Commercial: Communication with the court during litigation: Zuma's Choice Pet Product v Azumi [2017] EWCA Civ 2133

Richard Colbey

It should be absolutely intuitive to every lawyer, indeed anyone with a sense for what is fair, that there is no communication by one party to litigation with the court, unless the other is notified of that communication. It says little for those involved in litigation that the Court of Appeal has felt the need to spell that out in *Zuma's Choice Pet Product v Azumi* [2017] EWCA Civ 2133

There are a few exceptions, most significantly where injunctions are sought without notice in circumstances where involving the other party would be likely to defeat the purpose, often these are freezing orders (*Marevas)* or search orders (*Anton Pillers)*. In infant settlement approval cases it is acceptable to show the court the claimant's counsel's opinion on a confidential basis. In practice sending a skeleton argument to court, while waiting for the other party's to be ready for exchange is acceptable.

Illustrative of this is an appeal I am currently involved in arising from the other side not observing this fundamental principle, even though their communication after judgement was unobjectionable in nature. The error was compounded by the fact that the deputy district judge involved was in the same chambers as the barrister, which chambers was often instructed by her instructing solicitors, and they were able to communicate *ex parte* to an address not available to the other party.

The mere fact that a part time judge is in the same chambers as a party's advocate does not mean that judge should be recused. That much was stated by Sales J in *Watts v Watts* [2015] EWCA Civ 1297 and adopted in *Zuma.* One perhaps wonders if all right minded people, who, according to the Court of Appeal, would be aware that 'high ethical standards are achieved' by barristers, would actually see nothing unfair about such a situation.

Even accepting the Court of Appeal's view, to not explicitly and at the earliest opportunity disclose such a connection may give an impression of unfairness and is a recipe for disaster, or at least a costly appeal. I would suggest the better course is to avoid appearing in front of members of chambers at all if it can reasonably be avoided. If it can't be avoided openness and a complete lack of *ex parte* communications are essential.

Personal injury: Shelbourne -v- Cancer Research UK.

Napier Miles

Ms Shelbourne worked for Cancer Research UK, the charity, as their Cambridge Research Institute. She attended the Christmas party as did a Mr Bellik who was a visiting scientist. Mr Bellik had been drinking. He started physically lifting off the ground, without their permission, female guests who were dancing but when he did so to Ms Shelbourne, he lost his balance and she fell suffering severe spinal injury. She brought proceedings against Cancer Research alleging that it owed her a duty of care that had been breached and also that the defendant was vicariously liable for the action of Mr Bellik. At first instance the Recorder found there was a duty of care, but it had not been breached and there was no vicarious liability. The Claimant appealed with the redoubtable Rob Weir QC as her counsel and permission from Martin Spencer J.
On appeal, Lane J upheld the first instance decision. C made much of the fact that there was alcohol at the party and that the risk assessment had not addressed the range of inappropriate behaviour that might

ensue. Further, there were only 2 security guards, who had various duties and only occasionally passed through the party. Lane J thought differently: The judgement is a model of clarity and measured observations but at one point (para 97) he stated: "Although Mr Weir attempted to refute Mr White's categorisation of the appellant's case as "health and safety gone mad" there is some merit in that categorisation, albeit that I would not associate myself with the precise way that Mr White chose to express it." He went on: "The clear thrust of the appellant's submissions was, indeed, that once it is established a party or other gathering is to involve the provision of alcohol which can, sometimes, cause some people to behave in ways that fall to be categorised as inappropriate there needs to be (a) a written declaration signed by the attendees that they will not behave inappropriately; (b) a risk assessment encompassing eventualities stemming from all such forms of inappropriate behaviour; (c) trained staff (whether or not they are merely volunteering to help at the event); and (d) special training for those responsible for a risk assessment, covering all envisaged forms of inappropriate behaviour. As a matter of common sense that cannot, with respect be right. More to then point the archetypal reasonable person of the early 21st century would not regard this as a socially appropriate set of requirements to impose upon the organisers of *any* Christmas party or other similar social gathering regardless of the circumstances."

The case makes useful reading for anybody with a case involving injury at a party or in a club, but it is likely to be relied upon by Defendants keen to adopt "common sense" in a "health and safety gone mad" world.

Commercial: Private Virtue and Public Goods

Tim Frith

Historically, the virtue underpinning commercial law has been the ability of the parties to a contract to agree and enforce payment for the value of goods and services following a negotiation which inevitably considered the value which the other party attributed to such goods and services.

The 21st century has seen the development of the concepts of enhanced individual rights and Public Goods which have replaced this private virtue of bilateral agreement with the determination of what is the appropriate consideration for goods and services for society as a whole. This is exemplified in Telecommunications law where universal coverage and access to mobile networks have been raised up as human rights and a landscape shrouded by a cloud of connectivity is seen as a species of public goods whose delivery is not amenable to private agreement.

In this context the Electronic Communications Code ("the Code") governs the acquisition and exercise of new rights by operators of electronic communications networks to install electronic communications apparatus on, under or over land. The Code is found in Schedule 3A of the Communications Act 2003 into which it was inserted by the Digital Economy Act 2017 with effect from 28 December 2017. It empowers a court or tribunal to impose agreements providing for the exercise of Code rights on unwilling land owners and to provide payment and compensation provisions as a result of such agreements. The recent cases of Conerstone Telecommunications Infrastruture Ltd v Keast [2019] UKUT 116 and EE Ltd v Mayor and Burgesses of the London Borough of Islington [2019] UKUT have both shown that the that the upper tribunal is heavily influenced by the public right to a readily available and affordable network and the question of access has been summarily dealt with on an interim basis. However, in EE Ltd the payment and compensation for a final imposed access agreement was considered for the first time and following detailed consideration of a variety of methods of valuation of the consideration payable the tribunal held that:

"The objective of reducing the costs of providing high quality telecommunications services is apparent in the Code's consideration provisions, particularly in the no-network assumption in paragraph 24(3)(a) which gives effect to the policy that site providers should not share in the economic value created by the very high demand for those services" .

Accordingly, very modest consideration was attributed to the access agreement but the Tribunal did indicate that the door may be open to compensation based approaches in the future. The irony of the imposed access agreement was not lost on the Tribunal: "An imposed agreement is not an agreement at all, except by the deeming effect of paragraph 22 but once an agreement has been imposed it applies just as much to satisfy the requirement of paragraph 9 as for any other part of the code."

Commercial: Finality and Fraud.

Adam Swirsky

Finality of judgment lies at the root of our legal system. In *Virgin Atlantic Airways v Zodiac Seats* [2014] AC 160 Lord Sumption made this clear, telling us that "where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."

However, the Supreme Court has now confirmed that the strict rules as to finality do not apply when a party seeks to set aside an earlier judgment because it was obtained by fraud. In *Takhar v Gracefield Developments Limited* [2019] UKSC 13 the Supreme Court considered a claim concerned with a forgery that went to the heart of the original trial. The court found that the "existence or non-existence" of fraud had not been decided in the original proceedings but was a new issue. The second case did not involve the re-litigation of an identical claim. The court went on to point out that the law does not expect people to arrange their affairs on the basis that others may commit fraud.

Significantly, this will be the case even if the fraud could have been discovered before the original trial. The forgery in *Takhar* had taken place before the original trial but the Supreme Court emphasised that the issue of fraud had not been before the trial judge. It follows that the fact that the fraud could have been discovered by the claimant in the second action did not prevent her bringing a claim to set aside the original judgment.

There may be two potential exceptions to this rule. First, if fraud was considered at the first trial, then further proceedings may not be permitted based on new allegations (although Lord Sumption appeared to cast some doubt on this). Although not suggested by the court, it might be envisaged that the discretion against setting aside the original judgment would be exercised more sparingly if the new allegations could have been discovered before the original trial. The second potential exception would be the situation where a party makes a deliberate decision not to investigate the possibility of fraud in advance of the first trial, even if fraud had been suspected.

Employment: Proselytising in the Workplace

Barbara Zeitler

Domestic and Strasbourg jurisprudence draws a distinction between proper and improper proselytism of religious beliefs. In *Kuteh v Dartford and Gravesham NHS Trust* [2019] EWCA Civ 818, 14 May 2019, the Court of Appeal has considered the limits of proselytising in the workplace.

The Facts

The Claimant, Ms Kuteh, a committed Christian, worked as nurse in the Intensive Therapy Unit of a hospital. Part of her job duties were to assess patients due to undertake surgery, using a form which asked about the patient's religion. Patients complained that when undertaking the assessments, the Claimant had initiated discussions about religion with them. The hospital expressed concerns that the Claimant had been having unwanted religious discussions with patients. Her conduct continued. The Claimant was suspended from her duties while three allegations against her were being investigated. One of the allegations was that Claimant had breached the paragraph in the Nursing and Midwifery Council Code ('NMC Code'), which required her not to express her personal beliefs to people in an inappropriate way. A further patient complaint was received during the investigation process. The complaint related to the Claimant offering the patient her bible and asked him to sing Psalm 23 with her. The patient described the encounter as 'very bizarre' and 'like a Monty Python skit'. During an investigation meeting, the Claimant accepted that she would speak to patients about religion. She admitted that she did not follow reasonable management instructions and that she had given a patient a bible. Following a disciplinary process, the Claimant was dismissed for gross misconduct. The Claimant brought unfair dismissal proceedings (making no claim for religious discrimination), but referred to Article 9 European Convention on Human Rights ('ECHR') (freedom to manifest one's religion and beliefs) in the context of the NMC Code. The ET dismissed her dismissal claim, and the EAT did not grant her permission to appeal.

The Decision

The Claimant appealed, arguing the EAT had (i) failed to consider the correct interpretation of the relevant paragraph in the NMC Code and the distinction between appropriate and inappropriate beliefs and (ii) erred in failing to acknowledge Article 9 was applicable. The Court of Appeal emphasised that improper proselytism was not protected by Article 9 ECHR (which, in any event, was not a directly enforceable right in the Employment Tribunal). The Court stressed that cases like Ms Kuteh's should 'not become over-elaborate and excessively complicated' [para. 67]. The Court noted that: the Claimant's admissions during the investigatory process; her conduct had not changed; the hospital had conducted a fair procedure; and the decision to dismiss fell within the band of reasonable responses. It had plainly been open to the ET to conclude that, even having regard to the importance of the right to freedom of religion, the dismissal had not been unfair, and the EAT was correct to hold that the appeal had no reasonable prospect of success.