court of Appeal, possibly later in 2006.

Conclusion

Considering the authorities discussed above, the question of exactly what an employer facing an equal pay claim has to establish under the GMF defence is far from clear. It would appear that much depends upon the correct construction of the phrase, "objective justification". Does it mean (i) that the employer has to establish that the factor(s) relied upon by the employer are not tainted by sex discrimination, or (ii) does it mean that the employer, having established (i) above, must then go on to objectively justify the pay difference? It is hoped that the Court of Appeal decision in *Sharp* and *Villalba* will provide much needed clarification on this point.

Richard Benny - Profile

Richard is Senior Lecturer in Law in the Department of Law at Surrey University and Programme Director of the LLM in Employment Law by distance learning. He is also in part-time practice as a Solicitor with the firms of Delano McEvoy in Guildford and Martin Coakley in Haslemere. He is the General Editor of the loose-leaf practitioners' work, Sweet & Maxwell's Employment Law Manual. His most recent publications are, Labour Law, with Robert Upex and Stephen Hardy, published in 2004 by Oxford University Press (second edition due 2006)

Age discrimination guidance now available

In October 2006 it will become unlawful for an employer to discriminate on grounds of age in the workplace. What does this mean in practice and what steps should firms be taking now to ensure that they are able to comply with the legislation when it is introduced?

This new guidance from the Law Society, updated to take account of the final version of the regulations, aims to provide a brief introduction to the proposed legislation and sets out some basic steps which firms can take to help ensure that they are age inclusive.

To download the guidance go to www.lawsociety.org.uk. On the home page click on Rules, guidance and regulation, then on Regulations and professional conduct, then on Guidance.

START GETTING YOUR TEAMS TOGETHER
for
MIDDLESEX LAW SOCIETY'S

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(for the BBC's Children in Need)

EALING TOWN HALL
Victoria Hall
Thursday 16 November 2006

Register your firm's table for a minimum donation of £100 asap by contacting Social Secretary, Robert Drepaul on 0208 280 1095.

www.spr-consilio.com: The World's First Internet Law School

Those in the know will agree that the law, as an academic discipline, is one of the most notoriously difficult disciplines to understand. To law students, and even many lawyers, the legal system's complexity, alien language and, of course, inexorable growth, can be extremely daunting.

With this in mind, a group of enterprising lawyers founded the company Semple Piggot Rochez (SPR) in 1997; they market themselves as the world's first internet law school. Incidentally, this same team was also responsible for founding BPP Law School in London in the early 1990s.

Their website, www.spr-law.com, has a number of features which law students and lawyers will, no doubt, find useful. Firstly, there is a resource called LawinaBox which publishes a) Subject Files containing detailed text and casenotes; b) Q&A Packs with examination advice, multiple choice tests and exam questions and answers; and c) one hour Recorded Lectures. All are reasonably priced and purchased in pdf or CD form.

Another feature of www.spr-law.com is its free online magazine called Consilio which contains a constantly updated host of legal essays and articles. Consilio also provides a number of invaluable links to other websites of a legal nature, and neatly organises these links under a number of different categories, such as 'round ups', 'news', 'practice' etc.

Further, Consilio has a link to an interesting blog site called 'Charon QC the blawg' where the author's views on legal topics are posted on a daily basis and to which students and lawyers can add their comments.

An SPR resource which lawyers will find useful is the 'Legal Practitioner'. This provides a list of online CPD courses. The courses can be purchased individually from £18 per CPD hour; but you can also buy an annual subscription which gives access to 140 hours + of CPD courses for £225. This is superb value and saves the time and expense of attending conferences during work time.

In my opinion, www.spr-law.com provides a comprehensive and engaging one-stop-shop of legal resources; a useful tool to help both students and lawyers unravel the mysteries of the legal system.

Written by Samir Dathi, solicitor, and user of www.spr-consilio.com

DIGITAL DICTATION FOR SOLICITORS

THE CARTER REVIEW "merge or die" says the article in the Bill of Middlesex publication By Peter Duru.

The restructure of how small firms of solicitors work is currently underway with the forthcoming merger of smaller firms, a virtual assistant using digital dictation saves time and money, e.g. in the same way you would contact an employment agency for staff, at a our digital typing agency you would get the work typed and returned by our "YOU SPEAK WE TYPE" digital dictation system, rather than employing staff to come to you, you would send your work to us.

How does it work?

Using a digital dictation machine, you dictate into the machine as usual, plug the handset into your PC, down load the sound file to the assistant, who then types it up and sends it back, ready for printing and distribution.

Has this been done before?

Yes, outsourcing professional services is already happening across the board in firms of solicitors all over the country. There is a trend for more flexibility in offices, and more and more work is being outsourced. We are probably the first agency, locally, offering digital dictation.

Why do you need this service?

Saves money on office space, salary and like commitments, and also gives an opportunity for work to be carried out from remote locations. An admin assistant/receptionist can prepare this work, and distribute accordingly, we cover annual leave, maternity, sickness or just an office backlog of work.

We would like to build a data base of clients who might use this service, visit our website submit your details and we can arrange a demonstration free of charge.

We would like to provide a service you can use, designed to your requirements, as you can see, we offer a range of office expertise which we hope come together to make for a modern, comfortable profitable efficient working agency.

Our company offers: Legal secretarial support, Project Management, Health & Safety geared to office ergonomics.

And a small building company to make any small changes to the working environment Contact www.va-services.co.uk submit your details via the website and request a free brochure or ask for a free demonstration, you can also call us on 07764355085

Employing Placement Students in a Busy Litigation Practice – A Rewarding Experience

By Mr Raj Veja, Principal Solicitor, Veja & Co

I am the Principal Solicitor in the firm Veja & Co. We specialise in Criminal Litigation and for last three years, we have been offering six monthly work placements to law students from Brunel University. In a busy practice, with some 14 fee earners there is always work that students can assist with and whilst they are entirely supervised and do not have a case load of their own, these students are available to assist solicitors with their various tasks. Placement students work very closely with their supervisors enabling a solicitor to concentrate on more specific and involved matters.

Offering placements to students offers many advantages

The obvious advantage is the flexibility students have and the fact that they are on a six-month placement only. Historically, there has always been a shortage of clerks to attend with counsel at the crown court. On those occasions we would have instructed outside agents, and this created administrative difficulties in respect of the collection and return of files, and more importantly were expensive. The vast majority of our crown court clerking is now undertaken by the placement students. In addition to court clerking, students are able to deal with other work such as prison visits, conferences in chambers, site visits and office based work such as viewing video evidence, listening to audio tapes of defendant's interviews and comparing the accuracy of the transcript. They are also involved in actual case preparation i.e. taking witness statements, perusing prosecution material, summarising the prosecution case and are always available to help with reception duties if the receptionist is on holiday or sick.

Experience has taught us that students have adopted a very mature approach to their work and are very keen. Enthusiasm is the key ingredient in any litigation practice and what better opportunity is there to exploit this keen sense to impress and improve, than the employment of placement students. They require very little training for the work that they cover in the office and whilst their work is always supervised we have made ourselves an approachable open door practice giving placement students the opportunity to speak regularly to a solicitor for advice and clarification.

Recruiting students is very easy and good value for money

Recruiting a placement student is very easy and good value for money. Whilst there is no fixed salary for students, we have been paying a salary of £10,000 per annum pro rata, which is easily covered by the work the students undertake. On the whole, we have found the placement scheme very beneficial, not just financially, for our firm.

Students and employers are supported throughout the placement by tutors and administrators at Brunel University. The team is very helpful and approachable and contact is made through the telephone and email. The only stipulation that Brunel University has is that the placement must last for 22 weeks, that the work is legally relevant and that each student is supervised by someone who is legally qualified. This is the only criteria. We advertise our vacancy's with the Placement Office, they send on CV's for our perusal where we are completely free to select which candidates to interview. The Placement Office can also make all of the necessary interview arrangements on our behalf. We are normally spoilt for choice because of the high quality candidates that are available. In general the placement scheme takes up very little time from an administrative point of view.

From work placement to training contracts – a way to try and test the next recruits

One rewarding factor for us is that we are actually assisting a student about to embark on a career in law. We have found that some students have come to our practice and then decided that Criminal work is not for them whilst others have found that they have enjoyed the work so much that they will pick options relevant for Criminal Litigation and aim to qualify and practice as a Criminal Litigation Solicitor. The students are given a great opportunity, for some it's the first time to communicate in a working environment, meet other professionals, and learn many office skills.

We have a continuing policy to offer placements to students who have become an integral part of our firm. A number of students continue to keep in touch with us. One particular student has been offered a training contract and in addition to her work placements she has returned to us to undertake clerking work in the summer and at other holiday periods.

I would encourage all local law firms to offer these 6-month placements to students from our local University, not least because of the mutual benefit offered by the scheme.

Our student, Jo Mantell

Brunel University

Brunel University has a strong tradition of offering sandwich courses across many of its degree programmes. On the LLB approximately 120 students look for placements each year, many of which are very keen to work for local firms and companies.

The placement scheme is managed by Mr Doug Perkins, Placement Officer for the School of Social Sciences and Law. Doug leads a small team that can administer almost every aspect of the placement process for you. The service is free and includes the advertising of vacancies, the forwarding of CV's, the organisation of interviews and almost all post interview contact with students. University support is also available once students are placed through the allocation of an academic tutor who provides academic support during the placement and who also makes at least one visit to the student during the placement period.

There are only a few stipulations on what type of work we will accept as a placement. All we ask is that the work is legally relevant, lasts for at least 22 weeks and that a student is supervised by someone who is legally qualified. Placements commence each June until December and from each January until the summer.

Finally, there are many reasons why a placement student can be seen as a very useful resource. The placements are not work shadowing experiences – it is real work of genuine benefit to the firms who are involved.

If you would like more information about how the placement scheme can benefit your firm or would like to offer a placement opportunity, then please contact Doug on 01895 265559 or at doug.perkins@brunel.ac.uk

A Younger Local Law Society

With the future of the National Law Society being uncertain, and with big changes on the horizon, there has never been a greater need for a Local Law Society, particularly in the case of the trainee or newly qualified solicitor. As a recently qualified solicitor myself, I know only too well how easy it can be to find yourself entrenched with a large caseload and isolated from the outside world. Indeed it is often the case, having finally qualified and made the final leap from trainee to solicitor, that the only experience a newly qualified solicitor will have of the firm dynamic and what they should expect, is limited to that which they would have experienced within their own firms and nothing more.

It is therefore surprising that so few young solicitors actually attend and support their local law society, when it has so much to offer them at this early and important stage in their careers. So, who is to blame? Well perhaps blame is too strong a word to use, but there is certainly an apathy by the younger members of our profession towards their Local Law Society and no doubt a lack of encouragement, or gentle arm twisting as the case may be, by existing members to get younger members from within their firms along to Local Law Society meetings and events. I hate to say it, but even the Local Law Society itself cannot be without some reproach, as it has allowed itself to become a close-knit community of old friends and colleges that make for a daunting experience to outsiders.

So what can the Local Law Society do to change this trend and encourage new blood into an aging society?

Well it goes without saying, that the very first thing that needs to happen, is to actually get younger people along to meetings, and the various other social events and lectures that the Local Law Society holds throughout the year. Members should actively seek to bring new members of any age along, and it would not be a bad thing for partners of firms to encourage their trainees to attend as a matter of course. The fact of the matter is that the Local Law Society has a lot to offer young lawyers, and those very same lawyers will become the foundation for an evolving Local Law Society in years to come. It can only be of benefit to young lawyers to have a neutral environment in which to express themselves and interact in social surroundings with their peers and hopefully remove the sting of their first encounter on a professional basis. The senior member of the society are also an invaluable source of experience and knowledge that even the most erudite amongst us could make good use of, in this age of ever changing law and process.

The encouragement of partners, and the inducement offered by partners to write articles such as this one is in itself a challenge that young members would take on, and is certainly a way of promoting oneself and being heard. The Bill of Middlesex is a forum ready and available for the use of its members and it is an opportunity that should not be missed particularly for the young and ambitious.

Apathy amongst solicitors is perhaps something that young solicitors hear on a regular basis. I prefer to say that we are hard working busy practitioners endeavouring to provide a professional service in a world of costs cutting exercises. We need to make time, though, as the Local Law Society is our channel to the National Law Society and thereafter to influence change and improvement.

The drive for younger members within the Local Law Society is however, not an altruistic one. Although the Local Law society has a lot to offer, without new and younger members, the Society will eventually cease to exist as the numbers slowly dwindle and the older members leave. The Local Law Society therefore also needs to change and adapt to a new way of thinking that will bring new and energising members to what is an old and aging organisation. The Law Society needs to make itself appealing to the younger generation, and in return hopefully be rewarded with a new and vibrant base for the future of a healthy society.

If you are interested in joining the Local Law Society or attending any of our meetings or events, please contact Darrell Webb of Desor & Co at 0208 569 0708 or Maria Crowley of Freeman and Partners at 020 77245855 for further information. You may wish to access our website at www.middlesex-law.co.uk.

Darrell Webb, Solicitor, committee member of the Middlesex Law Society

"I bought the car from a friend" (Essential title checks for buyers of cars)

By Nicholas J. H. Preston, Barrister and Advocate (Scotland), Clerksroom and former finance company lawyer.

This article sets out a suggested check list for prior title claims and the innocent private purchaser defence in the case of motor vehicles before finance companies either release or claim title. To prove ownership, innocent private purchasers (IPP) have to show considerably more than, that on purchase, they did not know that a finance company still retained an interest in the vehicle being acquired.

Sections 27-29 of the Hire Purchase Act 1964 (HPA) – substituted by section 192(3)(a), Schedule 4, paragraph 22 of the Consumer Credit Act 1974 and amended by section 63(1)(a), Schedule 2, paragraph 4 of the sale of Goods Act 1979 – refer to three categories of IPP. Section numbers in this article refer to the HPA.

In tracing the ownership of the vehicle each link in the chain of transactions must be investigated, if possible, to establish whether title has passed at each transaction. The debtor in each example below of a chain of transactions is the customer of the finance company;

Category 1: section 27(2) – finance company – debtor – IPP;

Category 2: section 27(3) – finance company – debtor – trade or finance purchaser – IPP;

Category 3: section 27(4) – finance company – debtor – trade or finance purchaser – *purchase by conditional sale or hire purchase* by IPP.

Does the IPP fit directly into one of the three categories? If not, the following presumptions apply. In category 1 where the IPP buys from a private seller who is not the debtor and does not know whether the seller purchased from then debtor, it is presumed by section 28(3)a) that the first disposition was to an IPP and by section 28(3)(b) that the IPP disposed of it to the ultimate purchaser IPP. The chain of transactions is, therefore, deemed unbroken.

In category 2 the same applies where there is a break in the chain of transactions between the trade and finance purchaser and the ultimate purchaser IPP. It is presumed by section 28(4) that the disposition was to an IPP.

Can the presumptions be rebutted by showing that the immediate purchaser was not a private purchaser without notice? This may require investigation of the primary factual circumstances to see what secondary inferences may be drawn.

The defence is not restricted to regulated consumer credit agreements or to individuals because "person" in section 27(1) includes corporate body. This is an important consideration.

Does the original finance company creditor have good title? If not, it cannot pass title. This is all the more important since *Shogun Finance Ltd-v-Hudson* [2003] 3 WLR 1371 HL where by a bare majority the House of Lords decided that the only person who can be a consumer to a three party agreement is the person named in the proposal, despite the robust and principled dissenting opinion of Lord Millett. An example is where the finance company purchases the vehicle from a supplying dealer on terms that title does not pass to the finance company until delivery and the supplying dealer is a fraudster who delivers to another fraudster or himself using the name of the proposed customer. In those circumstances the finance company will never have acquired title and the supplying dealer may have passed title under a subsequent sale without finance defeating any prior title claim of the finance company.

Is the ultimate IPP a trade or finance purchaser? It is a question of status and not capacity. The term "private purchaser" excludes trade or finance purchasers – section 29(2). Does he wholly or partly purchase vehicles for the purpose of offering or exposing them for sale? It is not matter of the purpose of the particular purchase because a trade purchaser does not become a private purchaser when he purchases for his own use.

Is the disposition a sale? If yes, sale must have have a monetary consideration.

Although the requirement is actual notice of prior interest, honesty is the test. Are there any suspicious circumstances, such as price, manner of payment e.g. cash? Certain authorities appear to consider that the sale of a used vehicle without the registration book is not sale in the ordinary course of business; this could raise suspicion. Following the introduction of the computerised Driver and Vehicle Licensing Agency (DVLA) at Swansea there is nothing unusual about vehicles being separated from their registration documents for lengthy periods of time. Nor is it unusual for vehicles to be offered for sale without registration documents, which are not documents of title. The authorities which suggest that a sale of a used vehicle without its log book is not in the ordinary course of business, date from before the introduction of the DVLA computer system are, therefore, distinguishable.

In category 3 provided that the first private purchaser at the time of the possession under the finance agreement was *bona fide*, he acquires a good title even where, subsequently, he is informed of the existence of the original finance agreement.

Is a prior purchaser *mala fide?* If yes, neither he nor any person under him will be protected e.g. where a customer sells to his partner who was aware of the finance before the partner disposes of the vehicle in the open market.

Is the customer who originally transferred the vehicle a thief from finance company? If yes, then he has never acquired good title. This is different from the finance never having acquired title, because here there would be no finance agreement fo which the HPA to bite.

Until all these aspects of the purchase have been considered, it is not safe either to release title or to claim title. Finance companies beware!

Lessons from South Africa

Jenny Tait, GP

The following article has been published at my request. It is definitely not the type of article usually found in the The Bill of Middlesex: it has been written by a GP doctor, brought up in South Africa, who practices in Acton in our area, and it has never been previously published. I regard it as a privilege for our Society to be responsible for having published, for the first time in its magazine, a small, literary masterpiece. Whether or not you share the author's religious views, I am sure that the vast majority of our members, (with the possible exception of "disgusted " of Hanwell W.7), will endorse the article's very powerful message.
Alured Darlington President

Growing up in apartheid South Africa has given me some insight into our present world, and I am writing to share this with others. This article is adapted from a talk I gave, which Alured Darlington heard. He suggested that it may have some relevance for us in the UK today, and invited me to send it to this journal.

One of the heroes of the struggle in SA is Desmond Tutu, the first black archbishop of Cape Town, and I will be quoting extensively from one of his books: "God has a dream".

I grew up as a South African – not just any South African, but a white South African. Being white defined my whole life. It meant I had a completely segregated and privileged childhood. Its hard to believe it now looking back, and you may think I am exaggerating.

SA was divided into whites and non whites, and people were legally classified into 'whites', 'coloureds',' 'Indians' and 'blacks', or, more simply, into 'Whites' and 'non-Whites'. Your whole life was determined by what group you were put into – where you were allowed to live and work, what schools your children could go to, what benches you were allowed to sit on, what hospitals you could go to, which side of the post office you could use, who you could marry.

I lived in a white area. The only black people I ever came across or talked to were servants – the domestic worker or char, whom my parents and all their friends called "the girl", no matter her age, or gardeners, called "the garden boy" or petrol pump attendants – whom for some reason my father always called Willie. My school, Sunday school, church, youth group - every place I went, was for whites only. I grew up with it and never questioned it as a child.

There was so-called petty apartheid: every single place – parks, post offices, benches, trains, beaches were segregated. Until the age of 17 I never so much as sat on a bench that a 'non-White' had sat on, or went to a beach that a 'non-White' had been to. Every park I went to had some benches marked 'whites only' and others marked 'non-whites only'. Sitting on the wrong bench was a crime.

Meanwhile millions of back people were excluded from all the best places. While I was swinging on the park swing, Desmond Tutu might have been walking past with his children, as he describes in his book *"our youngest said "daddy I want to go on that swing". And I said with a hollow voice and a deadweight in the pit of my tummy "no darling you cant go there". How do you tell your little darling that she was not really a child, not that kind of child? In other words, not a white child and therefore not entitled to the same swings, fun, pleasure.*

The thing is, apartheid was so successful at keeping people apart and censoring information that we had no idea what was really happening. I remember very clearly starting first year at university, and for the first time ever there were some coloured and Indian people in my class!

I developed a friendship with a coloured student, Heather. One day we walked together to the train station meaning to go to the centre of Cape Town for a meal. As we walked, she said "OK, we'll meet at the fountain in Adderley St "(the main street in central Cape Town). I looked at her in amazement and said "but we're going together". She said, "Well yes but of course we can't sit together on the train, or meet up inside the station". The trains were divided like everything else into white and non-White coaches, and the station had separate entrances for whites and non-Whites. Looking back there are two things that shock me about that. First, it hadn't even occurred to me that this would happen – I had always been able to go wherever I wanted to. Yet it was obviously just part of everyday life for Heather. Second, and worse, it did not even occur to me to say no of course I'll go in your coach, or braver still, you come in mine.

So yes – a very successful strategy.

Then there was so-called grand apartheid, on a much bigger scale. The whole country was divided into white, coloured, Indian and black areas. All the nice, fertile, areas were designated White, and non-Whites were simply forced to move out. Imagine the authorities coming into your area and saying you can only stay here if you have blonde hair. Brown hair? move out – we've built you some nice tenement blocks 10 miles away. Mousy hair or any other colour? Queue up here and we'll tell you whether you can stay or must move. This is what happened to non white communities all over SA.

Christian nationalist education held that it would be unnecessary and in fact cruel to educate blacks as highly as whites, because they were only ever going to be labourers or miners anyway, so we had separate and very unequal education. As a child I had no idea this was even happening – I grew up with it and it was just the way of the world

And behind all this was an all powerful state, ruling by the whites for the whites, and controlling everything, especially the media. Non-whites had no say and no vote. Dissidents and protesters were routinely imprisoned, and sometimes tortured and killed. Non-white lives were not valued – infant mortality amongst non whites was about 5 times higher than whites, black crowds, even of school children, were shot at during protests. The state was all powerful, efficient and repressive, and prepared to do pretty much anything to protect white privilege.

We all expected that nothing could change this except terrible violence. We used to talk about "kill a white" day, when blacks would rise up and kill us all – only 1 in 10 black people would have to each kill one white person. The slogan of the black consciousness movement was not one man one vote, but one settler one bullet.

BUT then the miracle happened and peace broke out. The country was transformed! No civil war! Apartheid did not end overnight, and not without a struggle. BUT where people expected violence, civil war, and huge bloodshed, justice and peace broke out. Instead of kill a white day there was one person one vote day – a free fair election open to all. White and non-Whites who had never before even shared a post office queue, shared a queue to vote. Instead of one settler one bullet there was a truth and reconciliation commission to heal the wounds, allow victims to tell their story and criminal oppressors to admit their guilt and ask for forgiveness.

And yes South Africa still has problems – there is still violence, crime, poverty, HIV. But SA is a success story – people are being lifted out of poverty, there is education, health care, justice, equal rights for all.

SO why did it happen? How were the injustice, violence and poverty of apartheid ended? And what lessons can we learn from this?

First – it was Gods desire that it should change. History tells us that God is always on the side of the poor and the oppressed. God is at work transforming our world, and it was South Africa's turn. As Tutu says, "God has a dream – of a world whose ugliness, squalor and poverty are changed into their glorious counterparts, where there will be justice, and goodness and compassion and love and caring. Who in their right minds could ever have imagined SA to be anything but an example of the most ghastly awfulness, of how NOT to govern a nation? We were a hopeless case if ever there was one. We succeeded not because we were smart. Patently not so. Nor because we were particularly virtuous. We succeeded because God wanted us to succeed."

Secondly, it happened because of righteous people who walked close to God. This gave them the ability to open their eyes to evil, and the power to fight it. It also gave them an extraordinary ability to see others, even their oppressors through the eyes of God, and forgive and seek reconciliation. Nelson Mandela spent 27 yrs in prison, his children grew into adults, men flew to the moon, he sat in Robben Island. Yet he walked out not embittered and filled with hate, but strong, loving, seeking peace. Tutu tells of a man who worked with him in the South African Council of Churches – who told him that *"during his frequent stints in detention, when the security police routinely tortured him, he used to think "these are God's children, and yet they are behaving like animals. They need us to help them recover the humanity they have lost". How could our struggle not be successful with such remarkable people?*

Thirdly it happened because of people who were prepared to act against evil. In South Africa and all over the world people joined in, in big and small ways, to fight apartheid. Within South Africa many stood up to be counted, by opposing the system loudly in protests, newspapers, the media, and quietly by helping the poor, standing up for themselves or others in small everyday situations. Outside SA the world joined in protesting outside SA embassies, enforcing a sports boycott, sanctions, giving money and solidarity to those fighting the system. As Tutu says,
"we won a great victory but that victory would have been out of the question without the prayers of so many in SA and around the world."

So what can we learn from all this? Does it have any meaning for us in Britain, or is it just a feel good story.

South Africa has changed… but the world has not. I no longer live in an apartheid country – but I now live in an apartheid world: A divided world, where people suffer and die because of poverty, injustice, unfair trade agreements, debt to richer countries. We all still practice discrimination. We keep the best for ourselves while allowing people in poor countries to starve, to die for lack of basic resources like food, water, or drugs for malaria, TB, HIV. Tutu talks about *"The injustices that cause a small percentage of our world to consume the vast majority of its resources – not unlike what happened in apartheid SA – while the vast majority lives in poverty. Would you let your brother or sisters family, your relatives, eke out a miserable existence in poverty? Would you let them go hungry? Yet every 3.6 seconds someone – your neighbour – dies of hunger".*

Maybe justice and peace have not even broken out in our little corner here. In the UK, in Middlesex, there is poverty, fear, community division, racism, injustice, there are refugees who feel unwelcome, poor who suffer. Can we honestly say that we live in a country where there is no racism? Can we honestly say that we are totally without any racial prejudice?

Our challenge is to work to achieve change in the world, in the UK, in London.

How???

First, we need to really see the evil and injustice around us, perpetrated by our leaders in our name. I believe that only God can open our eyes to evil. I learnt in South Africa that evil is silent. It conceals itself. It makes itself invisible. No-one in South Africa ever said "we know apartheid will hurt and kill black people but we want the best for ourselves anyway". They dressed it up in clever talk and cunning actions. No western politician says" we want free trade and continued debt because it will benefit us and we don't care that it will harm and kill many in poorer countries". They dress it up in clever words and fancy spin – free trade, globalisation, market forces. Only by being vigilant can we keep our eyes open to see these evils, this apartheid.

Secondly, we need to act: We need to open our eyes to the evil in the world and find the power to stand up and act, not do nothing and let it continue. One of the things I battle with is how little I did in SA. At the time I thought I was doing my bit, but looking back I realize I should have done much much more. Most people here probably read about evils like the atrocities of the Nazi holocaust, or the Rwandan genocide, and have the comfortable feeling that if we were there we would have been different. I know I was there. And I was not different. That's painful, and I battle with that.

BUT I challenge you – are you closing your eyes to evil right now? I think we all are, still. We are all closing our eyes to the even greater evils of injustice, poverty, our rich lifestyle, our trade rules, that are literally killing millions more people than apartheid ever did. Let's stop being complicit in this evil, this apartheid, this holocaust of the poor! If you boycotted SA fruit 20 yrs ago, maybe now you should boycott any goods that are not fairly traded. If you protested at the SA embassy about apartheid, or left Barclays bank because of its links with South Africa, maybe now you should be campaigning even more for justice, and against global privatisation, or unfair trade agreements.

The present injustice and apartheid in our country and our world mean that we need to see evil, and act against it. As Tutu says *"All over this magnificent world God call us to extend His Kingdom of peace and wholeness, of justice, of goodness, of compassion. And as we share God's love with our brothers and sisters, God's other children, there is no tyrant who can resist us, no oppression that cannot be ended, no hunger that cannot be fed, no wound that cannot be healed, no hatred that cannot be turned to love, no dream that cannot be fulfilled."*

Passport to Prison

The society's president speaks out against the increasingly harsh penalties faced by passport offenders

This article is a sequel to an article written by me and published in the Justice of the Peace in May 1999.

Prior to the case of R.v Daljit the previous tariff for passport offenders in the Uxbridge Magistrates Court was 3 to 4 months imprisonment which gave the court ample jurisdiction to deal with these cases.

R. v.Singh (Daljit), the Times November 5th 1998 doubled the tariff at a stroke to a sentence of between 6 and 9 months which meant that if the case was contested the magistrates court would usually decline jurisdiction leaving the case to be tried in the crown court. As the sentence served was only half most practitioners would advise pleading in the magistrates court at the earliest opportunity on the purely pragmatic grounds that the court would probably accept jurisdiction, and so the sentence served would only be 3 months. Whereas it would take at least 3 months, and probably more, to list a trial in the crown court during which time the defendant would almost certainly be in custody, and would end up serving more time even if found not guilty. This may perhaps be regarded as the first of the rather dubious options forced upon practitioners by the case law.

The position was to some extent eased by the welcome decision of R.v Uxbridge Magistrates court ex parte Adimi July 1999 which held that where the illegal entry or use of false passports could be attributed to a bona fide desire to seek asylum that conduct was covered by Article 31 of the United Nations Convention relating to the status of refugees which commenced "the contracting states shall not impose penalties "in such cases. That decision recognised the practical reality that persons fleeing from oppressive regimes would be unlikely to have or be able to use genuine travel documents. It followed research by a probation officer in our area, Liz Hales, and pressure from the Joint Council for the Welfare of Immigrants. The immediate result of that decision was the virtual closing down of the foreign nationals' wing at Wormwood Scrubs prison as no longer being necessary as the CPS were discontinuing so many cases where asylum was raised as a possible defence.

However the government reacted to the decision by the imposition of Section 31 of the Immigration and Asylum Act 1999. Whereas this section paid lip service to the Adimi decision it actually limited its effect due to its insistence in section 31 (1) (a) on the applicant presenting himself to the authorities "without delay" and making a claim for asylum, section 3I(1)(c), "as soon as reasonably possible." This created a defence grey area when the CPS could pursue prosecutions confident that the defence would be unlikely to challenge a case, however quickly the applicant had claimed asylum, where he would be likely to spend more time in custody if he had gone to crown court and been found not guilty than if he had pleaded guilty in the magistrates court.

That this creates a potential for injustice, where a defendant is effectively forced to plead guilty to a matter where he might have a valid defence is obvious, and is a disgrace to a government that allows it to happen, But unfortunately there are no votes to be found among disenfranchised asylum seekers,only among those who would welcome their removal.

The Governments next initiative was the Asylum (Treatment of Claimants Act) 2004.

This created a new offence for those who arrived without any passport at all.

There were statutory defences provided, but they were of little use to those who might spend more time in custody on remand before a contested trial than they would spend if they plead guilty immediately.

Finally on 11th November 2004 we have the decision in Kolawole. This increased the sentence for passport offences, once again doubling the previous tariff, to a sentence of between 12 and 18 months on a person of good character even on a guilty plea. The presiding judge was the same judge as in R.v Daljit Singh. the Vice President of the Criminal Division, Lord Justice Rose, who retired in April 2006.

So what is the thinking behind these increasingly harsh penalties which are way out of proportion with really unpleasant offences of dishonesty and violence which receive lesser punishments? In R.v Daljit Lord Justice Rose stressed that it was important that the integrity of the passport system be maintained and quoting R.v Osman "the courts must when sentencing play their part in supporting the authorities."

It is clear from the judgement in Kolawole that the latest increase in the penalties is due to the terrorist threat. Every democratically elected government has a duty to protect its citizens and if these measures did have that effect it would be churlish to carp at them.

But where is the evidence that these measures can, or have, any effect at all in deterring passport offenders? They come from all over the world. I once had one from a remote province of China. How can they possibly know the level of sentences being imposed by the Isleworth Crown Court? If they are terrorists they know they face death so how can a potential sentence of imprisonment influence them? If they are genuine asylum seekers, also at risk of their lives in their own countries, how will they be influenced either?

But the vast majority will be economic migrants simply seeking better lives for themselves and their families in countries that are ours (Britain or Canada), by an accident of birth. They frequently cannot speak English so can have no idea about British sentencing tariffs, and so far as I know there are no notices in their own languages at airports warning them of those penalties.

These penalties seem designed as a sop to the hard working officers of Revenue and Customs, and to the electorate, to show that the government is "doing something" while actually it is doing nothing at all other than overcrowding our prisons and creating a rising tide of resentment among those very persons who we would wish to integrate into our way of life as being a just and fair society.

This country has a long tradition of behaving humanely to immigrants and refugees commencing with the Huguenots, continuing with the Jews and spreading over the years to countries all over the world. The present policies appear to be influenced by a knee jerk reaction which has no basis in fact.We in the Middlesex Law Society are on the front line of that battle. I contend that we cannot just leave it to the probation officers and the National Council for Immigrants to fight the battle for us while we rake in an apparently endless gravy train of standard fees for "passport jobs" without challenging the system that creates them. So let us please have more lawyers arguing cases like Adimi and if you, "disgusted of Hanwell.W7," wish to provide a reasoned response to this article let us please have it in the Bill of Middlesex by writing to our editor.

Alured Darlington

The Domestic Violence Balancing Act: a trial advocates perspective

Louise Sweet, barrister, Chambers of Richard Ferguson QC, 2-4 Tudor Street.

This article takes a look at the most recent changes in the law that are designed to protect "the vulnerable victim" in a domestic context. (This article concentrates on violence in the context of a relationship rather than the changes that relate to any children of the household as a result of the Domestic Violence, Crime and Victims Act 2004 and the now more familiar Criminal Justice Act 2003). Here I hope to highlight the main issues that commonly arise during the trial process and to consider whether the right balance been struck between this and the need to ensure the defendant has a fair trial?

Issues that arise during the trial process

Advice at the Police station

There has been a tendency for a defendant to elect to make no comment in these sorts of cases. They have adopted a "wait and see" approach. That is waiting to see whether the complainant (whom I shall refer to as she for the purposes of this article) supports the prosecution, or, if she turns up to the trial. A defendant cannot now as easily hide with silence. It is not always the safest course for a defendant who wishes to maintain a not guilty plea. The prosecution no longer need to get the witness to court for a successful prosecution. The witness statement may be read out as her evidence under s114 Criminal Justice Act 2003. (See below) If this happens the defendant will have no way to cross-examine her. He will also have to contend with the adverse inference at trial under s34 Public Order Act 1994 as a result of his silence in interview. The case will get past half time and call for an answer by the defendant. It is wise for the defendant to have at least set out some sort of denial by way of prepared statement or on charge to help rebut the inference. Alternatively, he may wish to give his side to the solicitor in conference so that he has the ability to waive privilege at trial and rely on instructions given at the time to rebut the suggestion of recent fabrication.

Was the Arrest lawful?

There used to be much confusion on the part of the police as to what their powers were to enter a property to affect an arrest in a domestic violence situation.

The position was that the police did have the powers of entry provided by s17 PACE 1984 namely, to arrest for an arrestable offence, to recapture a person unlawfully at large whom the officer is pursuing, for the purpose of saving life and limb or preventing serious damage to property. It the latter ground relating to saving life or limb under s17 (1) e which provided the safety valve for the domestic victim. There is little authority relating to it which tends to suggest that it was not as well known as it should have been. Instead, an alleged breach of the peace seems to be the favoured ground sited. The courts did not encourage entry into a private home on this basis unless there were reasonable grounds to believe there might be a further breach of the peace. (see Foulkes -v- Chief Constable of Merseyside Police(1998) 3AER 705).

These difficulties have been alleviated by recent changes in the law. S10 DVCVA 2004 makes Common Assault an arrestable offence giving power to enter to affect an arrest. Police powers of arrest have been more dramatically codified in the Serious Organised Crime and Police Act 2005 ss 110-111 (which came into force January 2006) which is essentially just another Criminal Justice Act. The distinction between arrestable and non arrestable offences is removed. The Act gives the police the powers of arrest without warrant for any one about to commit an offence, in the act of committing an offence or, other non specific reasons which include where he has reasonable grounds for believing is necessary to prevent physical injury, to himself (the suspect) or another, causing loss or damage to property, to protect a child or vulnerable person or prevent a prosecution being hindered by the disappearance of the defendant. The echoes of s17 PACE 1984 are clear.

We might ask whether the changes were necessary or what was required is a police force more aware of their powers. The courts were quite ready to find a power to arrest under s17(1)(e) PACE 1984, to save life and limb. For example, in circumstances where there had been a panicked call to the police but after their arrival the householder would not let them in and even said she no longer wanted the police help, the court stated there was such a power given the "disturbing nature of the call" and the behaviour of the male occupant towards them. (See Blench –v- DPP J.C.L 98 DC).

Where there is already a non molestation order in place (often agreed to by a defendant in family proceedings or imposed on the civil standard of proof) S42A Family Law Act 1996 makes the breach of a non molestation order imposed by the civil courts a criminal offence punishable by 5 years imprisonment.

What if the victim fails to attend the trial?

Application can be made to read the statement as hearsay under s114 (admission of hearsay) CJA 2003. Where the court is satisfied the witness does not attend through fear occasioned by the defendant or persons acting in his behalf the statement may be read. This can be even where the evidence may be the "sole or decisive evidence". The court must examine the quality and reliability of the evidence. There is no breach of a defendant's right to examine witnesses where it is a result of his own action that the witness does not attend. Where the court is sure that all reasonable steps have been taken to find the witness and believes to a high degree of probability that the witness is being intimidated by the defendant or on his behalf then there is no breach of Article 6(3)(d) ECHR (see R-v- Sellick 2005 1 WLR 3641)

Challenging the application:

Pre-trial Reviews – Practitioners should not wait to be ambushed at trial by an application under s114. At a PTR assurances should be given that that the victim is properly notified and arrangements made for her to attend the trial ensuring she continues to support the prosecution. Therefore, if there is any real evidence, as opposed to speculation, that the witness has been interfered with in any way the police will be properly appraised and will have notified the court in advance of the trial. This will help prevent an injustice being caused by poor witness marshalling. The defence will be on much stronger grounds to resist any s114 application where no such communication has been made to the police. (An order that the witness be notified in person by the officer in the case to attend 7 days before the trial and the court notified of any difficulties 2 days before the trial should be sufficient to achieve this)

Special Measures

Screens and TV links are more widely available in the Magistrates Courts and common place in the Crown Court. Where an application is made under s114 CJA 2003 to read witness statement then fears caused by the witness attending could be alleviated with the use of screens or TV link facility if the court concludes the facility would "maximise the quality of the evidence" of the intimidated adult giving evidence at the Magistrates or Crown Court (s19(2)b Youth Justice and Criminal Evidence Act 1999) Again this is an issue to be raised at a PTR where the court is notified of any reluctance to attend trial.

Previous Misconduct on the Part of the Defendant

It is now widely known that a defendant's bad character is more readily admissible in the modern trial. Importantly, this will include any past incidents of violence whether they resulted in a conviction or not. There does not even have to have been any past involvement of the police. This change is designed to acknowledge the fact that a complainant has come forward to the police and this means that this is unlikely to have been the first time it has happened.

In the past where a witness statement referred to past arguments and incidents of violence these often would have been edited. Not now. They are potentially admissible as evidence of bad character under the various gateways of s100 CJA 2003.

For example, they are admitted to show the defendant has a propensity to do this, to show this allegation is part of a pattern or to rebut any defence raised of self defence or accident.

Further, the prosecution are able to rely on evidence which may, on the face of it, support this past history such as the records of any neighbours, of medical staff, of records from A and E or G.P records.

In contrast therefore, the absence of such material provides a basis to challenge the prosecution application to have "non conviction" past history admitted, to have a witness statement read and ultimately the strength of the evidence at the close of the trial.

Sentence

At the time of writing guidance is still is expected from the Sentencing Guidelines Council to encourage a more uniform approach to sentence in these cases. It was always open to a court to bind a defendant over to keep the peace in the event of an acquittal if the court thought it necessary to prevent future similar behaviour. This power was rarely used. It is now open to the court to issue a Restraining Order when a defendant is acquitted under s5A protection of Harassment Act 1997 (INSERTED BY S12 DVCVA 2004) provided that the court considers it necessary to protect a person from harassment by the defendant. (the offence need not be an offence of violence or harassment).

Conclusion

The changes are dramatic and wide ranging. There was often an accusation of cynical defendants and their lawyers manipulating the criminal justice system. This is far from the position. There does need to be a time of reflection and absorption of these changes. This will prevent injustice by the balance tipping the other way or the legislation being abused by sloppy prosecutors. Most of all, it seems that every day we read of criminals "getting away" with something. It can only have benefits to the respect afforded to the criminal justice system and those who work within it if these changes and their obvious success are more widely advertised.

(General Policy change is further reflected in the recently published Code of Practice as to how those within the criminal justice system should treat victims (s32-33 DVCVA 2004))

Advising on silence in police stations

The Law Society has updated its guidance for criminal defence solicitors on the implications of adverse inferences and waiver of privilege for police station advice.

The updated guidance clearly and simply sets out the legal position and provides an update on relevant case law and new developments, particularly regarding bad character. It also now contains a useful checklist on obtaining police disclosure. It has been written by Professor Ed Cape, an acknowledged expert in the field.

A free copy of the guidance has already been sent to all defence practitioners. It can also be downloaded from the Law Society's website – go to www.lawsociety.org.uk, click on News and events, then on newsletters, then on Criminal practitioners newsletter. You will then be able to display the guidance, which updates the one originally published in October 2003.

Taxation of Trusts: act now on budget bombshell

The budget made important changes to the taxation of trusts. The changes will hit ordinary people hard and the Law Society is urging the government to postpone implementation until the full impact is understood.

Tell the Law Society how these changes will affect you and your clients by completing the short inheritance tax survey – go to www.lawsociety.org.uk, click on News and events, then on News from the Law Society, then on Hot topics.

The last word on the difference between fixed and floating charges? In re Spectrum Plus [2005] 2 A.C. 680 (HL)

Tim Akkouh

Bio: Tim Akkouh was called to the bar in 2004 after reading law at LSE and UCL. He is a member of New Square Chambers, where he is developing a commercial-chancery practice with a particular emphasis on company, insolvency and trusts matters.

Spectrum Plus Ltd carried on the business of a manufacturer of dyes, paints and pigments for the paint industry. In 1997 it changed banks, opening a new account with National Westminster with an overdraft facility of £250,000. The overdraft was secured by a debenture, which included a 'specific charge [of] all book debts and other debts … now and from time to time due or owing to [Spectrum].' Furthermore, Spectrum was required to pay into its account with the bank "all moneys which it may receive in respect of such debts and shall not without the prior consent in writing of the bank sell factor discount or otherwise charge or assign the same in favour of any other person … and shall … if called … to do so … execute legal assignments of such book debts and other debts to the bank." Spectrum duly paid the proceeds of its book debts into its account, which remained overdrawn. The overdraft was never called in, nor was any demand made by the bank for Spectrum to assign the book debts.

When Spectrum entered into voluntary liquidation in October 2001 its account was overdrawn to the tune of £165,407 odd. The bank sought to leapfrog Spectrum's preferential creditors in the insolvency hierarchy by asserting that their debenture over Spectrum's book debts was fixed and not floating; if successful, this argument would have yielded the bank an additional £16,136. Despite the comparatively small amount at stake, the appeal to the House of Lords raised a point of considerable importance; several hundred liquidations had been put 'on hold' pending their Lordships' decision.

The seven member House of Lords unanimously reversed a unanimous Court of Appeal and held that the charge created by Spectrum over its book debts was floating and not fixed. In the process, the House overruled the decisions of both Slade J in *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142 and the Court of Appeal In re New Bullas Trading Ltd [1994] 1 BCLC 485.

(iii) The importance of fixed and floating charges

Lord Scott gave a useful historical introduction to the importance of the distinction between fixed and floating charges at the beginning of his speech. At paragraph 95, his Lordship stated: *"By the middle of the 19th century industrial and commercial expansion in this country had led to an increasing need by companies for more capital. Subscription for share capital could not meet this need and loan capital had to be raised. But the lenders required security for their loans. Traditional security, in the form of legal or equitable charges on the borrowers' fixed assets, whether land or goods, could not meet the need. The greater part of most entrepreneurial companies' assets would consist of raw materials, work in progress, stock-in-trade and trade debts. These were circulating assets, replaced in the normal course of business and constantly changing. Assets of this character were not amenable to being the subject of traditional forms of security. Equity, however, intervened [by permitting the creation of floating charges over such circulating assets]."*

As can be seen from the above description of a company's circulating assets, a floating charge has the potential of 'stepping in and sweeping off' virtually all of a company's moveable and intangible assets, leaving little or nothing for other creditors. In reaction to this state of affairs, Parliament has intervened by introducing both the category of preferential creditors that rank in priority to the holders of floating charges and unsecured creditors (eg company employees are preferential creditors in respect of certain claims to unpaid wages: see s. 175 of the Insolvency Act 1986), and, more recently, a requirement that a proportion of the sums realised by some floating charge holders be made available to a company's unsecured creditors (see s. 176A of the Insolvency Act 1986). Hence, a chargee has a considerable incentive to argue that his charge is fixed and not floating. This is exactly what the bank sought to do in *Spectrum*.

(ii) The distinction between fixed and floating charges

Their Lordships held that if a company could deal with assets covered by a charge in the usual course of business, then that charge was floating and not fixed. Lord Scott made this point manifest in paragraph 111: *"…the essential characteristic of the floating charge, the characteristic that distinguishes it from a fixed charge, is that the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future [crystallising] event. In the meantime the chargor is left free to use the charged asset and to remove it from the security."*

On the facts of the case, the chargor could deal with book debts in the course of business as, although it was precluded from selling, factoring, discounting, assigning or charging them, it was not precluded from calling them in and paying them into its trading bank account.

The House agreed with Lord Millett's reasoning in *Agnew v Comr of Inland Revenue* [2001] UKPC 28, [2001] 2 AC 710 that parties could not create a fixed charge over book debts and only a floating charge over their proceeds because *"the essential value of a book debt as a security lies in the money that can be obtained from the debtor in payment…"* (per Lord Scott at 110).

Thus, one could not draw an artificial distinction between the book debts pre- and post-realisation. Such a dichotomy would, according to Lord Scott, have been wholly artificial, as *"the expression 'floating charge' has never been a term of art but is an expression invented by equity lawyers and judges to describe the nature of a particular type of security arrangement between lenders and borrowers. The categorisation depends upon the commercial nature and substance of the arrangement, not upon a formalistic analysis of how the bank clearing system works. If part of the arrangement is that the chargor is free to collect the book debts but must pay the collected money into a specified account, the categorisation must depend, in my opinion, on what, if any, restrictions there are on the use the chargor can make of the credit to the account that reflects each payment in"* (at para 116).

The *Spectrum* charge was, therefore, merely of the floating variety, as the chargor was free both to collect the charged asset and then to remove it from the security by making withdrawals from its bank account. In Lord Walker's words, the charge "*did not in any way restrict [the chargor] from taking the most natural course for a trader in the ordinary way of business, that is collecting the debts and paying them into its current account*" (at para 145). Nor did it matter that the bank *could* have exercised its contractual rights to terminate Spectrum's overdraft facility and demand that payment of proceeds from the book debts be made to a blocked account – while these acts could have had the effect of turning the floating charge into a fixed charge, they had simply not been carried out. Needless to say, characterisation of a charge as fixed or floating is a matter of substance and not form; as a result, little weight is attached to how the parties describe the charge in their debenture.

The House's analysis will make grim reading for banks wishing to maximise their security. Lord Hope, however, provided the banks with some solace by considering instances in which a charge over book debts would be fixed. At paragraph 54 he gave three such scenarios, namely: (i) where a chargor is under an obligation not to deal with book debts at all, (ii) where a chargor is under an obligation to pay the proceeds of those book debts to the chargee, or (iii) where a chargor is under an obligation to pay the proceeds of the book debts into a specific blocked bank account. However, their Lordships made it clear that it was not enough for the debenture to provide that payment was to be made to a blocked account, if in fact it was not operated as such an account (see, for example, Lord Walker's speech at para 140).

(iii) Conclusion

The House's unanimous overruling of the Court of Appeal's decision in *Spectrum Plus* is to be welcomed. Expanding the situations in which fixed charges can be created is not only intellectually dubious, resting on a formalistic analysis, but is contrary to the intention of Parliament in implementing concessions for both preferential creditors and, more recently, unsecured creditors.

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2006 – 2007 Professional Indemnity Insurance Market

It has already reached that time of year again when non-stop letters and proposal forms arrive on a daily basis in your post and there are numerous telephone messages from call centres enticing you to complete a proposal form for the insurance company / broker they are promoting.

So what's new this year, really not a great deal. There are no major changes to the cover in terms of minimum limits of indemnity or changes to the aggregation rules. As regards premiums, the market is going to be as competitive as it was last year. Last year a few new insurers captured a larger percentage of the total market share, other insurers allowed their market share to reduce due to some of the premiums being quoted by their fellow insurers.

The solicitors professional indemnity market is like all other insurances but with one difference. Whichever insurer you approach, they are providing you with the same policy wording / cover as per The Law Society. They do differentiate themselves by providing additional covers free of charge and also the quality of claims service they are able to provide you with.

You also need to bear in mind that the insurer market you are approaching, is in fact a lot smaller than all of the qualifying insurers listed by the Law Society. There are some insurers in that list that don't actively seek new business, there are others that don't actually at present underwrite any business. There are others who provide additional layers of insurance only, but not your primary layer.

Typically there are under 10 insurers who will quote for sole practitioners and just over 10 insurers for 2-4 partner firms and larger firms. Each insurer may only have 4 underwriters providing quotations and may well receive the same proposal form 5 or 6 times as a lot of brokers don't have direct access to an insurer and go via another broker. Insurers will generally quote on a first come, first served basis.

So, how does your practice obtain the most competitive quotation ?

- Use a limited number of brokers, but ascertain which markets they are going to approach on your behalf and whether they are able to do this direct with the insurer or via another broker
- Get prepared now, obtain from all previous brokers / insurers your confirmed claim summaries since September 2000 and your SIF claims summary rather than holding up your quotations if they have been submitted to insurers already. If you need to supply any additional information i.e OSS reports, have all these copies ready.
- Professional indemnity to an insurer is all about moral hazard, the better you complete the proposal form and provide the additional information, the better it looks to insurers
- Filling several proposal forms takes up a lot of time. However this is something you need to do. All other professions who purchase similar cover also have to go through this procedure once a year. Don't be tempted by the 'short proposal form'. A lot of questions asked by insurers in the longer proposal forms actually allow them to discount the premium by as much as 25%.

Mark Ramsbottom has been in the insurance business for 19 years of which 15 years have been in insurance broking. He has been involved in Solicitors Professional indemnity since September 2000 and last year set up Solicitorassist.com to provide a totally independent broking service.

Solution to competition You are wrong. However many pictures you guessed, there is one more which is on the framed cartoon being shown presented to committee member Robert Drepaul on page 11

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