

Alaric Watson

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Alaric practises in a wide range of business litigation and advisory work, including insolvency, commercial, employment, general contract, fraud and property. Alaric has a special interest in various aspects of the interrelationship between corporate recovery and employment law, including the transfer of undertakings and the problems facing administrators. He regularly writes for our employment bulletin.

Company/Corporate Insolvency:

Alaric's experience in company and insolvency work covers all aspects of corporate insolvency arising in voluntary arrangements, administrations, receiverships and liquidations. He regularly deals with applications relating to misfeasance, transactions at an undervalue and preferences, and has a specialist interest in the interface between insolvency and employment law, dealing with such issues as the transfer of undertakings and redundancies. His work also covers shareholders' disputes and directors' disqualification. His experience in general commercial, employment and property law ensures that he is able to offer an informed and well-rounded service.

Bankruptcy:

Drawing on considerable experience in this field, Alaric offers advice and advocacy in relation to all aspects personal insolvency, including IVAs, statutory demands, petitions, proofs of debt, continuation of the bankrupt's business, income payments and a range of applications both by and against trustees, such as those under section 303 of the Insolvency Act 1986 and those in relation to the realisation of assets (including the bankrupt's home), setting aside antecedent transactions, examinations, annulments and rescission.

Commercial:

Covering a wide range of business and commercial law, Alaric's practice includes sale of goods, credit and hire agreements (both within and outside the Consumer Credit Acts), supply of services, agency (including commercial agents), restraint of trade/restrictive covenants, transfer of undertakings, partnership and joint venture disputes and commercial property disputes (including rights of access and other easements). His experience includes drafting and advice as well as litigation and covers a range of injunctive and other commercial interim remedies. His knowledge of and experience in both employment and insolvency law allows him to offer an informed and comprehensive service to all business clients.

Employment:

Alaric has considerable experience in employment law, covering unfair/wrongful dismissals (including constructive dismissals), redundancies and protective awards, restrictive covenants and discrimination. His work in this field also includes general advice on and drafting of contracts of employment as well as issues arising in the context of insolvency and under TUPE. He is equally at home arguing cases for either employees or employers (whether individual or corporate). Recent cases have involved protected disclosures, breach of the implied covenant of trust and confidence (along the lines of *Eastwood v Magnox Electric Plc* [2004] UKHL 35), Equal Pay Act claims, claims for payment out of the National Insurance Fund and also issues of jurisdiction and procedure in the Tribunals. His experience in commercial, corporate and insolvency law ensures that he is able to offer a comprehensive service, which embraces both the Employment Tribunals and the Courts.

Cases for Alaric include:

Matthews v Smith [2008] EWHC 1128 (QB)

Fraudulent Misrepresentation

C alleged that he had been induced to enter into a short-term loan of £150K to a film production company, of which D was the managing director, by what were claimed to have been fraudulent misrepresentations made by D. C alleged that D made a number of misrepresentations of which, the Judge found, only 3 were actually said to be false. Of those 3, one was contradicted by C in giving his evidence and a second, implied, representation was not made out as a necessary implication (although in both instances the Judge also found that, on the facts, D had not stated the words she was alleged to have used that might have given rise to any such misrepresentations). In relation to the third alleged misrepresentation, the Judge found as a fact that no such representation had been made by D, but that rather the matters referred to were conclusions that C had himself drawn from documents that he had read. Although the documents, which derived from D's company, did appear to have been misleading, it was no part of C's case that he had been misled by these. The claim also foundered on issues of reliance.

Haine & Anor v Day (Re Compound Sections Ltd) [2008] EWCA Civ. 626 [2008] BPIR 1343 [2008] ICR 1102

Whether Protective Awards are Provable

The company (C) ran into financial difficulties and, having made most of its employees redundant without going through the consultation procedures required under s 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), almost immediately went into administration and thence quickly into liquidation. The union then brought proceedings on behalf of many of the redundant employees in the Employment Tribunal pursuant to s 189 of TULRCA. Some months later the Tribunal upheld those complaints, made the declaration sought and also made protective awards under s 189(2). The employees sought to prove in the Liquidation with respect to the protective award. The Liquidator, Mr Day (L), made an application pursuant to s 112 of the Insolvency Act 1986 (the 1986 Act) for guidance from the Court as to whether in the circumstances of this case the protective awards were provable in the Liquidation. Mr Haine (H) was joined as a representative respondent and the Secretary of State was joined as an interested party. At first instance, Sir Donald Rattee accepted submissions on behalf of L and held that a protective award made by a Tribunal under s 189(2) of TULRCA after the date of winding up was not a provable debt in the liquidation of the employer within the meaning of IR 12.3 and 13.12. He did so on analogy with a line of authorities including *Glenister v Rowe* [2000] Ch 76 (CA) and *R (Steele) v Birmingham City Council* [2006] 1 WLR 2380 (CA), in both of which it had been held that a liability arising on the exercise of a discretion exercised after the date of insolvency was not a provable debt. The former concerned a costs order and the latter involved a determination for repayment of wrongly paid job-seekers' allowance. In both cases the operative determination was a matter of the exercise of discretion and came after the date of the commencement of the debtor's bankruptcy and until the discretion was exercised there was no obligation to which the subsequent liability could relate. In the alternative, H sought to argue that the protective awards could be an expense of the liquidation, as being a "necessary disbursement" under IR 4.218(1)(m). The judge rejected this argument. H and the Secretary of State appealed. (H originally appealed both parts of the decision, but subsequently withdrew the appeal in relation to the latter argument.)

On appeal, it was held that, at least on the facts of this case, the protective awards were provable. Although the Tribunal did have a discretion, there was only realistically one way they could exercise that discretion and since it related back to "an obligation", namely the obligation to consult in s 188 of TULRCA, it must be a contingent liability. On this basis, the Court distinguished *Glenister v Rowe* and *Steele*. The Court felt compelled to reach this decision on the basis of European Law (in particular *EC Commission v Greece* [1989] ECR 2965), and the rationale in that respect is clear enough. The reasoning of the Court is not altogether clear, however, so that doubts must remain as to the precise effect this may have on other cases involving the exercise of discretion (including possibly costs cases such as *Glenister v Rowe*) and perhaps even whether, in a case where the discretion under s 189(2) is very much more borderline on the facts, the question provability might not still arise. Moreover, the characterisation of the obligation under s 188 as an obligation within the meaning of IR 13.12(2) is not without its problems.

Holley v Deyong (Maidstone County Court), 26/02/08; Deyong v Downtown Leisure Ltd & Anor Chairman Victoria Wallis, Ashford Employment Tribunal, 21/02/08, Jmt 6/03/08

Employment - Landlord & Tenant

This was a linked pair of cases with an interesting twist. In October 2007 the Claimant (H) acquired a nightclub business from Downtown Leisure Ltd (DLL), together with a lease of premises, which included a residential flat, from DLL's sister company (DIL). Mr Deyong (D) had for many years been in occupation of the flat as the licensee of DLL/DIL. The licence had been terminated by notice from DLL/DIL at the time of the sale and H then brought County Court possession proceedings against D. In his defence, D claimed to have been an employee of DLL, whose employment had been transferred under TUPE 2006 to H, so that neither DLL nor H had no right to terminate the license. At the same time

D brought Tribunal proceedings against both DLL and H claiming automatic unfair dismissal, by reason of the transfer (Regs. 4(3) and 7(1) of TUPE), and seeking reinstatement. It was common ground that D had been for a brief period in about 1998-2001 an employee of DLL and that at all times since (and for some time before) that period he had occupied the flat rent-free. It was also common ground that D had done some work for DLL in the period since the termination of his formal employment: D said this amounted to full-time work averaging about 65 hours a week; DLL maintained it was merely casual work under a gentlemen's agreement by which D was permitted to remain in the flat rent-free. At a PHR before the ET the issue was whether this relationship amounted to a contract of employment: the Chairman reserved her judgment. The following week, without the outcome of the ET hearing being known, the County Court possession action came on. D sought an adjournment to await the outcome of the ET proceedings. The Deputy District Judge agreed with submissions on behalf of H that the question whether D had been an employee was irrelevant, since the existence of D's claim showed that D accepted he was not an employee at the date of the hearing (or indeed the commencement of proceedings); it was held that the notice given was reasonable and possession was therefore ordered. Subsequently the ET determined that D had not in any event been an employee at the relevant time (September/October 2007); the arrangement between D and DLL being too vague and too informal to constitute a contract of employment and there being insufficient degree of control and/or mutuality of obligation for a relationship of employee-employer to have existed.

The case is of interest in relation to both the proper analysis of the grey area of informal or semi-formal relationships that might constitute employment contracts and in relation to the procedural interplay between County Court possession actions and ET cases (potentially) involving service occupancies.

Re Pritchard [2007] BPIR 1385

Bankruptcy - Whether the benefit under a joint critical illness policy fell within the bankruptcy estate

Mr Pritchard (P) and his wife took out a joint policy of each of their lives which included a critical illness benefit payable upon the diagnosis of a fatal illness. Very shortly thereafter P was made bankrupt, but the payments on the policy were maintained. Years later P's wife was diagnosed with cancer and the insurers accepted her claim for critical illness, although she died shortly after their acceptance of the claim. P claimed the entire benefit for his wife's estate; the insurers believed half was payable to P's Trustee in Bankruptcy.

Upon the Trustee's application for directions from the Court as to whether the sums payable as a terminal illness benefit under the terms of the policy were payable to the Trustee or to the estate of the deceased wife, the Court held that the policy was a joint policy, which had been severed by the bankruptcy of P such that, on a proper construction of the policy and applying the reasoning of the Court of Appeal in *Murphy v Murphy* [2003] EWCA (Civ) 1862, [2004] Lloyd's Rep IR 744, half the benefit was payable to the wife's estate and the other half would have been payable to P, which latterly vested in and was thus payable to the Trustee.

Re Mohammed Ahmed AKA Mohammed Marria (2007) High Court, Bankruptcy

Bankruptcy – Antecedent Transactions

The Debtor (M) was made bankrupt in October 2004 and immediately absconded to Dubai, leaving his wife (W) in London. Shortly before the bankruptcy order, M had transferred his 100% interest in the family home in Streatham to W, nominally for full consideration; but the completion statement showed that upon completion 70% of net proceeds was immediately repaid to W. As at the date of the bankruptcy M and W owned another freehold in Balham as express beneficial joint tenants. In March 2004, after the date of presentation of the petition, M and W purported to grant W four long leases carved out of the Balham freehold. The Trustee sought declarations to the effect that: (a) the sale of the Streatham property was at an undervalue within the meaning of s 339 of the Insolvency Act 1986 (the 1986 Act); (b) M's 50% share of the freehold in Balham (the joint tenancy having been severed) vested in the Trustee; and (c) the grants of the leaseholds were all void pursuant to s 284. She also sought orders for sale and consequential relief, including an account. The matter raised complex issues of law, not least due to the existence of chargees and assignees of some of the leases. However, before it came on for final hearing, the matter was settled.

Weaving Corporate Finance Ltd v BioD Vervaltungs GmbH & Anor (2007) High Court, QB

The Claimant (C) provided services, initially to the First Defendant (D1), in relation to preparing and submitting proposals for financing of D1's proposed venture in the bio-diesel industry in Germany and procuring such financing. Towards the close of this process a new SPV, D2, had been incorporated by the international finance companies backing the project and D1. Assurances had been sought of and given by D1, subsequently confirmed by D2, that C would be paid its fees in any event. After a long succession of without prejudice discussions, C offered a compromise in writing (The WP Letter), which Ds purported to accept by conduct. C claimed the full sums due, but Ds entered a defence referring to their alleged acceptance of the terms of the WP Letter. C applied to strike-out and/or summary judgment, on the basis - inter alia - that there had clearly been no acceptance of the terms of the WP Letter and the defence was therefore both doomed and an abuse of process. 2 months later, a few days prior to the hearing, Ds applied to amend their Defence to plead several other oral compromises allegedly concluded at earlier stages in the negotiations.

The Master held that the Defence as amended did have a real (not fanciful) prospect of success and that the earlier compromises were potentially arguable and on that basis declined to grant C's application and allowed Ds to amend. However, he also held that the tactics of Ds had amounted to an ambush and that the Defence as originally pleaded would not have withstood the application: in consequence he awarded C all its costs down to the date of the application to amend and ordered the remainder of the costs of both side's applications to be in the case. The case, which has since settled, is of interest in particular in relation to the use and potential abuse of without prejudice material.

Adjudication Ltd & Ors v Admiral Leasing Plc & Anor (2007) Brighton County Court

Adjudication Ltd (C1) hired equipment under an HP agreement for its beauty business. The HP agreement was guaranteed by C1's Directors (C2 & C3). There were issues as to the suitability of the equipment, fitness for purpose and issues over the incorporation and efficacy of express exclusion clauses and implied terms as to time of delivery. More interestingly, there were also issues in relation to the total failure of consideration as the machine eventually delivered by the supplier was not that which was specified by serial number in the agreement and the guarantees (and in the sale agreement between the supplier and D). In a further twist, it emerged very late in the proceedings that the serial number and other details in the agreement, the guarantees and an acknowledgement of delivery note were all inserted by D after the documents had been signed by or on behalf of the Cs; this raised questions of whether the rule in *Pigot's Case* applied.

The case was notable for the complexity of the factual and legal issues (to which the above summary does little justice), with each side relying on a considerable number of legal authorities. In a judgment running to 46 pages and 177 paragraphs, the Judge found for D on the facts. He went on to hold that although most of the ingredients necessary to engage the rule in *Pigot's Case* were present in this case, the potential prejudice necessary to engage the rule was not made out in relation to each of the 3 classes of document concerned. Although on the facts this might seem a curious result, permission to appeal was refused and it has not been taken further.

The City & Guilds of London Institute v Morgan Whittaker Ltd (2007) High Court, QB

The Claimant (C) offers diplomas in a number of fields of technical and vocational expertise and accepted the Defendant (D) as an accredited provider. From the outset there were problems with non-payment of fees on the part of D, with the immediate result of a suspension of credit terms and ultimately the termination of the accreditation agreement. On an action by C for payment of the outstanding arrears D failed to file a Defence even within the extended period allowed by C's consent. D applied to have the default judgment set aside, supported by a draft Defence setting up a number of factual issues essentially amounting to a defence of set-off. Following a succession of failures on the part of D's solicitors to comply with the directions of the Master as to drawing up of orders and service of documents upon C, it was held that there was sufficient in the Defence to warrant the matter going forward to trial, but D was ordered to make a sizeable payment into Court as a condition of the default judgment being set aside.