

Whiteheads Legal Bulletin

House of Lords Decision - R v Davis June 2008

This House of Lords decision has seen high profile coverage in the media and will have significant ramifications in relation to the use of anonymous witnesses in both Civil and Criminal proceedings. Emergency legislation brought in yesterday addresses the effect that this decision has on criminal cases.

What is the impact of these recent events?

The impact of the decision is essentially that where a case is based solely or to a decisive extent on anonymous evidence, a trial based on that evidence is likely to be unfair and any conviction achieved at risk of being quashed as unsatisfactory and unsafe.

In preparing cases for Court, regard must now be had to this decision as it is going to impact upon the nature of the evidence that can be relied on.

It is clear that anonymous evidence cannot be ruled out as a matter of principle. Each case will have to be looked at on its own merits. However, the starting point is that the Defendant is entitled to know who the witnesses against him/her are and a departure from this principle has to be justified. In the words of the House of Lords "a clear case of necessity should be made".

The more important the evidence is to the case, the more the presumption will be that the witnesses who have supplied that evidence should attend Court openly and in person. If, therefore, we wish to use the evidence of anonymous witnesses there will have to be clear evidence that the reluctance of witnesses to give evidence openly in Court is both genuinely and objectively justified.

We may also be in a situation of having to disclose to the Defence anything detrimental that is known in relation to these witnesses (for example previous criminal history).

Obtaining protection for witnesses

If it is proposed that the evidence should be given anonymously it will be necessary to make an Application to the Court for this to be permitted and for the relevant "protective measures" to be put in place. These could include for example:

- Evidence from behind screens
- Voice modulation

- Withholding of names and addresses etc.

Having made the application, it is then up to the Court to make a decision and rule on the protective measures that can be put in place.

Making a good case

Having regard to the decision by the Lords, the following table might be helpful when you are reviewing the strength of a case. The idea is to provide a “litmus test” in relation to the strength of the evidence in a matter which is to be **contested**. The evidence types range from good quality at the top of the table to poor quality at the bottom of the table and I have indicated the likely prospect of success for each type.

Type of Evidence	Prospect of Success
All evidence given in person by identified witnesses	High
Key evidence given by identified witnesses in person supported by attributable Hearsay	High
Key evidence given by identified witnesses in person supported by non-attributable Hearsay	Reasonable
All evidence given in person by anonymous witnesses	Low
Key evidence given in person by anonymous witnesses supported by attributable Hearsay	Low
Key evidence given in person by anonymous witnesses supported by non-attributable Hearsay	Low
All evidence given by attributable Hearsay	Low
All evidence given by non-attributable Hearsay	Low

Good Quality



Poor Quality

Clearly the evaluation of a case is rather more complex than can be achieved by the simple application of a table of this kind, but it is intended to give a flavour of the factors that you would want to take into account when deciding whether a case that you have developed has reasonable prospects of success in Court if contested. The position may well be very different where the proceedings are not fought and as we know, many Injunction Applications turn out to be uncontested or are settled on Undertakings without evidence being called or tested.

The Legislation mentioned earlier that was introduced on the 3rd July is limited to Criminal Proceedings. In discussions I held this week with the Ministry of Justice there was a clear recognition that the case is applicable to Civil Proceedings but at present there is no legislative fix in the offing.

Please get in touch if you have any comments or queries about this bulletin.

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