Manchester Law Society
Instituted 1838 Incorporated 1871

DECEMBER 2023 | ISSUE 16

# THE MLS Journal

## COURT REPORTS MAGAZINE

On the cover

## Going on an Adventure Holiday? Be Very Careful What You Sign Up To! p.34


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# From the **Chief Executive's desk**

## Our AGM was held on Tuesday, 5th December and we were delighted to welcome our new Officers:

- **David Anderson** – President
- **Fiona Ledden** – Vice President
- **Ian McConkey** – Deputy Vice President
- **Mark Fitzgibbon** – Honorary Treasurer
- **Michelle Garlick** – Joint Honorary Secretary
- **Cheryl Palmer-Hughes** – Joint Honorary Secretary
- **Nick Johnson** – Immediate Past President

Thanks to **Eversheds Sutherland** for hosting the AGM and especially for the wonderful mince pies and macarons!

> "We want to say a big thank you to all our Officers, Council, Committees, Members, and partners for all your support over 2023

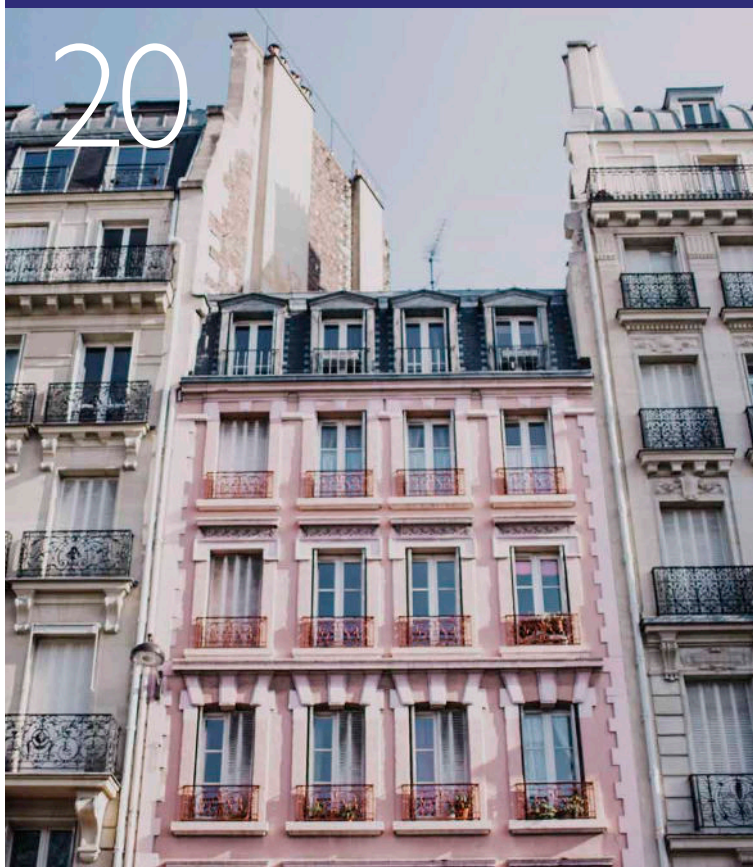
We want to say a big thank you to all our Officers, Council, Committees, Members, and partners for all your support over 2023. We are really excited for all our plans for 2024 and we hope you are too.

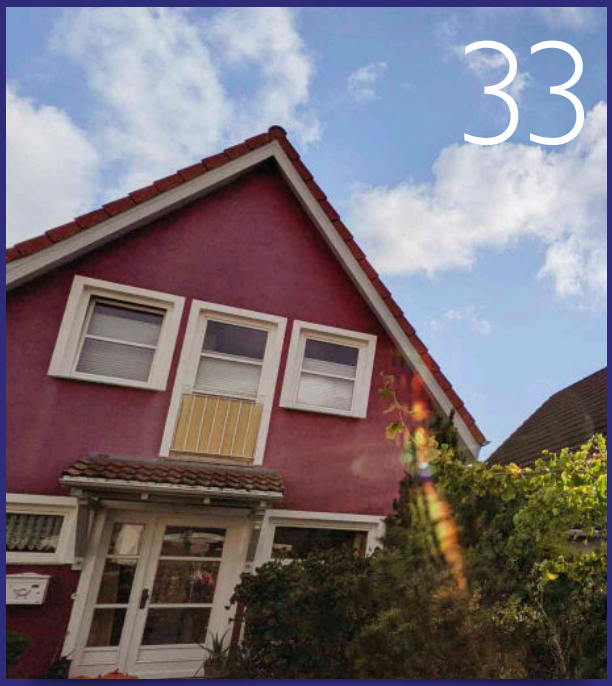
Some of these include our new website (which is now live! **Check it out here!** ), an MLS App for members – coming in the new year – and lots of exciting events. Have you seen our **AI Conference** and **Employment Law Conference** both taking place in March?

**Fran Eccles-Bech, Chief Executive, Manchester Law Society**

# Contents











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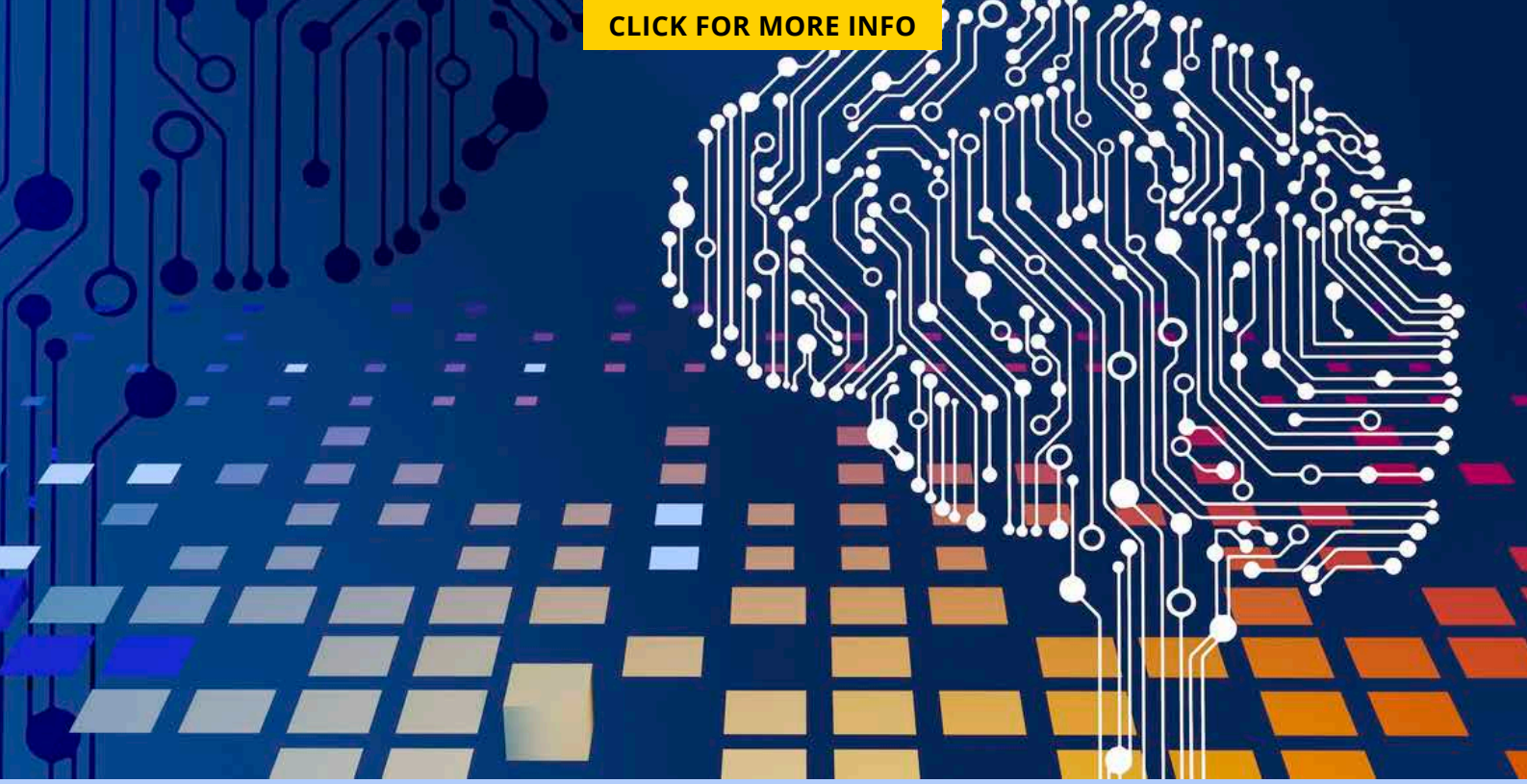

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# AI CONFERENCE

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Join us for a full day conference exploring how AI will impact the legal sector and the effects it is already having.

**James Akrigg**

**Conference Chair**

Click here for more information

# Are Bonus Clawback Provisions an Unreasonable Restraint of Trade?

Published 23/10/2023

Employment bonuses are commonly awarded on the basis that they must be repaid if recipients leave their jobs within a given period of time. In an important ruling, the High Court considered whether such clawback arrangements are capable of amounting to an unreasonable restraint of trade.

A global executive search firm operated a discretionary annual bonus scheme whereby awards were conditional on recipients remaining in the firm's employ, and not having given, or been given, notice of termination of their appointments, during the three months following the date of payment.

A dispute arose when an employee resigned during the month following his receipt of a £187,500 bonus, a sum that was almost three times his basic salary. After he declined to reimburse that sum, the firm issued a statutory demand requiring him to repay the full amount of the bonus plus legal costs.

In applying to have the demand set aside, the employee contended that the clawback provisions operated as an unreasonable restraint of trade and were thus unenforceable. Given that he was required to give three months' notice before leaving his job, the provisions meant that he could secure his bonus only if he worked for the firm for an additional six months.

Rejecting his application, a judge found that the weight of legal authority was that the clawback provisions did not fall within the restraint of trade doctrine since they did not restrict his ability to work elsewhere. The conditions attached to his bonus payments were, the judge ruled, very moderate and

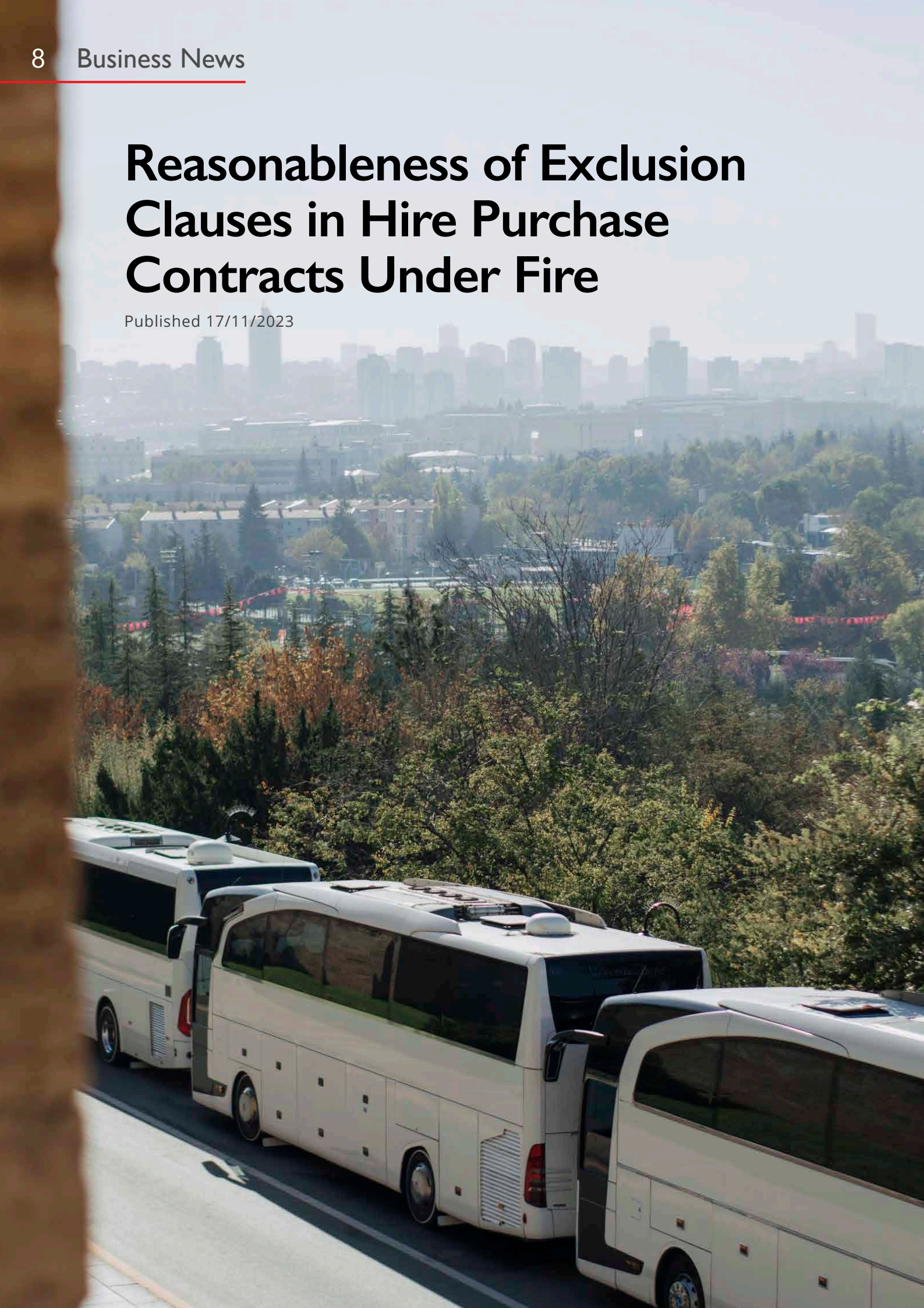
it was not arguable that they gave rise to adverse consequences for him that were clearly out of all proportion to the benefit he received.

In dismissing his appeal against that outcome, the Court acknowledged that there may be circumstances in which bonus clawback provisions are so punitive as to amount to an unreasonable restraint of trade. It was agreed that the provisions in question disincentivised the employee from resigning within three months of receiving his annual bonus. However, the judge's analysis of the law and his conclusion that the effect of the provisions was not unreasonable were unimpeachable.

**Case notes:**
Steel v Spencer Road LLP.
Case Number: CH-2023-000084

# Reasonableness of Exclusion Clauses in Hire Purchase Contracts Under Fire

Published 17/11/2023



## A tour company entered into five hire purchase agreements with a finance house by which it hired a fleet of 30 coaches worth £7.5 million

In a ruling of particular importance to the motor sales industry, the reasonableness of exclusion clauses in hire purchase contracts which seek to avoid liability in respect of goods that are not of satisfactory quality has been thrown into doubt by a Court of Appeal decision.

A tour company entered into five hire purchase agreements with a finance house by which it hired a fleet of 30 coaches worth £7.5 million. The contracts each contained clauses which purported to exclude the term that would ordinarily be implied into them by Section 10(2) of the **Supply of Goods (Implied Terms) Act 1973** that the goods hired would be of satisfactory quality.

The company subsequently launched proceedings against the finance house and the coaches' original supplier, asserting that they were liable to – and in four cases did – catch fire due to defects which required the company to employ a far more rigorous and expensive maintenance regime than would otherwise have been required. The company valued its claim at in excess of 10 million euros.

Following a hearing, however, a judge summarily dismissed the company's claim on the basis that it was caught by the exclusion clauses. Given that both parties to the bargain were commercially sophisticated and in an equal bargaining position, he found that the company had no real prospect of establishing that the clauses were unreasonable within the meaning of the **Unfair Contract Terms Act 1977** (UCTA) and thus unenforceable.

Upholding the company's challenge to that outcome, the Court observed that the terms of the UCTA are not confined to regulating consumer contracts. It noted, however, that experienced parties, enjoying equal bargaining power, who enter into commercial contracts are generally entitled to apportion risk as they see fit, without judicial intervention. The bargain agreed between them will usually prevail.

However, it is possible for a party to have equal bargaining strength when it comes to agreeing a price for goods but to be in a weaker position when negotiating the terms of a contract. That is particularly so where an exclusion clause appears in the small print on the back of a contract and is included as a non-negotiable standard term. In such circumstances, negotiating parties may not truly be on an equal footing.

When it came to considering the reasonableness of the exclusion clauses, the judge erred in his approach and took no account of key factors, including the insurance position of the parties, about which he heard no evidence. Reinstating the company's claim against the finance house, the Court found that a full trial was required to resolve the question of whether the exclusion clauses were reasonable.

**Case notes:**
Last Bus Limited v Dawson Group Bus and Coach Limited & Anr. Case Number: CA-2022-002404

# Body Repatriation Services Ruled Zero-Rated for VAT Purposes

Published 16/10/2023

In determining the correct VAT treatment of particular goods or services, specialist tax tribunals immerse themselves in multifarious aspects of UK business life, from the mundane to the more unusual. One such case concerned a company that specialises in the repatriation of bodies.

The company's principal business is the repatriation by air of bodies from the UK to other countries. Its customers are almost always the deceased's next of kin, whom it relieves of the physical and administrative burden of arranging repatriation. Its role, however, ceases once the body is on board an aircraft and it plays no part in funeral or disposal arrangements in the destination country.

The company contended that it is primarily in the international transport business and that its services should thus be zero-rated for VAT. It pointed out that transporting bodies by standard postal or courier service is illegal and that airlines view human remains as goods or cargo rather than passengers.

HM Revenue and Customs, however, argued that the company is involved in making arrangements for, or in connection with, the disposal of the remains of the dead, a service which is exempt from VAT, rather than zero-rated. Given that impasse, the First-tier Tribunal (FTT) was asked to provide an authoritative answer as to how the company's services should be treated for VAT purposes.

Ruling on the matter, the FTT noted that the company offers its customers caskets ranging in price from £550 to over £21,000. It also provides an embalming service, although the

company contended that this was required for international transport purposes. The type of embalming it performed was not the same as that which would ordinarily be carried out in the context of a domestic funeral.

The FTT agreed with the company that the predominant element of its business is the supply of specialist transport services. Its typical customers were looking primarily for a business that could arrange transport of a recently deceased relative to a country of their choice.

The fact that the value of caskets supplied by the company might exceed that of all other elements of the supply did not change the qualitative nature of the services provided. The FTT concluded that those services are, for VAT purposes, zero-rated.

**Case notes:**
UK Funerals On-Line Limited v The Commissioners for His Majesty's Revenue and Customs. Case Number: TC08937

# Bank Cancelled Thousands of Mortgages by Mistake – High Court Ruling

Published 20/11/2023

Lovers of Monopoly enjoy pocketing play money after picking up a 'community chest' card announcing that a bank error has been made in their favour. However, as a case concerning a high street bank's mistaken discharge of thousands of mortgages showed, such glaring errors can, in the real world, be reversed.

Over an 11-month period, and at great expense, the bank embarked on a project to tidy up its mortgage books. It came up with what it believed to be an accurate list of many thousands of mortgages that had not been formally cancelled although the debts they were originally meant to secure had been paid off.

After the bank requested the Land Registry to discharge those mortgages, some borrowers asked if a mistake had been made in that, so far as they were concerned, they still owed money on their mortgages. By the time the error was identified, more than 25,000 mortgages had been discharged. Following a laborious checking process, the bank contended that more than 5,000 of those mortgages still secured outstanding debts and had been cancelled in error.

After the bank launched proceedings, the High Court found that it had made a clear and distinct mistake based on its positive belief that the borrowers concerned no longer owed it money and that the mortgages thus served no useful purpose. It had taken some care in producing the list but, due to the mistake, it had inadvertently turned itself from a secured into an unsecured creditor. It was plainly not the bank's intention to make a gift of its security to its customers.


The Court thus had the power to reverse the mistake and instruct the Land Registry to reinstate relevant mortgages. To achieve that objective, however, the bank would further have to establish that it would be unconscionable for its customers to retain the benefit of the mistake. That would require consideration of the personal circumstances of each individual borrower in further proceedings.

The Court noted that the Land Registry had faithfully followed the bank's instructions and bore no responsibility for what happened. At this stage of the proceedings, the bank pursued its case only against one named couple whose position was said to be typical of all the thousands of affected borrowers. They did not contend that it would be unconscionable to set aside the mistaken discharge of their mortgage and the bank was granted summary judgment against them.

**Case notes:**
Barclays Bank UK Limited v Terry & Anr.
Case Number: PT-2023-000875

# Legal Costs Update

***By Nick McDonnell (pictured on the left) and Colin Campbell (right)***

Here, in Kain Knight Costs Lawyers' regular monthly legal costs update, we focus on those cases which we believe are likely to have a practical relevance for its members. We welcome feedback and if there is an area, topic or case you would like us to address, please let us know.

In the first case since *PACCAR*, which decided that Litigation Funding Agreements (LFA) can be Damages Based Agreements, and can be unenforceable if they do not comply with the DBA Regulations, Jacobs J had to address the consequences – see ***Therium Litigation Funding A IC v Bugsby Property LLC*** [2023] EWHC 2627 (Comm). The claimant had won damages of £27m, but under the LFA, that entire sum fell to be paid to their solicitors and litigation funders. Or did it? If the LFA was now a DBA and unenforceable, were the funders due anything, or could the terms that offended the DBA regulations be severed, leaving an enforceable agreement? Pending a trial of that issue, Jacobs J has preserved the fund by a making freezing injunction.

After that judgment, *Bugsby* applied for fortification of cross-undertakings in damages which the two litigation funders had given in relation to injunctive relief that they had obtained. *Bugsby* claimed that the injunction had already cost it £5.14m and wanted from each funder £3,283,489.14, and £ 4,093,246.48, respectively. Jacobs J refused the application. Having gone through the legal principles relating to fortification. He held that *Bugsby* had failed to establish a good arguable case that the claimed loss would be suffered as a consequence of the injunctions. Indeed, the loss for which fortification was sought was speculative, so the application failed.

For a case adding to the growing body of case law for non-party costs orders under s.51 Senior Courts Act 1981, see *Trafalgar Multi Asset Trading Company (in liquidation) v Hadley* [2023] WEHC 2670 (Ch) in which the court was not persuaded that the action had been one of the exceptional cases where it would be just to make the seventh defendant jointly responsible with the sixth defendant for its costs liability to the claimant. The court was not favourably disposed either to order a payment on account for a litigant in person at £150 an hour. Without saying what rate was used, it ordered £15,000 which was "*… a very substantially lower level than he [the LIP] was asking for*".

Next, a lesson that winding up proceedings are not the appropriate forum for pursuing a company where the debt is disputed. In *Morrison Water Services Ltd v Browning* [2023] EWHC 2725 (Ch), the court dismissed the petition with costs and made an order restraining indefinitely the petitioner from applying to wind up the company, where the debt was very clearly disputed.

For an example of a departure from the usual costs order in the Court of Protection, see *Sandwell and West Birmingham Hospitals NHS Trust v GH* [2023] EWCOP 50. A Trust

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responsible for managing a woman's cancer treatment applied to the Court of Protection for declarations and orders regarding her capacity to conduct proceedings and make decisions about whether to undergo surgery. At the conclusion of the hearing the Official Solicitor, acting as her Litigation Friend, applied for a costs order on the grounds of excessive delay in issuing the proceedings, notwithstanding COPR 2017 r.19.3, which says that no costs order would generally be made where personal welfare is concerned. In a helpful judgment going through the law and cases, Poole J held that, taking into account the degree of unreasonableness and the extent of the delay, and its impact, the Trust should pay 80% of the Official Solicitor's costs.

Finally, a long but clear judgment involving Qualified One-Way Costs Shifting (QOCS) and the extent to which QOCS protection can be diluted under CPR 44.16(2) (where the claim has been made for the benefit of a person other than the claimant). The issue in *Amjad v UK Insurance Ltd* [2023] EWHC 2832 (KB) was whether a credit hire company (CHC), which had provided a replacement vehicle whilst the claimant's taxi was being repaired, fell within the rule at sub-section (a) or (b). Below, the court gave judgment for the claimant for £10,029.64, but as he had failed to beat a Part 36 offer, the judge permitted the defendant to enforce its costs order, capped at £15,000 under sub-section (b). Ritchie J on appeal held that QOCS protection should not have been lifted because sub-section (a) not sub-section (b) applied. The CHC, not the claimant, gained the "benefit" of any award under the terms of the CHC agreement. It followed that the judge below had not been empowered to lift the QOCS cap, so his decision to do so was set aside. This is an important decision on the differences between sub-section (a) and sub-section (b) and requires full consideration.

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As always, these are a selection of the principal recent cases which are likely to be of use to practitioners and if any further information is required, please contact either Nick McDonnell or Colin Campbell at **Nick.McDonnell@kain-knight.co.uk** or **Colin.Campbell@kain-knight.co.uk**

# Litigating Without Professional Representation – This is What Can Happen

Published 24/10/2023

Anyone tempted to pursue litigation without professional assistance should take note of a case in which a businessman's persistent delay in getting his case in order resulted in his appeal against a six-figure tax bill being struck out without his arguments ever having been considered on their merits.

Following an investigation, HM Revenue and Customs (HMRC) decided that the man was liable for more than £940,000 in Income Tax in respect of undeclared income and gains over a period of about 15 years. He contended that no tax was due in that he was domiciled abroad during the relevant period and that work giving rise to the disputed income had been performed outside the UK. Without the benefit of legal representation, he lodged an appeal to the First-tier Tribunal (FTT).

The FTT subsequently issued a succession of increasingly firm orders requiring him, amongst other things, to set out his case in detail and to disclose a list of documents on which he intended to rely. When he failed to meet a deadline set by the last of those orders, his appeal was automatically struck out. He subsequently applied to reinstate the appeal.

Ruling on the matter, the FTT found that he had, over a lengthy period, failed to give proper attention to the conduct of his appeal. He had been obstructive and almost belligerent in his communications with HMRC and the FTT, and had for many months made no serious attempt to locate relevant documents. There was no reason, other than apathy, for his failure to appoint legal representation.


In nevertheless permitting his appeal to proceed by the narrowest of margins, the FTT found that he had used his best endeavours to comply with what he mistakenly believed to be the deadline. He had provided the documents required, albeit after the deadline passed, and had finally appointed a lawyer to represent him.

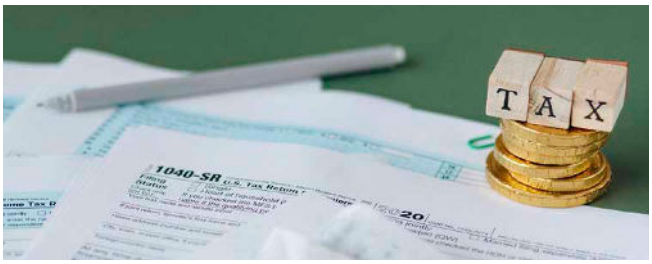
In upholding HMRC's challenge to that decision, the Upper Tribunal (UT) found that the FTT had failed to take account of the full extent of his non-compliance with its orders. It also had regard to the irrelevant fact that the initial burden of proof in the proposed appeal would rest upon HMRC.

Remaking the decision, the UT found that his conduct of the appeal demonstrated a long history of non-compliance with the FTT's orders, requirements and requests which was both serious and significant. It reached the clear conclusion that his appeal should remain struck out.

**Case notes:**
The Commissioners for His Majesty's Revenue and Customs v Breen. Case Number: UT/2022/00090

# The Sheer Complexity of Cross-Border Tax Fraud is a Challenge for HMRC

Published 22/11/2023




Cross-border tax frauds, involving a plethora of shadow companies and convoluted supply chains, are a favourite ruse of organised crime gangs. As a tax tribunal ruling showed, the sheer complexity of such scams can present a daunting challenge to HM Revenue and Customs (HMRC) in even proving their existence.

The case concerned a wholesale commodity trader dealing in high volumes of electronic consumer goods. HMRC denied the company's claim to VAT zero-rating in respect of 28 consignments of mobile phones sold to an overseas buyer which HMRC alleged was a fraudulent enterprise.

The company entered liquidation after it was assessed for almost £3 million in VAT, also receiving a penalty in excess of £1.7 million on the basis that the relevant VAT returns were inaccurate. HMRC also raised personal liability notices (PLNs) against a director and a senior manager of the company requiring them to pay more than £880,000 each.

Challenging the PLNs before the First-tier Tribunal (FTT), the pair pointed out that the company was intensely busy and involved in upwards of 100 transactions a month. HMRC had challenged only 28 of the 517 deals it had carried out during the relevant period. HMRC did not allege that they had acted dishonestly and they contended that they did not, and could not, have known that the transactions in question were connected to the fraudulent evasion of VAT.

HMRC alleged that the transactions formed part of the overseas buyer's involvement in a highly complex scheme to defraud the revenue of an EU member state. From a standing start, the buyer was said to have generated total gross sales of over 240 million euros in just six months. The scam was said to have involved an array of traders and essentially fictitious companies ranging across several jurisdictions.

Ruling on the matter, the FTT noted that situations involving potential cross-border fraud are very hard to unravel, particularly where numerous missing traders and buffer companies are engaged to throw tax authorities off the scent. It is in the nature of such frauds that they are designed to be difficult for outsiders to trace.

HMRC had produced evidence indicating the hallmarks of fraud. That included companies without employees or premises starting and ceasing to operate in very short order whilst in the meantime generating vast amounts of turnover. Very long transaction chains were said to have lacked a commercial rationale.

Overturning the PLNs, however, the FTT noted significant evidential gaps in HMRC's case. Despite a laborious international investigation, it had not managed to piece together the entire chain of allegedly fraudulent transactions. HMRC bore the burden of proof and had not established that there were fraudulent VAT losses connected to the company. Whilst the FTT understood the sense of frustration that HMRC might feel, that could not counteract the shortcomings in its case.

**Case notes:**
Sheth & Anr v The Commissioners for Her Majesty's Revenue and Customs.
Case Number: TC08494

# Relationship Come to an End? Do You Understand the Tax Implications?

Published 06/11/2023

The end of a relationship will often have important tax implications which might only be apparent to a trained professional. That was certainly so in the case of a woman who, following the collapse of her marriage, was saddled with a substantial Capital Gains Tax (CGT) bill on the sale of her ex-husband's home.

Prior to their divorce, the husband moved out of the former matrimonial home into another property which they jointly owned. After renovating the other property, the husband sold it at a substantial profit. As the property was not the wife's principal private residence, HM Revenue and Customs assessed her for £14,376 in CGT on the transaction.

Ruling on her challenge to that bill, the First-tier Tribunal (FTT) noted that, following their separation, the couple informally agreed that she would retain the former matrimonial home whilst he would have the other property. That arrangement was subsequently reflected in their divorce settlement. However, when the sale went through, she remained the other property's joint legal owner.

She had made a £100,000 commitment towards the property's purchase. Following their separation, however, she ceased contributing towards the mortgage and played no part in its subsequent renovation and sale. She never occupied it and received none of the sale proceeds.

In upholding her appeal, the FTT found that the informal separation agreement had the effect of transferring the entirety of her beneficial interest in the property to the husband. That reflected their common intention and mutual understanding. No CGT liability arose in that, following the agreement, she held her legal interest in the property on constructive trust for the husband, who became its sole beneficial owner.

**Case notes:**
Wilmore v The Commissioners for His Majesty's Revenue and Customs. Case Number: TC08959

# Judge's Factual Findings in Congenital Injury Case Ruled 'Plainly Wrong'

Published 24/11/2023

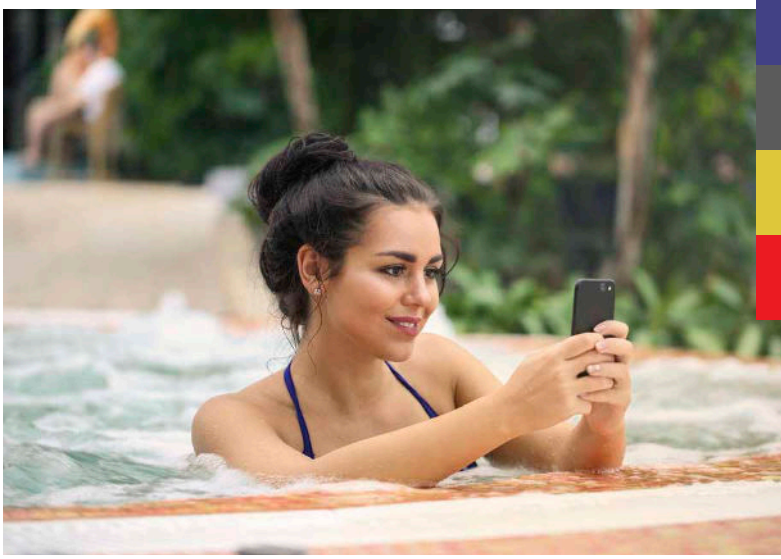
It is a very rare event for the Court of Appeal to find that a judge's assessment of factual evidence is plainly wrong. However, that is what occurred in an unusual case concerning serious injury said to have been sustained by an unborn child.

The boy's mother, who was 25 weeks pregnant with him, struck her abdomen when she fell after using a hotel's outdoor jacuzzi. He was alleged to have suffered serious injury as a result and a compensation claim was launched against the hotel's owner under the **Congenital Disabilities (Civil Liability) Act 1976**.

The mother gave evidence that she fell from the unprotected leading edge of an area of raised decking running alongside the jacuzzi. Following a trial, however, a judge found that she missed her footing whilst on the stairs leading from the jacuzzi. On that basis, he dismissed the claim.

Upholding the mother's challenge to that outcome, the Court found that it was, at the start of the trial, an agreed fact that the fall occurred in the location she alleged. There being no dispute about that, it was not an issue properly before the judge. Questions as to where the accident happened were only raised during the trial, resulting in procedural unfairness and prejudice to the boy's case.

The Court went on to rule that certain factual findings made by the judge were plainly wrong. On the issue of the location of the mother's fall, he relied almost exclusively on a contemporaneous note of the accident that was manifestly unreliable. He did not have regard to the unchallenged evidence of one witness and made unjustified criticisms of



testimony given by the mother, whose honesty as a witness was never questioned.

Reversing the judge's decision, the Court found that there was no rational basis on which he could have found otherwise than that the accident occurred on the raised decking. Given the judge's finding that the decking's leading edge was unguarded, there was only one logical outcome and the Court entered judgment for the boy on the issue of breach of duty.

The Court noted that it is exceptional for an appeal to be allowed on the basis that a judge's findings of fact are plainly wrong. Judges who decide cases on the evidence are the primary arbiters of fact and the Court emphasised that the outcome of the appeal should not be taken as an encouragement to others to lodge similar challenges.

**Case notes:**
Clements-Siddall v Dunbobbin Hotels Limited. Case Number: CA-2023-000245

# Doctors Are Not Machines But Must Exercise Reasonable Care and Skill

Published 07/11/2023

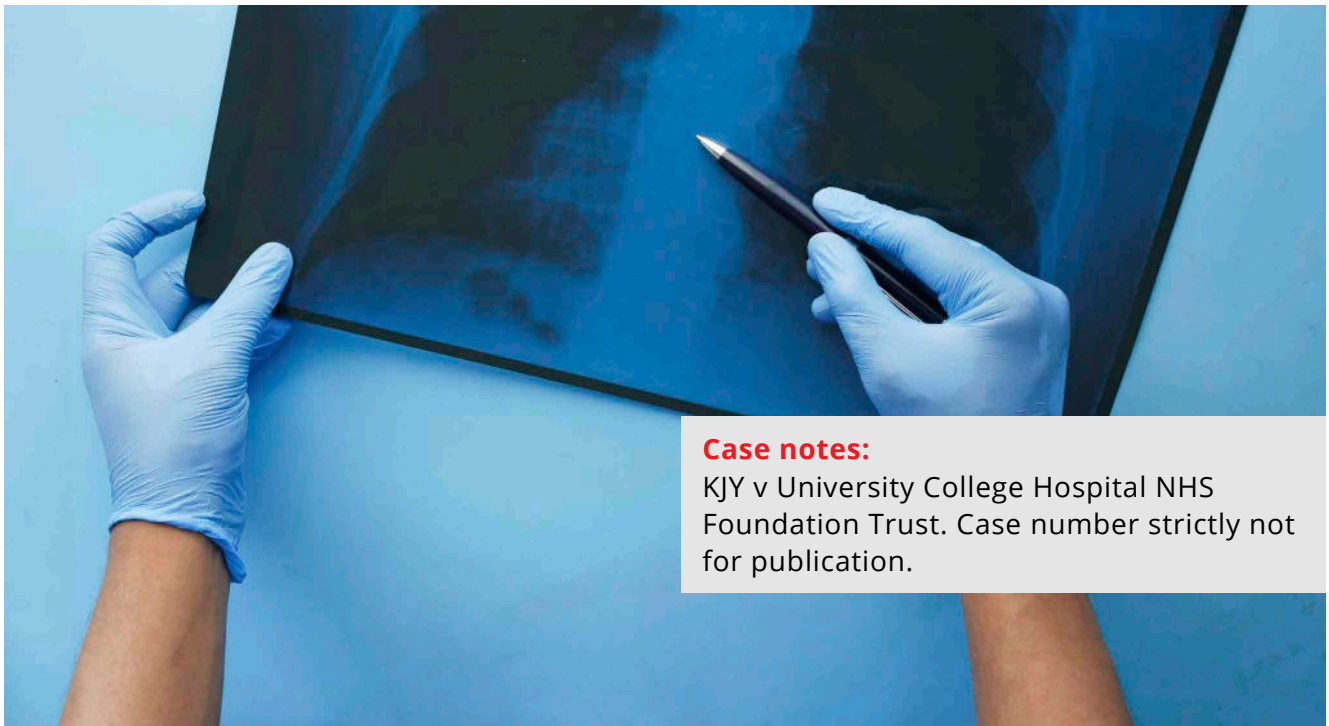
Doctors are neither machines nor infallible, but patients are entitled to expect them to exercise a level of care and skill commensurate with their years of training. The High Court made that point in finding that two radiologists breached their duty of care in failing to spot signs of abnormality in a newborn baby.

The boy was 14 months old when he was diagnosed with development dysplasia of the hips, a relatively common abnormality in newborn children which can often be effectively treated if detected early enough. As it was, the condition had profound and irreversible consequences. Despite repeated bouts of surgery, he was only able to walk unsteadily as he approached his teens.

A clinical negligence claim was launched on his behalf against the NHS trust that bore responsibility for his neonatal care. It was argued that radiologists who reviewed X-rays taken of his abdomen when he was one day old should have identified signs of hip abnormality, thereby enabling earlier diagnosis and treatment.

Ruling on the matter, the Court noted that the boy was born with his umbilical cord wrapped around his neck and stomach. The X-rays were taken after he suffered choking episodes in his incubator. No concerns had been raised about possible skeletal issues and the radiologists were not instructed to look for hip abnormality.

The Court found, however, that they were required to take a holistic approach to the X-rays and to consider each part of them with equal rigour. The signs of possible hip abnormality were sufficiently plain and evident from the X-rays that no reasonable and responsible radiologist would have failed to identify them. Other issues in the case would be considered at a further hearing, if not agreed.



**Case notes:**
KJY v University College Hospital NHS Foundation Trust. Case number strictly not for publication.

# Victim of Herpes Simplex Virus Receives Millions in Compensation

Published 10/11/2023

A young man who sustained catastrophic brain damage after contracting the herpes simplex virus when he was a baby is set to receive a multi-million-pound settlement of his clinical negligence claim.

The man, in his 20s, was a few months old when the virus crossed the blood-brain barrier, causing encephalitis. It was alleged that there was a negligent failure to promptly diagnose and treat the infection. The NHS trust that bore responsibility for his care admitted breach of duty but contended that it would have made little or no difference had he been treated earlier with an antiviral drug.

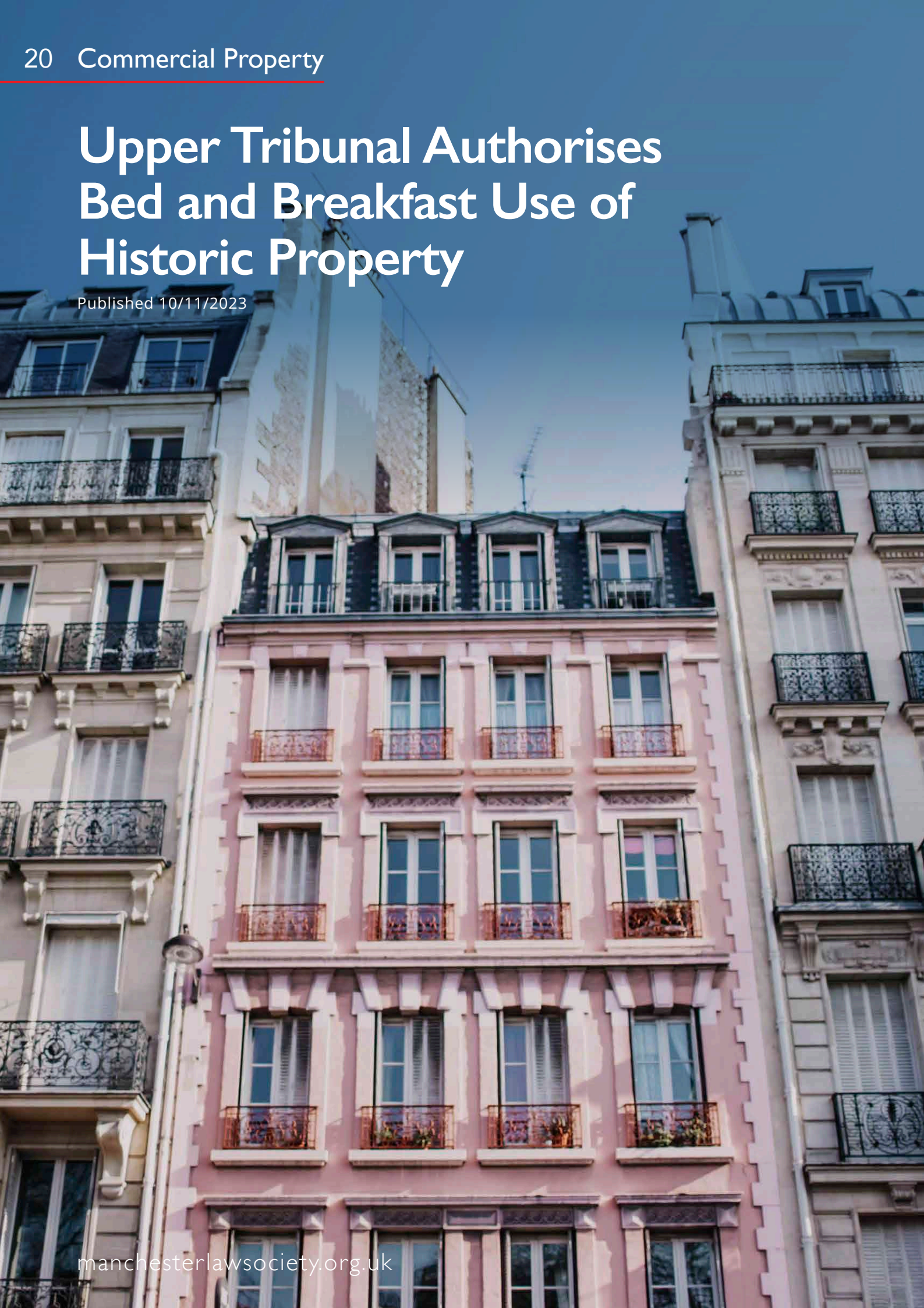
However, a contested trial proved unnecessary after the trust agreed to pay 70 per cent of the full value of the man's claim. A final settlement was thereafter reached whereby he would receive a lump sum of £5,150,000, together with index-linked payments of £305,000 a year towards the costs of his care for life.

Approving the settlement, the court praised the man's family for their great love and devotion in meeting the almost unimaginable challenge of caring for him. No amount of money could compensate for such a dreadful injury, but the settlement means that his financial future is secure and that he will be treated with dignity. The court hoped that his loved ones felt that justice had been obtained.

**Case notes:**
PXD v Royal Berkshire NHS Foundation Trust. Case number strictly not for publication.

# Upper Tribunal Authorises Bed and Breakfast Use of Historic Property

Published 10/11/2023



Many owners of historic homes seek to defray the expense of maintaining them by putting them to some form of commercial use. Such ventures may encounter stiff opposition from neighbours but, as an Upper Tribunal (UT) ruling showed, their objections can, with the right legal advice, be overcome.

The case concerned a listed property that had historical associations and had its origins in the 17th century. After its owner began letting out five of its 15 bedrooms to bed and breakfast customers, a couple who owned a nearby cottage objected. They pointed to a restrictive covenant enshrined in the property's title deeds which forbade its use as anything other than a single private residence.

The owner applied to the UT under Section 84 of the **Law of Property Act 1925** for the covenant to be modified so as to enable the property's continued bed and breakfast use. However, the couple contended that the covenant should be maintained in full force.

The owner, who had purchased the property for £1.7 million before spending another £1 million on its renovation, said that his desire was to generate a modest income to help preserve the property for the enjoyment of future generations. He estimated the cost of maintaining the property at £50,000 a year, excluding any significant repairs.

The couple, however, said that the property's business use impinged on the peace and tranquillity enjoyed by occupiers of the cottage. They were anxious to preserve the ambience of the property's setting and feared that modifying the covenant would be the thin end of the wedge, paving the way for other modifications to be sought enabling further commercial uses of the property or its grounds.

Ruling on the case, the UT noted that the bed and breakfast use of the property was

> The owner said that his desire was to generate a modest income to help preserve the property for the enjoyment of future generations

covered by permitted development rights and did not require planning consent. The use was a reasonable one and did not involve making any changes to the property's fabric. The planning system would continue to protect the couple against any inappropriate development of the property or its estate.

The modification sought went no further than was necessary to enable continuation of the bed and breakfast use and the primary purpose and effectiveness of the covenant would remain untrammelled. The UT found that maintaining the covenant in its current form would afford the couple no practical benefits of substantial value or advantage. Overall, there was no credible evidence that modifying the covenant would have any effect on their interests.

The UT acknowledged that it should have been self-evident to the owner that the bed and breakfast use was in breach of the covenant. However, in authorising the amendment, it found that his conduct was neither egregious nor unconscionable. He had an apparently sincere desire to preserve a heritage asset and to make it available, albeit on a small scale, to the paying public.

**Case notes:**
Kay v Cunningham & Anr.
Case Number: LC-2022-579

# Want to Ensure Your Wishes Are Fulfilled? Make a Professionally Drafted Will

Published 23/11/2023

Having your will drafted by a professional involves only modest expense and has the great advantage of reducing the risk of your bequests being successfully challenged after you are gone. In a case on point, the High Court gave full legal effect to a strong-willed mother's determination to leave nothing to her son.

By her final will, the woman bequeathed one quarter of her estate to her sister and the remainder to her daughter. Before her death in her late 70s, she also signed a deed by which she transferred her home – by far her largest asset – into a trust of which her daughter was the ultimate beneficiary. Her son subsequently launched proceedings, challenging the validity of both documents.

He contended that his mother lacked the mental capacity required to make either document and that she neither understood nor approved of their contents. He accused his sister of bringing undue influence to bear upon their mother and of having poisoned her mind against him.

Ruling on the matter, the Court noted that she had, about 25 years before her death, suffered serious mental health difficulties following the traumatic breakdown of her marriage. By the time she died, she had been diagnosed with multiple medical conditions, including Alzheimer's disease and diabetes. Her ability to speak and understand English, which was not her native tongue, deteriorated in the last few years of her life.

She had, however, at no point been assessed as lacking the mental capacity to make important decisions. A video of her, taken three years before she died, revealed a vibrantly alert, inquisitive and happy individual. Shortly before her death, she was able to decide for herself that she wished to be returned home from hospital in the knowledge that she would die there.

Crucially, the Court noted that neither the will nor the trust deed were home-made or DIY documents. They were professionally drafted by solicitors at her request and in the absence of her daughter. The solicitors concerned testified that both documents accurately reflected the clear instructions she had given them.

Dismissing the son's claims, the Court found that she was a woman who held strong opinions and knew her own mind. When instructing the solicitor who drafted her will, she forcefully expressed her wish that her son should inherit nothing. She was not at the time being treated for any disturbance or impairment of the mind and there was no evidence that she was suffering side-effects from medication. Given that the final will in fact reduced her daughter's inheritance – she had been her sole beneficiary under a previous will – it was inherently unlikely that she had subjected her mother to undue influence.

In also upholding the validity of the trust deed, the Court noted evidence that she particularly wished her son to have no claim on her home. The document's effect was explained to her as part of the independent legal advice that she received and the language barrier was not such that she required an interpreter.

**Case notes:**
Ieropoullos v Wilson.
Case Number: PT-2022-LDS-000045

# First Salvo in Bitter Inheritance Dispute Fired Before Deceased Laid to Rest

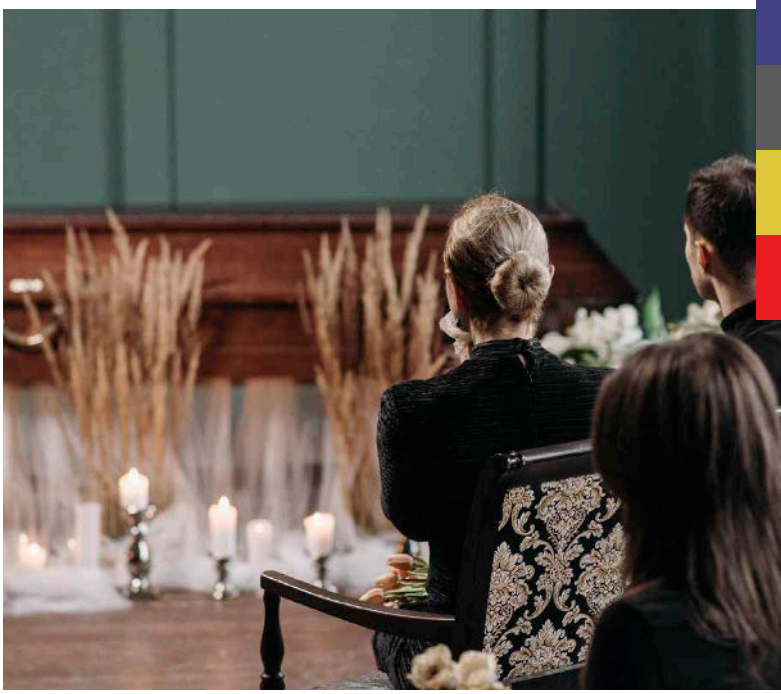
Published 03/11/2023

Making a will when your death is imminent is almost never a good idea and is often a positive invitation to dispute between your loved ones after you are gone. In a case on point, the first salvo in a tragic inheritance dispute was fired even before the deceased could be laid to rest.

Following a family man's death in his 60s, one of his five children sought possession of his body so that she could make funeral arrangements. She had the backing of her siblings, the man's mother and other relatives. However, the man's partner staunchly resisted her claim.

Following an urgent hearing, the child was granted an injunction that forbade the partner from taking possession of the body or arranging for its disposal. The partner responded with an application to set the injunction aside. In doing so, she asserted that the man had made a valid will, about three weeks before he died, in which he appointed her daughter as one of his executors.

Ruling on the matter, the High Court noted that the validity of the will, which was apparently signed by way of a fingerprint, was likely to be challenged on various grounds. Amongst other things, it was said that the fingerprint was not that of the deceased and that he lacked the mental capacity required to make a valid will. The disposal of his body was, however, an urgent matter that could not await the resolution of potentially lengthy probate proceedings.



In setting aside the injunction, the Court noted that the will was rational on its face and appeared to have been properly executed in accordance with Section 9 of the **Wills Act 1837** . In those circumstances, the law presumed, unless proved otherwise, that the will was valid and that the man had the capacity to make it. On that basis, the Court ruled that his partner's daughter and the other executor named in the will were entitled to take possession of his body and to arrange his funeral.

**Case notes:**
Otitoju v Onwordi.
Case Number: PT-2023-000740

# Father Who Undermined Privacy of Adoption Hearing Feels Force of the Law

Published 07/11/2023

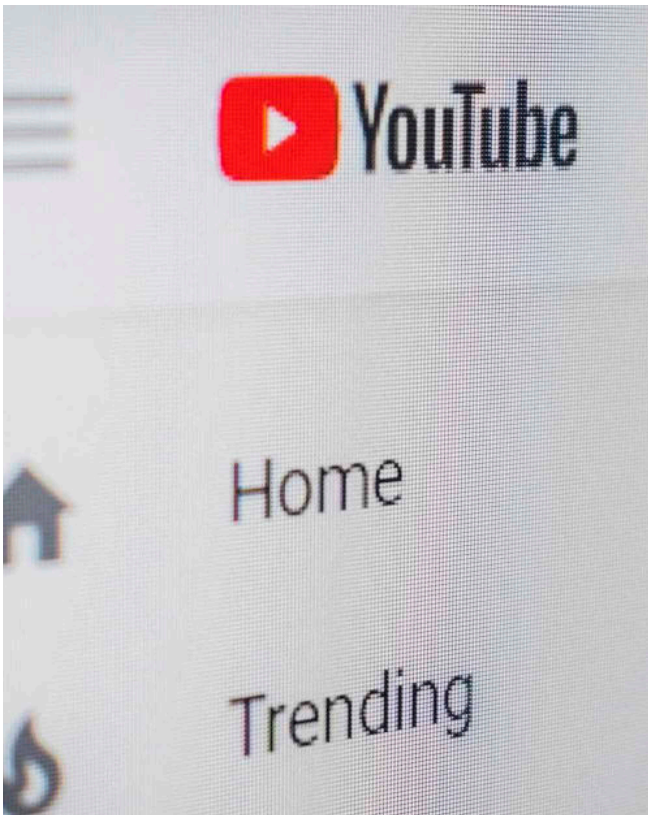
It is unsurprising that some parents who lose their children to adoption feel that they have suffered a grave injustice. As a High Court ruling showed, however, those who undermine the privacy of such proceedings with a view to giving public vent to their frustration are likely to feel the full force of the law.

The case concerned a father who made a covert audio recording of a private Family Court hearing which culminated in a final adoption order being made in respect of his child. He later disposed of the recording to an individual who posted it on YouTube, together with other material relating to the proceedings.

The post referred to the name of the child at least three times and was accompanied by rolling text which made serious allegations about the integrity of the proceedings and the honesty of professionals involved. The father subsequently asserted, amongst other things, that the hearing was a sham.

After the Solicitor General launched proceedings seeking his committal to prison for contempt of court, the High Court noted that there is arguably no category of case which is more sensitive and private than one involving the adoption of a young child. The public identification of children involved in such cases may threaten the security and emotional stability of their placements.

In upholding the Solicitor General's application, the Court observed that to covertly record an adoption hearing, in defiance of the long-established principle of




privacy in such cases, is a most serious act of contempt, made all the worse by subsequent publication. The Court was satisfied beyond reasonable doubt that the father had recorded the hearing in the knowledge that it was being held in private.

To give him an opportunity to obtain legal representation, the question of sanction was deferred to a later hearing. The maximum penalties for contempt of court are two years' imprisonment, an unlimited fine or both.

**Case notes:**
His Majesty's Solicitor General v A Father.
Case Number: FD23F00038

# Criminal Compensation Orders Must Be Affordable – Court of Appeal Ruling

Published 13/11/2023

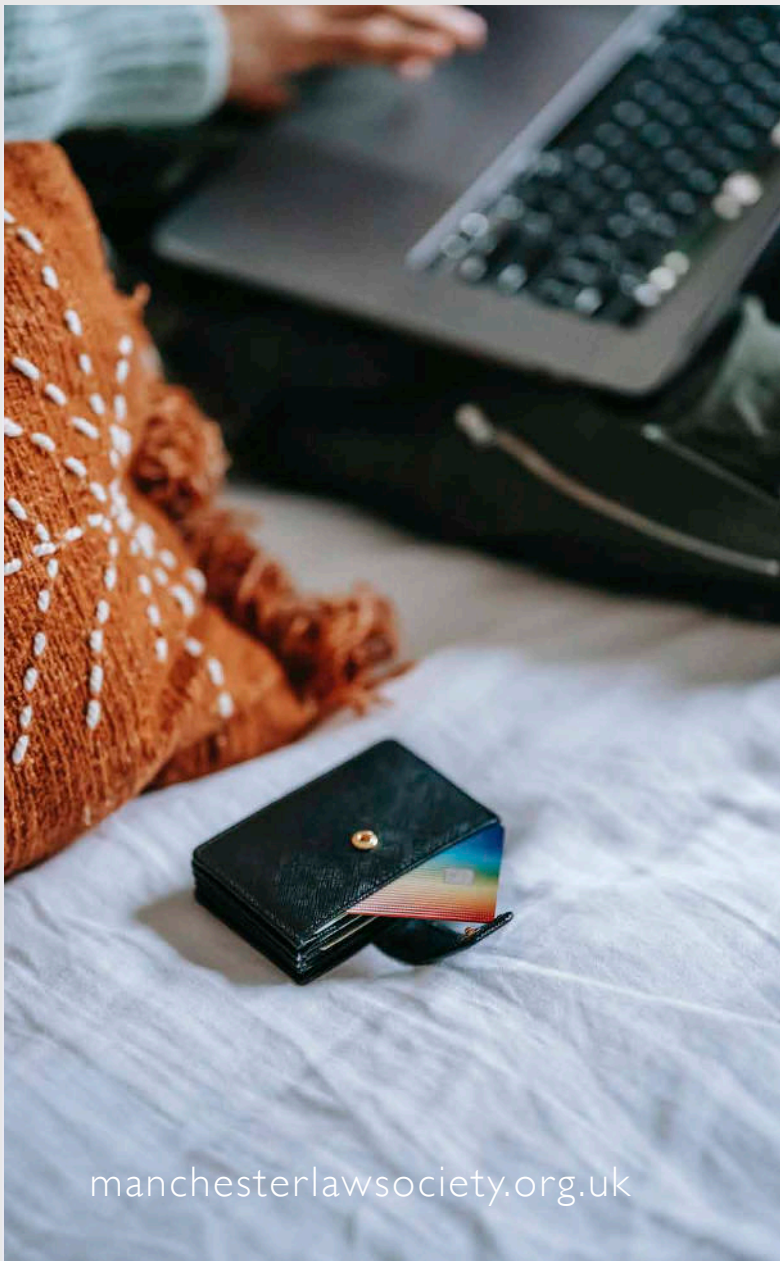
Fraud perpetrated against elderly victims is a particularly mean offence. However, as a Court of Appeal ruling made plain, compensation orders issued against offenders must in every case take realistic account of their ability to pay within a reasonable period of time.

The case concerned a young woman who preyed on her step-grandmother, using her bank card details to make various online purchases, from the mundane to the luxurious. After she pleaded guilty to fraud, she received a suspended two-year jail term and was ordered to perform unpaid work and rehabilitation activities.

The judge also ordered her to pay compensation of £12,261 to her victim, by instalments of £25 a month. Challenging that order as manifestly excessive, she argued that, at that rate, it would take her 40 years to pay the sum due. Entirely dependent on benefits, she has very limited means and has three dependant children, one of whom has autism spectrum disorder.
Upholding her appeal, the Court noted that it is well established that a compensation order should not be made unless it is realistic, in the sense that the offender has, or will have, the means to discharge it within a reasonable time. A repayment period of two to three years is generally regarded as towards the top end of the scale. There was no prospect of any meaningful sum being raised by selling goods that she had fraudulently purchased.

**Case notes:**
Rex v Ellwood.
Case Number: 2023/01140/A5

The Court noted that the making of the compensation order was probably one of the reasons why she narrowly avoided an immediate custodial sentence. Given the facts of the case, she should be made to feel at least part of the loss that she caused to her vulnerable relative. The Court substituted a compensation order in the sum of £900, payable by instalments of £25 a month over the course of three years.



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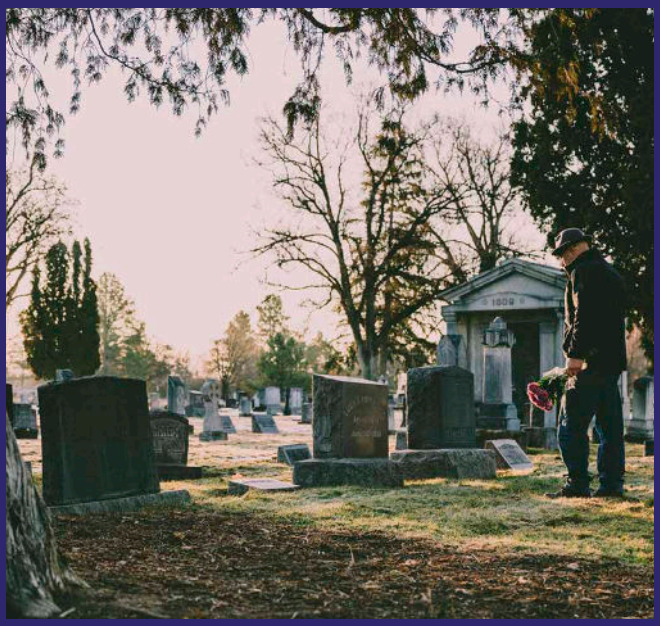
# Inheritance – High Court Shows Compassion in 'Mercy Killing' Case

Published 17/11/2023

Where one person unlawfully kills another, the killer usually forfeits their right to inherit any part of the victim's property. As a High Court ruling in an exceptionally sad case showed, however, that general rule may be tempered by compassion in cases involving so-called 'mercy killing' or assisted suicide.



Prior to the death of a woman who was suffering from lung cancer, she made a will leaving the whole of her estate to her husband. He subsequently took his own life after instructing a funeral director that his public death notices should state that he died of a broken heart. By his will, he bequeathed his estate, including assets that he had inherited from his wife, to charity.

However, in the eulogy that he gave her and in notes to his solicitor and the funeral director, he had indicated that he had a hand in her death. She suffered dreadfully in the final stages of her illness and, in one of the notes, he wrote that he had done what she wanted but had later come to regret to the bottom of his heart having ended the life of his best and only friend.

The **Forfeiture Act 1982** enshrines the longstanding rule of public policy which generally precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing. The executor of the husband's estate, however, sought a judicial declaration that the forfeiture rule should not be applied to the husband's inheritance from his wife.

Ruling on the matter, the Court was satisfied from the husband's own records that he either assisted his wife to commit suicide or ended her life himself. It was plain that he had unlawfully killed her. It was, however, absolutely clear that he had done so with extreme reluctance, as a desperate last resort. He later suffered unimaginable distress and was ultimately unable to go on living with what he had done.

In granting relief from the forfeiture rule, the Court found that the husband's motives were entirely compassionate. What he did was consistent with his wife's own settled and informed intention to end her life. He had almost no moral culpability for her death and, had he lived, he plainly would not have been prosecuted. His gift to charity in his will also elided with his wife's wishes.

**Case notes:**
Withers Trust Corporation Limited v The Estate of Hannah Goodman.
Case Number: PT-2023-000516

# University Manager Succeeds in Unfair Dismissal/Disability Discrimination Claims

Published 03/11/2023

Redundancy processes that lack transparency or fail to pay particular regard to the position of disabled employees are highly likely to result in costly Employment Tribunal (ET) proceedings. That was certainly so in the case of a university faculty manager who lost her job in the midst of a restructuring exercise.

The woman suffered from depression and general anxiety disorder and was agreed to be disabled. With a view to cutting costs and achieving greater efficiency, the university decided to merge her faculty with another. She and a number of other managers were informed that they were at risk of redundancy.

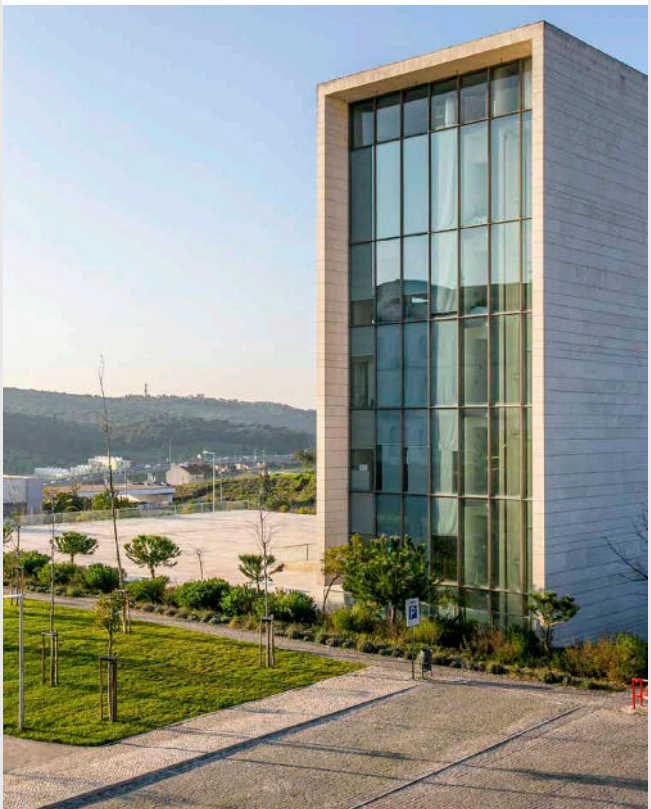
She had the opportunity to apply for two alternative positions in the new structure but was on sick leave at the relevant time and not well enough to attend interviews. She was dismissed on grounds of redundancy after failing to obtain either of those positions. She subsequently launched ET proceedings.

Ruling on the matter, the ET found that a genuine redundancy situation had arisen and that the university's approach to it was, in broad terms, reasonable. There was a potentially fair reason for her dismissal. It was not inherently unfair to have regard to her state of health when considering whether she was likely to be fit enough to take up one of the alternative positions within a reasonable period.

In nevertheless upholding her unfair dismissal claim, the ET noted that the selection process was presented to her as an assessment of her skills and knowledge. At no stage was it suggested to her that the university might believe that her health issues precluded her appointment. She was given no chance to respond to such concerns, and occupational health reports which indicated that she would be capable of a phased return to work within a few months were not taken into account.

The ET rejected the university's plea that her dismissal was a proportionate means of achieving a legitimate aim. Her dismissal was also discriminatory in that it was unfavourable treatment because of something arising in consequence of her disability. Her compensation, if not agreed, would be assessed at a further hearing on the basis that she lost a one-in-three chance of being appointed to one of the alternative posts and a one-in-two chance of appointment to the other.

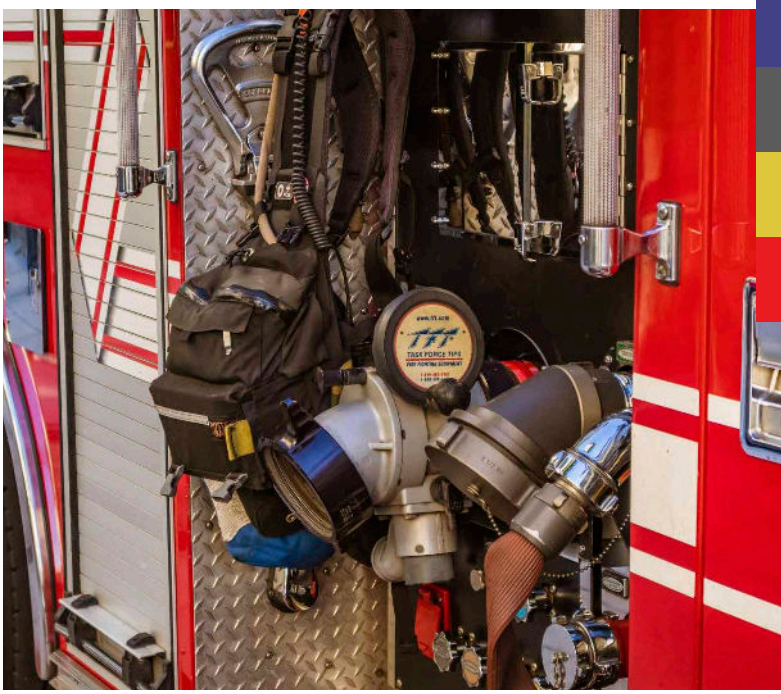
**Case notes:**
McAuley v Canterbury Christ Church University. Case Number: 2300946/2021



# Employers – Stamp Out Offensively Blokeish Behaviour or Pay the Price

Published 31/10/2023

When offensively blokeish behaviour in the workplace enters the realms of sexual harassment it is employers who are likely to carry the financial and reputational can. The point was powerfully made by a case concerning a female firefighter who was humiliated by male colleagues' sexist comments.



The woman claimed that she and three firemen were inside a fire engine, awaiting delivery of a takeaway meal, when the men began making assessments of female passers-by, commenting on whether they would or would not have sex with them. Their words, she said, left her feeling uncomfortable, invisible, disregarded and neither respected nor valued as a female member of the team.

On another occasion, she alleged that, at the urging of one of the firemen, the fire engine took a 'scenic route' via a seafront area rather than taking the most direct route back to the fire station. The same fireman was said to have asked the team leader several times 'what he could do with' women they passed. She said that she felt intimidated and degraded by his remarks.

She later launched Employment Tribunal (ET) proceedings against her fire authority employer on the basis that it bore vicarious, or indirect, legal responsibility for the firemen's conduct. Their comments, she asserted, amounted to harassment of a sexual nature contrary to Section 26(2) of the **Equality Act 2010**.

The firemen denied her allegations in their entirety. However, in upholding her claim, the ET preferred her evidence and found, on the balance of probabilities, that the incidents occurred in all material respects as she had described them. Given that finding, the authority conceded that the conduct complained of was of a sexual nature.

In finding that the firemen's conduct was unwanted, the ET noted that the woman was not a prude. She felt, however, that their inappropriate, sexist and degrading commentary on other women had crossed the line. Their conduct had the effect of creating an intimidating, hostile, humiliating or offensive environment for her. If not agreed, the amount of her compensation would be assessed at a further hearing.

**Case notes:**
Wilkinson v Cleveland Fire Authority.
Case Number: 2500877/2022

# Injured Fairground Worker Succeeds in Personal Injury Claim

Published 13/11/2023

There are often few, if any, witnesses to accidents at work and accounts of how they occurred may differ dramatically. As a case concerning an injured fairground worker showed, however, judges are adept at weighing up the evidence before reaching conclusions as to the most likely sequence of events.

The worker suffered multiple injuries to his right foot when he fell 15-20 feet whilst working on a ride. His account was that he and a manager were standing on a wet handrail, attempting to free a seized bolt, when he fell. He said that a scaffolding pole had been attached to a standard spanner, with a view to improving leverage, and that he lost his footing when the bolt suddenly gave way.

After he launched a personal injury claim, however, his employer denied liability. It asserted, amongst other things, that the manager was not present when he fell and that he was neither instructed nor authorised to work at height. All reasonable steps were said to have been taken to minimise risk of injury in that only the manager was allowed to work at height and he was provided with a harness.

Following a trial, however, a judge preferred the worker's account of what had happened. His description of events leading up to the accident had been consistent throughout and was inherently credible. On that basis, the judge had no hesitation in finding that his injuries arose from an unsafe system of work.

He had no formal health and safety training, having learned on the job, and the judge found that the manager had positively requested his assistance in performing a task that was foreseeably dangerous. If not agreed, the amount of his compensation would be assessed at a further hearing.

**Case notes:**
James v Shaw.
Case Number: QBD-2022-002097

“

The worker suffered multiple injuries to his right foot when he fell 15-20 feet whilst working on a ride

# Applications for Fresh Commercial Tenancies – Court of Appeal Guidance

Published 16/11/2023

How does one decide whether a commercial tenant 'ought not' to be granted a new tenancy under Part II of the **Landlord and Tenant Act 1954** ? The Court of Appeal addressed that and other important issues in a guideline case.

The tenant of two newsagents' shops issued notices under Section 26 of the Act, seeking new tenancies. The landlord, however, served counter-notices under Section 30, asserting that the tenant had breached its obligations under the lease and that there were good reasons why new tenancies ought not to be granted.

Following a hearing, a judge found that the premises were in a state of substantial disrepair when the landlord issued the counter-notices and that the tenant had persistently delayed paying rent. In nevertheless ordering new tenancies to be granted, he found that the disrepair had been remedied by the date of the hearing and that the delays in paying rent were minor and would not recur.
Dismissing the landlord's second appeal against that outcome, the Court found that the judge was not confined to considering the state of disrepair of the premises as at the date of the hearing, without regard to the tenant's past behaviour. In deciding whether delays in paying rent were persistent, he was plainly entitled to survey the tenant's payment record throughout the course of the tenancies.

In considering whether the tenant ought not to be granted new tenancies, the judge was entitled to have regard to all the circumstances, including his assessment that the landlord was a 'hands off' commercial landlord and the tenant's potential loss of livelihood if it were not granted fresh leases. The prospects of the tenant complying with its lease obligations in future were also relevant.

There was no evidence before the judge that the relationship between landlord and tenant had broken down and, taken in the round, he was entitled to conclude that the tenant's conduct was not serious enough to deny the grant of new tenancies. He had adopted the correct approach and there were no grounds for disturbing the value judgment he had reached.

**Case notes:**
Gill v Lees News Limited. Case Number: CA-2023-000285

# Family Succession to Secure Tenancies – Court of Appeal Clarifies the Law

Published 20/11/2023

In the realm of social housing, there are few more controversial issues than a child's entitlement to succeed to the secure tenancy of a parent on the latter's death. As a Court of Appeal ruling showed, however, succession rights may quite easily be secured by those who seek legal advice before it is too late.

The case concerned a woman in her 60s who, for many years, lived with her mother in a council-owned house of which the latter was the secure tenant. After the mother developed dementia, she had to move permanently into a care home. Provisions of the **Housing Act 1985** meant that the house at that point ceased to be the mother's sole or primary residence and her secure tenancy lapsed.

Had she died while still living in the house, her daughter would have been entitled to succeed to her tenancy. She could also have obtained professional assistance in assigning her tenancy to her daughter while she still had the mental capacity to do so. As she had failed to take that step, however, a judge subsequently found that the daughter had no entitlement to continue in occupation of the house and, at the council's behest, issued a possession order against her.

The judge noted, amongst other things, that the social housing shortage in the relevant area was dire, particularly in respect of family homes, and that the daughter would be significantly under-occupying the three-bedroom house if she were to remain living in it alone. The council had accepted a responsibility to rehouse her and there was no question of her being made homeless.

Dismissing the daughter's challenge to that outcome, the Court rejected arguments that those provisions of the Act which rendered her unable to succeed to her mother's tenancy directly discriminated against her, in violation of Article 14 of the European Convention on Human Rights. Even had there been such discrimination, the Court found that it would have been justified.

The Court noted that the Act enshrines bright-line rules in relation to tenancy succession aimed at striking a balance between the interests of different groups, including those languishing on housing waiting lists. The objective of the legislation is to create a clear framework that can be operated by tenants, their families and local authorities with certainty and without creating difficult conflicts of interest.

The Court appreciated that its ruling would come as a blow to the daughter. It shared the judge's hope, however, that she would be able to move forward in her life as she had much to offer others.

**Case notes:**
Dudley Metropolitan Borough Council v Mailley. Case Number: CA 2022002177

# Going on an Adventure Holiday? Be Very Careful What You Sign Up To!

Published 03/11/2023

Adventure holidays abroad are increasingly popular but, as a High Court case made plain, tourists should be extremely careful when invited to sign documents before taking part in potentially hazardous activities.

A young woman embarked on what was described as an all-terrain safari whilst on a two-week holiday in Mexico. She was a passenger in an off-road vehicle when it rolled over, severing her arm above the elbow. Prior to the accident, she signed an agreement that included a clause stating that the courts in the resort where she was staying would have exclusive jurisdiction to resolve any disputes arising.

After her return home, she issued a personal injury claim in this country against the Mexican company that was said to have arranged the ill-fated excursion. However, in arguing that the case should be tried in the local courts, the company pointed to, amongst other things, the jurisdiction clause.

Ruling on the matter, the Court acknowledged that the woman is habitually resident and domiciled in England and that her claim stood a real prospect of success. In contending that her case should be heard in this country, she argued that pursuing her claim in Mexico would give rise to a raft of evidential, linguistic and other difficulties and would be prohibitively expensive. The Mexican courts were also said to be less adept at dealing with catastrophic injury cases.

Crucially, however, the Court found that the jurisdiction clause was likely to be viewed as valid in Mexico. The Mexican courts are competent to deal with serious personal

injury cases and have become increasingly claimant-friendly in recent times. The woman had succeeded in raising significant sums which could be used to fund her case and any economic imbalance or interference with her human rights was not so severe as to render the jurisdiction clause void.

The Court further noted that the company operates exclusively in Mexico, where it is registered and where the accident took place. Much of the evidence would focus on events in Mexico and the case, even if heard in England, would have to be decided under Mexican law. Overall, the Court concluded that Mexico was the natural and appropriate forum in which the case should be tried and that the ends of justice would be better met there than in England. The English proceedings were therefore stayed.

**Case notes:**
Roach v Vallarta Adventure, S.A de C.V.
Case Number: QB-2021-003044

# How Good a Guide is an AIM Listing to a Share's Open Market Value?

Published 02/11/2023

Most investors would agree that the price at which shares are listed on an accredited investment exchange is as reliable a guide as any to their open market value. A tax dispute concerning a gift of shares to charity, however, showed that such an assumption may not always be correct.

A man received 190,000 shares in a recently formed company as a gift from a friend before gifting them on to a children's charity. Based on the price attributed to the shares on AIM, he asserted that they were, on the date of the gift, worth 42.5 pence each, giving a total value for his holding of £80,750.

Claiming relief under Section 587B of the **Income and Corporation Taxes Act 1988**, he sought to set that sum off against his Income Tax liability for the relevant year. HM Revenue and Customs (HMRC), however, took the view that the shares were, on the relevant date, worth less than a quarter of the sum claimed and reduced his tax credit accordingly.

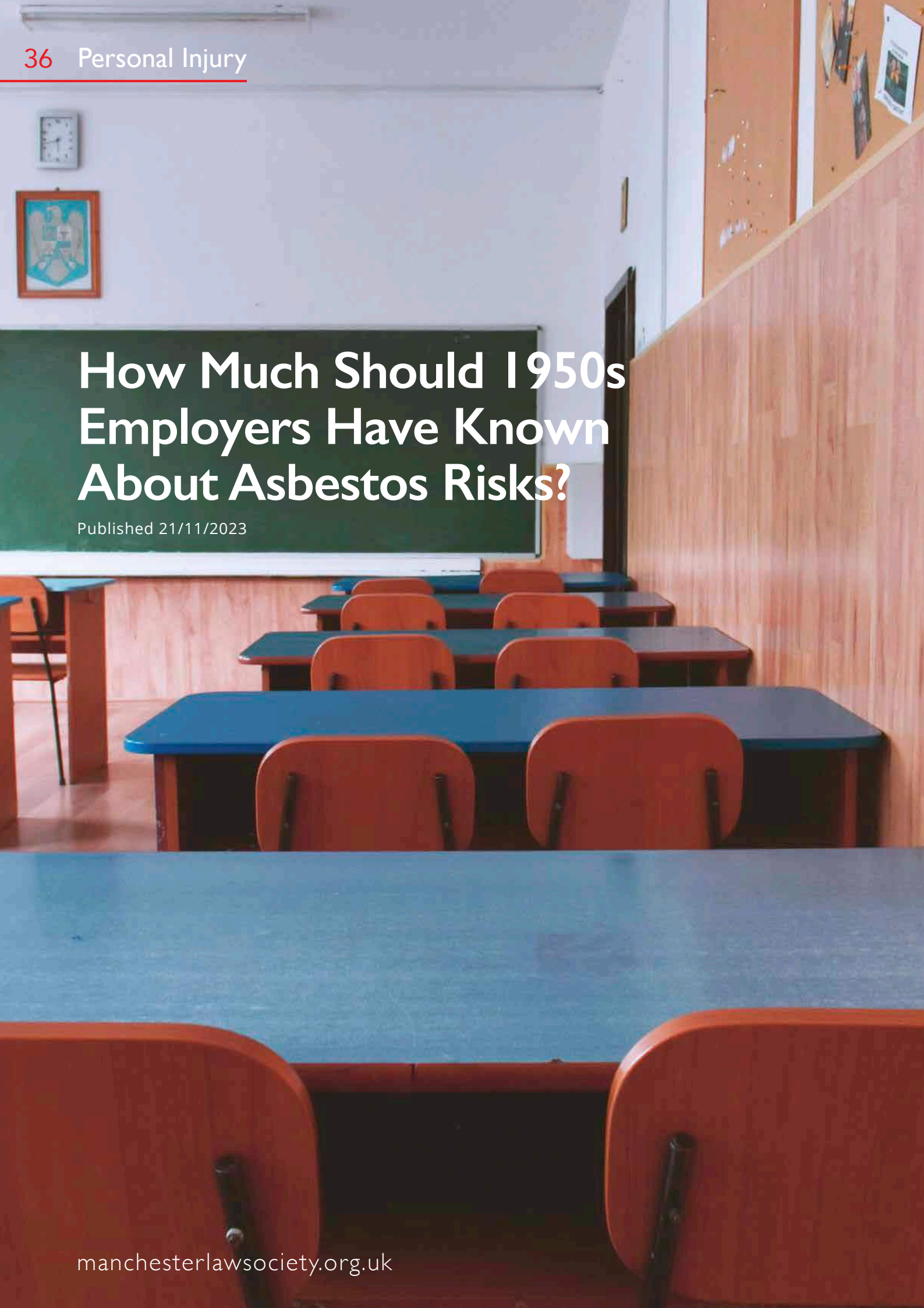
Challenging that decision, the man asserted that the AIM listing was potent evidence which supported his assessment of the shares' market value. There was no evidence of price manipulation and, as a private individual, he had relied on publicly available information to arrive at a correct valuation of the shares for tax purposes. The company was still listed on AIM and had apparently done well.

Ruling on the matter, the First-tier Tribunal (FTT) acknowledged that the price at which a share is listed on AIM may be relevant to a valuation. However, there had only been a limited number of trades in the company's


shares prior to the gift. The price at which such modest volumes of shares had been traded could not, without more, be viewed as a reliable proxy for the open market value of those shares.

The FTT preferred expert evidence presented by HMRC as to the price that a hypothetical prudent investor, armed with relevant information, would realistically have paid for the shares on the relevant date. On that basis, the FTT found that the shares were at the time worth 9.42 pence each and that the man's tax credit should thus be limited to £17,898.

**Case notes:**
Kay v The Commissioners for His Majesty's Revenue and Customs. Case Number: TC08962



# How Much Should 1950s Employers Have Known About Asbestos Risks?

Published 21/11/2023

**Every employer should nowadays appreciate that there is no safe level of exposure to asbestos. As a High Court ruling showed, however, knowledge of the risks has evolved over time and, in a personal injury context, it is not the state of understanding today but decades ago that is often most relevant.**

The case concerned a man who died of asbestos-related lung cancer more than 60 years after he was engaged in construction work at a school. Prior to his death, he described sweeping up asbestos-laden dust and being in close proximity to others who were cutting up asbestos sheets. His widow subsequently lodged a personal injury claim against the company that employed him at the time.

Ruling on the matter, the Court found elements of the man's account of events in the 1950s implausible. Memories, it noted, are fallible over such an expanse of time and he gave his account when he was already unwell and after being informed of his gloomy prognosis. On the balance of probabilities, the Court concluded that his exposure to asbestos whilst working at the school was light and intermittent.

The Court noted that it is common knowledge today that exposure to even tiny amounts of asbestos is extremely dangerous. However, such knowledge could not, with the benefit of hindsight, be imported to employers in the 1950s. What mattered was the extent to which asbestos risks should have been appreciated by a reasonable employer at the time of the man's exposure.

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The Court found that a reasonable employer, keeping abreast of relevant information available in the 1950s, could not reasonably have foreseen that there was a significant risk of injury arising from light and intermittent exposure to asbestos. Even permissible levels of asbestos exposure set in the 1970s were far in excess of the levels to which the man was probably exposed.

Given the low level of exposure and the state of knowledge at the relevant time, the company was not to be criticised for failing to give warnings or take precautions against breathing in asbestos dust. Whilst expressing overwhelming sympathy for the widow and other members of the man's family, the Court was driven to the conclusion that liability on the company's part had not been established.

**Case notes:**
Cuthbert v Taylor Woodrow Construction Holdings. Case Number: QB-2021-004430

# Motor Insurers Are Relentless in Exposing Dishonest Road Accident Claims

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Road traffic accidents happen in the twinkling of an eye and it is not at all surprising that those involved often give differing accounts of what occurred. As a High Court ruling showed, however, motor insurers are relentless in their pursuit of those whom they suspect of trying to pull the wool over their eyes.

The case concerned a delivery rider who alleged that his motorcycle was stationary when a car struck it from behind. In seeking compensation, he asserted, amongst other things, that the motorcycle was rendered undriveable and that he had to hire a replacement vehicle. Together with relatively modest sums in respect of personal injuries, lost earnings and expenses, he claimed reimbursement of over £74,000 in vehicle hire charges from the car driver's insurers.

The insurers later obtained CCTV footage which, they contended, undermined his account of the accident. It was common ground that the footage supported the car driver's case that the motorcycle was not stationary and that it clipped the car's offside whilst weaving through traffic.

Documents were also presented by the insurers which they said demonstrated that the motorcycle was not damaged to the extent that it was unroadworthy and that the rider was able to, and did, continue to use it following the collision. The documents were said to be wholly inconsistent with his assertion that he needed to hire a replacement vehicle.

Following disclosure of that evidence, the rider's solicitors gave notice to discontinue his claim. The insurers, however, did not leave the matter there: taking the view that his claim was fundamentally dishonest and that he had made sworn statements which he knew to be false, they applied for permission to seek his committal to prison for contempt of court.

Ruling on the matter, the Court found that the insurers had come nowhere near to establishing, to the criminal standard of proof, an arguable case of contempt in respect of the personal injury elements of his claim. Those elements were extremely modest when compared to his hire charges claim.

However, the Court went on to find that the insurers had, on the face of it, shown a strong case that he knew his account of the accident was untrue and that he knowingly advanced a false claim in respect of vehicle hire, storage and recovery charges. It was in the public interest for those aspects of the committal application to proceed to a full hearing. If ultimately found in contempt, the rider would be exposed to a maximum penalty of two years' imprisonment, an unlimited fine or both.

**Case notes:**
Aviva Insurance Limited v Sakyi.
Case Number: KB-2022-002990

# Football Club's Crowd Control Challenge to Development Kicked Into Touch

Published 21/11/2023

Commercial property owners are often concerned that residential developments may prejudice their longstanding use of their premises. In a High Court case on point, a football club argued that planning consent was granted for thousands of new homes without sufficient regard to the consequences in terms of match day crowd control.

The club's stadium, which has a capacity of about 70,000, stands in one of England's most deprived areas that has long been targeted for regeneration. In challenging the consent, the club contended, amongst other things, that members of the local planning authority were misled as to the additional burden that the development would place upon the club in respect of crowd control measures.

Rejecting the club's complaints, however, the Court noted that a crowd control study provided by the developer and an independent review had concluded that proposed measures to control queuing fans during and after construction of the development would provide greater flexibility and would be at least equivalent to, or a positive improvement on, those currently in place.

The authority lawfully decided that a combination of detailed conditions attached to the consent and planning obligations placed upon the developer were sufficient to ensure that adequate crowd safety would be achieved during the construction phase of the development and thereafter.

The authority had acted lawfully in putting in place a mechanism that encouraged the club and the developer to cooperate in relation to

access to the stadium. Neither of them would have the whip hand in negotiations and the authority was entitled to proceed on the basis that socially and commercially sensible actors would behave reasonably in seeking to ensure crowd safety. Other grounds of challenge to the consent were also dismissed.

**Case notes:**
R on the Application of Tottenham Hotspur Limited v The London Borough of Haringey. Case Number: AC-2022-LON-002828

# Misselling of Financial Products – Supreme Court Upholds PPI Claim

Published 22/11/2023

f you have been missold a financial product, any delay in seeking legal advice may jeopardise your right to compensation – but what if facts on which you might found your case have been deliberately concealed from you? The Supreme Court answered that question in a case of crucial importance to consumer rights.

A woman borrowed £20,787 from a bank. Of that sum, £3,834 related to a payment protection insurance (PPI) policy which the bank arranged on her behalf. Unbeknown to her, over 95 per cent of the latter sum was paid to the bank as commission on the sale of the policy. The insurer received £182.

More than 12 years later, after taking legal advice, the woman launched proceedings against the bank, seeking to recover sums that she had paid in respect of the PPI policy, plus interest. The bank's failure to disclose the commission, she contended, rendered the relationship between them unfair within the meaning of Section 140A of the **Consumer Credit Act 1974**.

The bank defended her claim on the basis that it had been brought far outside the six-year limitation period which applies to such cases under the **Limitation Act 1980**. In upholding her claim, however, a judge found that the existence of the commission had been deliberately concealed from her. That decision was subsequently upheld by the Court of Appeal.

# High Court Considers Limits on the Right of Parents to Name Their Children

Published 21/11/2023

Parents have a right to name their children and, in modern Britain, the options open to them are almost limitless. However, as a High Court ruling showed, there are rare occasions when a parental choice of forename may conflict with a child's welfare.

The case concerned a deeply troubled mother whose son was placed in interim care soon after his birth. In the first few days of his life, the mother called him by a name commonly associated with boys. However, when she registered his birth, she gave him a name predominantly considered appropriate to girls.

The local authority caring for him applied to the Court for permission to change his registered name to that originally used by his mother. His registered name, the council contended, might have a negative impact on him as he grew up in that he would be exposed to bullying, ridicule and teasing by his peers.

Ruling on the case, the Court was not satisfied that the boy's registered name would expose him to significant emotional harm. In Britain's diverse society, parents choose a vast range of names for their children that are considered acceptable unless they are bizarre, extreme or just plain foolish. Societal views on gender are evolving at some pace and a name that a child may at first consider embarrassing may become a badge of pride in later life.

Ruling on the bank's challenge to that outcome, the Supreme Court noted that it had not been established that the bank knew or intended that its failure to disclose the commission would render the relationship with the woman unfair. It could not be said, therefore, that the bank had deliberately committed a breach of duty. To displace the limitation period, it was insufficient to show that the bank had acted recklessly in turning a blind eye to the risk that the relationship would be unfair.

In dismissing the appeal, however, the Court found that the deliberate concealment of the commission, within the meaning of Section 32(1)(b) of the 1980 Act, meant that the limitation period did not start to run until the woman discovered its existence on taking legal advice. Her claim, which was issued promptly thereafter, was therefore not lodged out of time.

The Court noted that a fact is concealed if it has been kept secret, either by taking active steps to hide it or by failing to disclose it. The woman did not have to show that the bank was under a legal, moral or social duty to disclose the commission. All that she was required to establish was that the bank deliberately ensured that she did not know about the commission and so could not bring proceedings within the limitation period.

The woman could not, the Court observed, have pursued her claim without knowing about the commission and its amount. The bank deliberately concealed its existence by consciously deciding not to tell her about it. There was no suggestion that she could, with reasonable diligence, have found out about it any earlier than she did. The requirements of Section 32(1)(b) having been met, the start of the limitation period was postponed until the date on which she obtained actual knowledge of the commission.

**Case notes:**
Canada Square Operations Limited v Potter. Case Number: [2023] UKSC 41

It was important to respect the choice made by the mother, whose right to respect for her family life was enshrined in Article 8 of the European Convention on Human Rights. Unless her son were returned to her care in the future, choosing his name represented one of the few ways in which she could exercise her parental responsibility for him.

His father, however, asserted that he was excluded from involvement in his naming and the registration of his birth. The council's ultimate plan was to place him in the care of his paternal grandmother. Members of the paternal family strongly objected to his registered name and the Court noted that they might choose unilaterally to call him by another name. The registered name thus had the potential to cause intra-family conflict and confusion during his formative years.

Striking a balance, the Court ruled that, in the event that a final care order was made and the boy placed with his grandmother, the name originally used for him by his mother should be added to his birth certificate. The registered name that she had chosen for him would not be expunged from the certificate and would remain available to him should he wish to use it in later life. If he were not ultimately placed with his paternal family, there was no proper basis for the Court's intervention and the certificate would remain unaltered.

**Case notes:**
A Local Authority v A (Mother) & Ors. Case Number: LS23C50158

# Debt Recovery and Winding Up Proceedings – a High Court Cautionary Tale

Published 09/11/2023

If you are having trouble recovering a debt from a company, it is open to you to issue a statutory demand and, if it is not satisfied, to apply to a judge to have the company wound up. As a High Court ruling showed, however, attempting to wield such a big legal stick without first taking professional advice is almost never wise.

After being made redundant from a senior position, a man issued a statutory demand against his corporate former employer, asserting that it owed him over £40,000. Most of that sum was made up of a bonus payment which he claimed was due to him. The company denied that it owed him anything and responded by seeking an order restraining him from applying to wind it up.

Ruling on the matter, the Court noted that, after being selected for redundancy, the man had signed a settlement agreement with the company whereby he received a payment of £97,600. The agreement was reached without any admission of liability by the company and stated in terms that it was, with a few exceptions, in full and final settlement of any claims or causes of action he might have against the company.


The man, who appeared in court without legal representation, had made a number of disputed allegations about the circumstances leading up to the execution of the settlement agreement and the circumstances in which it was signed. The Court noted, however, that he had accepted that he was bound by its terms.

The Court found that he had an arguable case that a bonus would have been due to him. Whatever his original bonus entitlement may have been under his employment contract, however, the settlement agreement now governed his position vis-à-vis the company. It seemed to the Court that the terms of the agreement provided a complete answer to his bonus claim.

At the very least, the Court found that the bonus claim, together with other elements of the alleged debt, were disputed by the company on bona fide and substantial grounds. The dispute was therefore wholly unsuited to resolution in insolvency proceedings. The man was restrained indefinitely from applying to wind up the company and was ordered to pay its reasonable legal costs.

**Case notes:**
Morrison Water Services Limited v Browning. Case Number: CR-2023-LDS-000706

# Prisoner Unlawfully Evicted from Housing Association Flat Wins Damages

Published 05/12/2023

The concept of unlawful eviction may bring to mind a picture of a malign landlord changing the locks and throwing a vulnerable tenant onto the street. However, a case in which a serving prisoner's protected tenancy was wrongfully terminated during his absence behind bars showed that it more commonly arises from a landlord's muddled understanding of the law.

The man had for some years held an assured tenancy of a housing association flat. After he was convicted of serious drug offences, he received a 22-year jail term. His wife remained living in the flat with their young child. Their marriage did not survive his incarceration and, following their divorce, the wife and child moved to another property. The flat was subsequently re-let.

In upholding the man's unlawful eviction claim, the High Court found that nothing he said, wrote or did following his imprisonment amounted to an unequivocal surrender of his tenancy, which was protected under the **Housing Act 1988** . Although he was keen to add his wife to his tenancy so that she and their child could retain the roof over their heads, he never offered to give up his own right to possession of the flat. His landlord had no entitlement to treat his tenancy as at an end.

The Court noted that it is rare for social landlords unlawfully to evict their tenants. When they do so, it is usually a result of honest misjudgment and scarcely ever arises from a deliberate intention to act unlawfully. Standing back, the evidence painted a picture of hopeless muddle and seeming administrative and managerial incompetence on the landlord's part. There was a lack of clarity as to what should be done, what was being done and why, in response to the man's imprisonment.

In awarding him £145,800 in damages and interest, the Court noted that he had been punished for his crimes to the full extent of the law. His tenancy enjoyed security of tenure and it did not follow from the fact of his offending that his landlord was in any way justified in unlawfully depriving him of his home.

**Case notes:**
Khan v Notting Hill Genesis.
Case Number: J03EC319

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