

## Whiteheads Legal Bulletin – UPDATED 22<sup>nd</sup> July 2008

### House of Lords Decision - R v Davis June 2008

#### **Summary**

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, in the form of the Criminal Evidence (Witness Anonymity) Act received Royal Assent yesterday (21<sup>st</sup> July 2008) and addresses the effect that this decision has on criminal cases. This Act clarifies the circumstances in which anonymous evidence can be used and ensures that convictions cannot be quashed solely on the basis that anonymous evidence was used. The Act introduces Witness Anonymity Orders which can be applied for by either party and reflect the measures that the Court feels are appropriate in order to afford anonymity. If the order is breached and the identity of the witness is disclosed, this constitutes contempt of court.

#### **Background**

The new Act came about because of a House of Lords decision which stated that anonymous evidence in criminal cases did not allow for a fair trial and that new legislation was required in order to assure this. The impact of the original decision is 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.

#### Civil Cases

It should be borne in mind that the new Act relates to criminal cases but not Civil cases. Therefore 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:

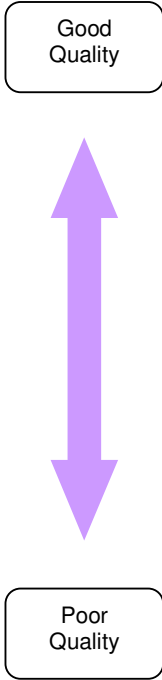
- Evidence from behind screens
- Voice modulation
- Withholding of names and addresses etc.

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, and bearing in mind the new Act, 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



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.

In recent discussions I had 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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