Neutral Citation Number: [2005] EWHC 2443 (Comm)

Case No: 2005/100

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 7th November 2005

Before :

MR JUSTICE CHRISTOPHER CLARKE

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Between :

ASIA PACIFIC (HK) LIMITED & OTHERS **Clai**

- and -

(1) HANJIN SHIPPING CO LTD

Defen

(2) OWNERS OF THE MV "HANJIN PENNSYLVANIA"

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Mr Julian Flaux, Q.C. and Miss Jo Cunningham (instructed by **Mays Brown**) for the **Claimants**

Mr Steven Berry, Q.C. (instructed by **Hill Taylor Dickinson**) for the **Defendants**

Hearing date: 3rd November 2005

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Judgment

MR JUSTICE CHRISTOPHER CLARKE:

1.
The claimants were the owners of cargo contained in containers laden on the vessel “Hanjin Pennsylvania”. On 11th November 2002 an explosion occurred on board the vessel and a fire broke out when she was en route between Singapore and Northern Europe. Many of the containers were either lost or they and their contents were damaged. In the case of the claimants two of their containers were a total loss and others may have been damaged.

2.
The first defendant – Hanjin Shipping Co Ltd (“Hanjin”) - is the owner of the vessel. On 15th June 2004 it began a limitation action and a general limitation decree was granted on 6th December of that year.

3.

A number of different groups of cargo owners, represented by different solicitors, have commenced proceedings in the Commercial Court against Hanjin, which is represented by Hill Taylor Dickinson ("HTD"). One of the sets of cargo interests is represented by Mays Brown.

4.
The cargo claims were subject to the 12 month time limit under the Hague or Hague Visby rules. In 2004 and early 2005 there was correspondence between HTD and the solicitors for various cargo interests including Mays Brown. Agreements were made as to English law and jurisdiction and extensions of time were given. In November 2004 two sets of claimants, represented by Waltons & Morse and Clyde & Co respectively, issued claim forms; but they did not then serve them. On 12th January HTD gave notice to Mays Brown and five other solicitors or claims agents acting for cargo interests that they would not extend time for issuing any claim beyond 11th February 2005. Their letter also suggested that the clients of those to whom it was addressed should join in the action (sic) begun by the claimants represented by Waltons & Morse and Clydes.

5.
On 8th February 2005 Mays Brown received instructions by e-mail from the Hong Kong solicitors instructing them to proceed with the filing and service of a claim against Hanjin. Mr van der Reyden of Mays Brown acknowledged those instructions the same day and said that Mays Brown would proceed accordingly.

6.
On 10th February 2005 Mays Brown issued a claim form. By virtue of CPR 7.5 (2) that claim form had to be served within 4 months of its issue i.e. by no later than 11th June 2005.

7.
On 8th March 2005 Waltons & Morse and Clyde & Co served on HTD a claim form and response pack (and in the case of Waltons & Morse, Particulars of Claim). In each case the letter that came with the documents said in terms that they were being sent "by way of service".

8.
On 15th March 2005 Mr Hoyes of HTD wrote to 6 solicitors or recovery agents, including Mays Brown, asking for confirmation that they had issued English proceedings against Hanjin. He also asked whether the addressees had any objection to claims against Hanjin being consolidated into one action, or proceeding under a Group Litigation Order, and confirmed that HTD had instructions to accept service of proceedings on behalf of Hanjin.

9.
One of the addressees of the fax of 15th March was Pysdens. On 18th March they confirmed that a claim form had been issued against Hanjin on 11th February 2005 "a copy of which is attached for your information, which our clients do not wish us to serve formally, if cargo are not proceedings (sic) against their insured".

10.
On 21st March 2005 Mays Brown faxed to HTD a letter which read as follows:

"We refer to your fax of 15th March 2005

Attached please find a copy of the Claim Form issued by the Claimants represented by us

We are awaiting instructions as regards the proposed consolidation of actions"

The letter was accompanied by a copy of the claim form.

11.
On 22nd March 2005 a telephone conversation took place between Mr Hoyes of HTD and Mr van der Reyden of Mays Brown in the course of which Mr van der Reyden said that he was awaiting instructions about consolidation. His notes record the following:

"Confirmed Waltons Morse served Claim Subs.

Re Consolidation – they have asked WM for general stay in proceedings until confirmation from other parties that actions can be consolidated

As to consolid – do not know when this will happen –everything is stayed until then

Advised we are awaiting instructions re consolid.."

12.
Both Mr Hoyes and Mr van der Reyden had limited recollection of that conversation although Mr Hoyes was sure that he did not agree any stay of the present action, about which I have little doubt that he is correct. On 4th April Mr van der Reyden wrote in these terms:

"We confirm that the Claimants represented by us and who appear on the Claim Form forwarded to you on 21st March 2005 have no objection to their claims being consolidated into one Action"

13.
On 13th June HTD wrote to the representatives of a number of parties including Mays Brown advising that a Case Management Conference ("CMC") was to take place in the limitation action and asking whether any of the recipients who were not parties on the record in the limitation action wanted a copy of the CMC bundle or to attend the hearing.

14.
On 14th June Mr van der Reyden telephoned Mr Hoyes' secretary and asked her to forward to him a copy of the CMC bundle which she agreed to do. On 22nd June he telephoned HTD to ensure that the CMC bundle would be provided to him so that he could give it to Counsel whom he had instructed to attend the CMC. During the course of the latter conversation Mr Hoyes expressed the view that the claimants had failed to serve the claim form.

15.
There is a conflict of evidence between Mr van der Reyden and Mr Hoyes, which it is not necessary to resolve, as to whether Mr van der Reyden said that he had no instructions to serve the form either in March or then. Whether or not he said that, it is apparent that Mays Brown did have such instructions. It is accepted that he referred, mistakenly, to the period for service of the form as being 12 months.

16.
The fax of 21st March 2005 did not state that the claim form attached was faxed by way of service. The claim form attached was stamped "Claimants Copy". It was not accompanied by a response pack. Thereafter no certificate of service was filed by the claimant as required by CPR 6.14 (2) (a). Nor were any steps were taken after 21st March to press for an acknowledgement of service. According to Mr van der Reyden this was because he understood from his telephone conversations with Mr Hoyes that no action by the parties would be taken pending the consolidation of the claims.

17.
It did not occur to Mr Hoyes that by their fax of 21st March Mays Brown were serving the claim form rather than confirming, in response to his query of 15th March, that it had been issued. It was for that reason that he took no steps to acknowledge service.

18.
The claimant seeks a declaration that the claim form was served on Hanjin within the time prescribed by CPR 7.5. In the alternative it seeks an order extending time for service under CPR 7.6, or that the Court should dispense with service under CPR 6.9.

What amounts to service?

19.
The first question, therefore, is whether what happened on 21st March amounts to service. That question must – as is common ground - be judged objectively, that is to say by looking at what was done and said by and as between the parties in order to determine whether it amounts to service. If it does so, an unexpressed intention that it should not do so cannot alter the position. If it does not do so, the fact that the person who did the acts in question intended or thought that what he did constituted service does not make it so. Whether service has been effected cannot depend upon the views, possibly idiosyncratic or even bizarre, of individual litigants or their advisors.

20.
The Civil Procedure Rules do not define what is meant by service other than by prescribing how it may be done. Personal service involves leaving the document with the relevant person: CPR 6.4. (3), (4) and (5). Service other than personal service may consist of leaving the document at an address for service within the jurisdiction, or serving it through a document exchange, or sending it by post or fax. The common thread is that the party serving the documents delivers it into the possession or control of the recipient or takes steps to cause it to be so delivered. But, as the authorities recognise, a party delivering the claim form may say that he is not delivering it by way of service, but for information only. If he does so he is to be taken at his word.

The defendant’s submissions

21.
Mr Steven Berry, QC, for the defendant, submits that that which can be done expressly can be done impliedly and that the true principle is that “service” is the delivery of a document in circumstances which convey to the objective but knowledgeable observer that delivery is intended by way of service, and not for information only. That has to be conveyed to the recipient in order that he may realise (i) that it is incumbent upon him to file an acknowledgment of service and (ii) that what has been described as the treadmill of procedural steps that have to be taken thereafter has begun to operate.

22.
The circumstances surrounding the fax of the claim form in the present case manifested, in his submission, an intention not to serve or, to put it another way, did not manifest an intention to serve. The fax of 21st March was in answer to the request of 15th March for confirmation that proceedings had been issued. The attached claimant’s copy of the claim form came in response, giving that confirmation, without any indication that it was faxed by way of service and without a response pack. Claims are often issued (in order to preserve time limits) but not served, and claim forms are sometimes delivered on the basis that they are not being served. Where service is intended the almost

invariable practice of shipping solicitors is for the letter enclosing the documents to say that they are sent “by way of service”.

23.
In those circumstances, Mr Berry submits, the fax of 21st March would have conveyed to any reasonable solicitor as it did to Mr Hoyes, that the Claim Form was not sent by way of service; and would not have conveyed to any such solicitor that it was so sent. It was that circumstance that made the defendant’s objection one of substance. If it had been apparent that the claimants were attempting to serve the proceedings the matters to which he referred (no reference to enclosing the claim form by way of service, use of the claimant’s copy and absence of a response pack) would not be fatal. But those matters supported the conclusion that there was no intention to serve.

The claimant’s submissions

24.
Mr Julian Flaux, Q.C., for the claimant, submits that the faxed letter of 21st March together with its enclosure constituted service of the claim form. The rules provide for service by fax. There is no requirement that the letter should use the words “by way of service” or some similar expression. Indeed the claim form could simply be faxed with a compliments slip. An implied manifestation that the claim form was not sent by way of service is, he suggests, a contradiction in terms. Further the fax of 21st March, albeit responsive to the fax of 15th March, went further than was necessary to confirm that proceedings had been issued because it provided a copy of the claim form. The reference to awaiting instructions on the question of consolidation of actions showed that Mays Brown did intend to serve the claim form. The failure to serve the response pack was no more than a procedural irregularity; and the fact that what was served was a copy of the claimant’s copy of the claim form was immaterial. That of which it was a copy was an original document marked with the seal of the Court.

Discussion

25.
I accept that an implied manifestation could be said to be a contradiction in terms if by “manifestation” some express statement is meant. What Mr Berry means is that what is said or done may, in context, signify that service is not intended, even if the words “for information only” or the equivalent are not used.

The judgments of the Court of Appeal

26.
Both Mr Flaux and Mr Berry relied on passages in the judgment of the Court of Appeal in several conjoined cases of which the first was Cranfield v Bridgegrove Ltd[2003] 1 WLR 2441. In one of those cases, Murphy v Staples UK Ltd, the defendant’s solicitors, Branton, wrote to the claimant’s solicitors confirming that they had instructions to accept service. That meant that, unless the provisions of section 725 (1) of the Companies Act 1985 applied, service could only be effected by serving Branton. On 21st November 2001, one day before the expiry of the limitation period Horwich, the claimant’s solicitors, served the defendant by sending the claim form and other documents by first class post to the defendant’s registered office. On the same day Horwich sent to Branton by first class post copies of all the documents purportedly served on the defendant under cover of a letter which informed Branton that the documents “had been served to day on your client’s registered office”.

27.
The Court of Appeal decided that, by virtue of section 725 (1), service on the company's registered office constituted good service. But they went on to consider whether, on the footing that service should have been on Branton, the judge was right to dispense with service under CPR 6.9. The Court held that, on that assumption, a copy of the right document was sent to the right person at the right address and, if rule 6.7 applied, it was deemed to have been served before the expiry of the four month period. They then said this:

"Moreover, Branton were informed by Horwich that the original documents had been served on the defendant's registered office that same day. The only flaw in the process was that Horwich sent a copy of the issued claim form, rather than the original document itself. In this regard, it is to be noted that, if Horwich had sent the issued claim form to Branton by fax, that would have been good service. A document received by fax is a copy document. The circumstances revealed by this case do not precisely satisfy the Anderton [1] criteria: Branton received a document served by one of the permitted methods of service (i.e. by first class post on the right person at the right address) but it was a copy of the document that should have been served.

88 In these very unusual circumstances, had it been necessary to so, we would have decided that it was right to dispense with service under rule 6.9."

28.
Mr Flaux submits that those observations show that service of a claim form by fax does not have to be accompanied by a letter indicating that the claim form is faxed to the recipient by way of service. The "only" flaw discerned by the Court of Appeal in the process was that what was sent was not an original - a consideration that does not apply if service is permitted by fax. It was no flaw that the letter to the solicitors said nothing about enclosing the claim form by way of service. On the contrary it indicated that service had been effected on the defendant at its registered office.

29.
Mr Berry submits that Murphy is of no assistance to the claimants. On the hypothesis upon which the Court considered CPR 6.9, service on the registered office was not good service. But it was clear that what the claimants were doing was trying to serve, even though they had gone about it in the wrong way by claiming that they had served the defendant by sending the claim form to the registered office.

30.
Mr Berry relied on Claussen v Yeates, another of the conjoined cases considered by the Court of Appeal. In that case the claimant's solicitor wrote to the defendant's solicitors, Wyeth & Co, saying that they did not propose to serve the proceedings as they anticipated that the matter would settle. Wyeth indicated that service would be accepted at their London office and asked for a copy of the sealed summons "in confirmation of the commencement of the proceedings". The claimant's solicitor sent them a copy of the claim form issued. Wyeth then wrote back asking the claimant's solicitor to ensure that "when service is affected and if you intend to ask us to accept service on the defendant's behalf, the appropriate documentation is sent to this firm's London office".

31.
The Court of Appeal held that, in that case, the real reason why the claim form had not been served was that the claimant's solicitor had failed to take a number of steps. They rejected an application to dispense with service which had been advanced on the basis that the claim form had been sent by a permitted method of service to a person authorised to accept service at the address give for service

and that the case, therefore, fell within Anderton. The Court rejected that submission on the grounds that in the two cases where service was dispensed with in Anderton

“what was sent was the original claim form that had been issued by the court, and it was clear that the claim forms were purportedly being served, albeit that they were deemed to be served out of time. The recipient knew that, on the assumption that what was sent amounted to valid service, time started to run from the date of service of the claim for certain purposes…

50 But in the present case Traymans did not purport to serve the claim form by sending the copy to Wyeth. On the contrary Traymans made it clear that they were not proposing to serve the claim form on 9th November…”

32.
This passage indicates, he submits, that for service to be effective it must be made apparent to the recipient that, subject to any question as to the efficacy of the service, time has started to run. Otherwise he would be at risk of having a judgment entered against him in default of acknowledgement of service without it being apparent that he was bound to enter one.

Conclusion

33.
In my judgment the dispatch of the fax of 21st March did constitute service of the claim form. The substance of the matter is that Mays Brown delivered to HTD, by a permitted method of service, a claim form, and thereby not only brought to their attention the fact that that the claim form had been issued but also provided them with a copy of it. Mays Brown did not indicate that the form was provided to them subject to a condition that it was for information only, or that, although delivered, it was not to be regarded as served. When a claim form is delivered to the recipient in a manner provided for by the rules it is, in my view, served unless it is made clear by the person who delivers it that, whilst he is delivering the form by such a method he is not in fact serving it.

34.
I do not regard the claimant’s solicitors as having made that clear either by express words or by what they said or did (or omitted to say). The letter of 21st March did not say that the claim form was being sent for information only. In providing it Mays Brown went further than was necessary to respond to the question whether a claim form had been issued. They provided the claim form to a firm which had indicated that it had instructions to accept service.

35.
I accept that the question whether or not there should in the future be consolidation of actions can be ventilated both in the context of proceedings that have been issued and served and in the context of proceedings that have been issued but not served (as was the case with the clients of Pysdens). Nevertheless the reference in the letter of 21st March to awaiting instructions as regards consolidation, as well as providing no indication that the delivery of the claim form was not to count as service, is, to my mind, more readily explicable on the basis that the claim was on foot (in the sense that it had gone beyond the stage of being a claim which might have to be dealt with, if, but not unless, the claim form was served) so that it could appropriately be consolidated with other similar claims.

36.

The facts (i) that no response pack was served, (ii) that the claim form was marked “Claimants Copy” and (iii) that the fax did not state that the claim form was faxed “by way of service” do not in my judgment demonstrate that no service was intended at all. The failure to serve a response pack was a failure to comply with the rules but, of itself, it signifies no more than that that which ought to have been done on service was not done. It was a procedural irregularity: a technical mistake of the kind that in Harrigan v Harrigan, CA 18th May 2000, was not treated as affecting the real substance of the matter. The claim form was marked “Claimants Copy” but it was still a copy of the original claim form. The letter did not use the words “by way of service”; but, whatever the practice, these or similar words are not obligatory, and neither did it say that the despatch was by way of information.

37.
I am conscious that it is necessary to look at the cumulative effect of the matters upon which Mr Berry relies but even when I do so I am not persuaded that they demonstrate that the claim form was not provided by way of service.

38.
Lastly I have considered whether this analysis produces a result that is either unsatisfactory or unworkable. In my judgement it does not. The CPR provides for service of a claim form by letter or fax, if a solicitor has previously expressed a willingness to be served by such method. In those circumstances, as I see it, the drafters of the rules intended that a despatch of the claim form by those means should constitute service in the absence of a clear indication to the contrary. If such a solicitor thinks that, despite the absence of any statement that the form is faxed for information only, that may have been the intention, he has only to ask the sender whether that is so.

Extending time under CPR 7.6. (3)

39.
Mr Flaux submits that, if necessary, I should extend the time for service of the claim form under CPR 7.6 (3). The Court has power to do so if “the claimant has taken all reasonable steps to serve the claim form but has been unable to do so”.

40.
If, however, contrary to my finding, the claim form was not served that will have been because the manner of purported service (despatch of a claimant’s copy in response to the letter of 15th March without an indication that it was by way of service or a response pack) meant that there was in truth no service at all. I do not see how it can then be said that the claimant has taken “all reasonable steps to serve the claim form”. On this hypothesis the claimant could have made clear that the documents were sent by way of service; it could have used a copy other than the claimant’s copy; and it could have enclosed a response pack.

41.
In Cranfield v Bridgegrove Ltd the Court of Appeal held that the Court may be treated as “unable” to serve for the purposes of CPR 7.6 (3) (a) even though no attempt has been made to do so, even if by incompetence or oversight. By parity of reasoning, submits Mr Flaux, Mr van der Reyden was unable to serve because he thought he had done so and, unbeknownst to him, he had not. Mr Flaux relies in this regard on a number of circumstances which, he submits, reinforced Mr van der Reyden in his belief that he had in fact served the claim form:

(a) the fax with which he sent the claim form referred to taking instructions about proposed consolidation, a topic to which he later returned.

(b) the conversation between Mr Hoyes and Mr van der Reyden on 22nd March about consolidation, which he submits understandably led Mr van der Reyden to think that Mr Hoyes was proposing that all claims including that of the claimant should be stayed until the question of consolidation of all claims was resolved by the Court.

(c) his fax of 4th April confirming that consolidation was agreed;

(d) HTD's fax of 13th June inviting the claimants to attend the CMC in the limitation action– a pointless exercise if, as is now submitted, the claim had not been served and was thereby time barred.

42.
Whilst I can accept that Mr van der Reyden's belief that he had served the claim form was reinforced by this sequence of events it is only, in fact, the last that is wholly inconsistent with the claim form not having been served. It is possible to discuss and reach agreement on future consolidation if and when the claim form has been served.

43.
More importantly the fact that Mr Van der Reyden believed that he had served the Claim Form does not mean that, if he was wrong about that, he had taken all reasonable steps to do so. If I had found that there was no valid service I would not have found that the claimant had taken all reasonable steps to effect it.

Dispensing with service under CPR 6.9

44.
Alternatively Mr Flaux invites me to dispense with service of the claim form under CPR 6.9.

45.
In Anderton v Clwyd County Council [2002] I WLR 2441 the Court of Appeal, in a decision delivered on July 3rd 2002, affirmed the principle laid down in Godwinv Swindon Borough Council[2002] 1 WLR 997 that rule 6.9 should not be used to circumvent the restrictions on granting an extension of time laid down in rule 7.6 (3), and that, in the majority of cases, applications for retrospective orders to dispense with service will be caught by Godwin. But it distinguished an application under rule 6.9 by a claimant who had not even attempted to serve a claim by one of the methods permitted by rule 6.2 from an application by a claimant who had made an ineffective attempt to do so. It held that, in the latter case, if the defendant's legal advisor has in fact received the claim form by a permitted method of service within the four month period, the claimant may be able to persuade the Court that there is no need to go though the motions of a second attempt at service of that which the defendant has already received and that it should, therefore, exercise a "dispensing discretion".

46.
In Wilkey v BBC [2003] 1 WLR the Court of Appeal, in a judgment delivered on October 22nd 2002, dispensed with service of a claim form when the claim form had been delivered to the legal department of the BBC on the last day of the period allowed for service and was therefore deemed by rule 6.7 (1) to have been served on the next day. The Court indicated that in post Anderton cases the Court should ordinarily not exercise its dispensing power in the claimant's favour, and would be the readier to reject the claimant's explanation for late service and to criticise his conduct of the proceedings, both considerations being ones identified in Anderton as relevant to the exercise of the dispensing discretion.

47.

In Cranfield v Bridegrove Ltd [2003] I WLR 2441, decided on May 14th 2003, Dyson LJ pointed out that in Anderton the Court did not have to consider whether the exception to the rule in Godwin might also apply where there has been some comparatively minor departure from the permitted method of service such as the despatch by second class post of a form that has been received by the right person within the four month period. He did not think that the Court was precluded by Wilkey from exercising discretion in such a case. That, Mr Berry submits is not the case here where, if he is right, the facts indicated an absence of an intention to serve.

48.
One of the cases under consideration was, as I have indicated. Murphy v Staples UK, to the facts of which I have referred. There the Court held that it would have been appropriate to dispense with service under rule 6.9. In doing so it said:

"It is possible that the relationship between service under section 725 (1) and service under the CPR was not fully understood, and that the importance of serving on the party to be served the original claim form that had been issued (rather than a copy) was not appreciated. But in future the significance of these points will have to be taken in to account. Errors of this kind will generally not be regarded as good reasons for making an order under rule 6.9. In stipulating for a strict approach for the future in such circumstances, we have been guided by what was said in the Anderton and Wilkey cases"..

49.
In the present case the Claim Form was despatched about 2.5 months prior to the expiry of time for its service. It was sent to the right person by a permitted method of service. After it had been sent discussions took place which were consistent (albeit not only consistent) with its having been served. After the four month period was over, HTD extended an invitation which was meaningless if service had not in fact taken place. I recognise that this was done in the course of a "round robin" letter to a number of different cargo interests and that Mr Hoyes may well not have had in mind that the four month period had expired two days before. If, contrary to my view, the claim form was not effectively served, it would have been so served if the words "by way of service" had been used in the letter of 21st March 2005.

50.
Had I thought that service had not been effected, I would have regarded the circumstances as sufficiently exceptional to make it right to dispense with service. The approach taken by the claimant's solicitors bordered on the sloppy; but the reality is that the claim form was with the defendant's solicitors in good time, considerably before the expiry of the four month period. In the words of Lord Justice Mummery "the defendant does not dispute that he or his legal adviser has in fact received, and had his attention drawn to, the claim form by a permitted method of service within the period of four months, or an extension thereof." No useful purpose would be served by requiring the claimant to send the claim form again. If service is dispensed with, no prejudice will have been suffered by the defendant other than that it will not be able to rely upon an unmeritorious limitation defence. But that is no prejudice at all: Moran Est (Scotland) Ltd v Hanson Concrete Products Ltd[2005] 1 WLR 2557, paragraph 42.

51.
The case is not one where, as in Claussen v Yates, the form was delivered upon the avowed basis that it was not being served at all. Nor do I accept that I can only dispense with service if it was objectively apparent to the defendant's solicitors that the claimant's solicitors were attempting to serve them

with the claim form that they received. In this connection I note that in Murphy v Staples the Court of Appeal regarded the judge's decision to dispense with service as valid even though, on the hypothesis upon which the question of giving such a dispensation arose, the claim form should have been served on the solicitors and, in their letter to the latter, the claimant's solicitors claimed that service had been effected on the defendant.

52.
Accordingly, subject to any argument as to the form of the order I propose to declare that the claim form dated 10th February 2005 was served on Hanjin on 21st March 2005 within the time prescribed by CPR 7.5.

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[1] Anderton v Clwyd County Council (No 2)[2002] 1 WLR 3174; [2002] EWCA Civ 933: see paragraph 45 below.