Employment: *Diplomatic immunity and domestic workers*
Reyes v Al-Malki and another [2017] UKSC 61

Elizabeth Dwomoh

A diplomatic agent and his wife are posted to London. They subsequently employ a foreign domestic worker to look after their children. The domestic worker is also required to cook and clean for the family.

During the course of the domestic worker's employment, the diplomatic agent and his wife allegedly discriminate against her on the basis of her race, fail to pay her the national minimum wage and makes unlawful deductions from her wages. Her employment ends when she escapes from her employers.

The diplomatic agent leaves the United Kingdom when his posting comes to an end.

The domestic worker brings a claim against her former employers in the Employment Tribunal. A diplomatic agent is ordinarily entitled to immunity from suit under article 31 of the Vienna Convention on Diplomatic Relations 1961 ("the Convention"). A family member is entitled to a derivative immunity under article 37(1) of the Convention. Can the domestic worker sue her former employers relying upon the exception to immunity afforded by article 31(1)(c) of the Convention; namely, where the proceedings arise out of "any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions"?

On the facts in *Reyes v Al-Malki and another,* the Supreme Court held that the domestic worker could sue, albeit on a different and much narrower ground. Article 31 of the Convention only conferred immunity on a diplomatic agent whilst he is in post. When a diplomatic agent left his posting and the receiving state, he was only entitled to immunity under article 39(2) of the Convention for acts performed whilst he was in post in the exercise of his diplomatic functions. The personal services Ms Reyes carried out for Mr and Mrs Al-Malki did not form part of Mr Al-Malki's official functions as a diplomatic agent. Accordingly, the immunity afforded by article 39(2) of the Convention did not apply.

In light of its findings, the Supreme Court did not give a binding decision on whether the employment of a domestic worker to provide purely personal services amounted to a "commercial activity" under article 31(1)(c) of the Convention. The issue, however, divided the court.

Company Law: *Can permission to continue a derivative action be obtained retrospectively?*
Wilton UK Limited v John Shuttleworth & Ors [2017] EWHC 2195 (Ch)

Hannah Laithwaite

Derivative claims

Under the common law, the proper claimant for a wrong against a company is the company itself. The courts will not interfere with the internal management of a company acting within its power: *Foss v Harbottle* [1843] 2 Hare 461, and the power to decide whether or not to litigate lies with the directors.

The advent of the Companies Act 2006 ("the Act") widened the circumstances in which a member could bring a claim in respect of a cause of action vested in the company. Under Part 11, such a claim may be brought against a director or third party where the cause of action arose from an actual or proposed act or omission involving negligence, default, breach of duty and/or breach of trust (s.260(3)). This includes the directors' duties prescribed under Part 10.

The requirement for permission

There is no requirement to obtain permission to issue a derivative claim but there is such a requirement under s.261(1) to continue it (also CPR 19.9A). The court's permission must be obtained before any other step is taken in the proceedings.

Wilton UK Limited v John Shuttleworth & Ors

The High Court was faced with a claim where permission to continue the proceedings had not been obtained prior to service, the 4-month expiry period for service of the claim form had long expired and a new claim was statute-barred by the Limitation Act 1980. Was the claim beyond hope?

The Court held that:

- Any steps taken in the absence of permission were not valid until set aside by the court; that gave insufficient weight to the statutory regime requiring permission and insufficient protection to the company or other defendants concerned;

- The court did however have jurisdiction to retrospectively validate steps taken in the absence of permission; that was consistent with the principles underlying derivative actions, and the court's "filtering" role whereby it retained control over such actions.

Whilst the decision does not offer guidance on *when* the jurisdiction will be exercised (the court is still due to decide whether to grant retrospective permission), the fact it has been held to exist at all offers defaulting parties a glimmer of hope, opening the door to some interesting further argument on the relevant factors pertaining to the exercise of that jurisdiction.

Property: *A Knotty Issue – Knotweed Litigation*

Adam Swirsky

The presence of Japanese Knotweed is an ever increasing problem for anyone selling their property and for some other property owners. The problem is so acute that a specific question is asked in the Law Society's standard property information form. Question 7.8 tells owners that *Japanese knotweed is an invasive plant that can cause damage to property* and that it *can take several years to eradicate*; it then asks '*is the property affected by Japanese knotweed?'* Of course, not everyone will know whether or not they have a knotweed problem but the consequences of how a vendor answers the question can be enormous.

There do not seem to be any reported decisions dealing with private sales but a number of cases are now progressing through the Courts and it's plain that, giving the wrong answer to question 7.8, can amount to an actionable misrepresentation. Most obviously, if the vendor ticks the 'no' box when they know that their property is affected by knotweed, then there is a clear misrepresentation to the purchaser. However, even ticking the 'Not Known' box will be a risk if the vendor has any cause to think that knotweed might be present on their property. But what of the consequences? Some surveyors suggest that a purchaser's damages will be significant, based on the cost of removal and management coupled with the property having a much reduced value. It can take years to eradicate knotweed and, understandably, purchasers are reluctant to take on the risk.

Of course, problems do not begin and end in an owners' own backyard. Knotweed can cause a nuisance to neighbours and a whole neighbourhood can become blighted once the plant spreads. This was only too clearly demonstrated in the County Court case of **Williams & Waistell v Network Rail Infrastructure limited** (unreported). Here knotweed had spread from the Defendant's land into the gardens of adjacent bungalows. Two owners brought a claim for damages based on private nuisance and, at first instance, succeeded on the basis that there had been an unlawful interference with their enjoyment of their property. The alternative claim based on encroachment failed only because there was no actual physical damage. Most worrying for property owners, the damages awarded were significant covering the cost of treatment and an insurance backed guarantee together with the diminution in value of the claimants' properties.

That decision is subject to appeal but it demonstrates the risks of having knotweed and not controlling it. The amount of damage recovered shows the potential losses a property owner or vendor might face if they don't control knotweed or if they misled a purchaser.