

A tour of judicial decision-making: The "Easter Egg" in *O'Driscoll v Clayton (Junior)* [2025] EWHC 2607 (Ch)

Briefing Summary: This briefing looks at HHJ Paul Matthews' observations on the recent judgment *O'Driscoll v Clayton* in relation to how judges reach a decision in the litigation process.

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At first sight the subject matter of *O'Driscoll v Clayton* would not appear to be ripe territory for a legal briefing on Channel Islands dispute resolution and employment law.

However, in the midst of a mildly interesting judgment involving the enforceability of an oral agreement for the sale of all the shares in a company (Caddicks Ltd), whose only asset was land in Cheshire comes a very useful guide to how English judges in civil claims reach decisions.

Whilst HHJ Paul Matthews (who also sits on Jersey's Court of Appeal) framed his comments as being for the benefit of lay readers in England and Wales, his observations are of use to any participants in litigation – in particular clients, including in the context of Channel Islands courts and tribunals.

HHJ Matthews explained the reasons for his comments as follows:

"First of all, judges are human. They do not possess supernatural powers that enable them to divine when someone is mistaken, or not telling the truth. Instead, they take note of the witnesses giving live evidence before them, look carefully at all the material presented (witness statements and all the other documents), listen to the arguments made to them, and then make up their minds. The point is that there are a number of important procedural rules which govern the decision-making of judges, and which are not as well-known as they might be."

HHJ Matthews covered the following:

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Burden of proof

In English civil proceedings, the burden of proof rests on the party who brings the claim.

In this case, Mr O'Driscoll, as the claimant, was required to prove that there was a binding agreement for the sale of the company's shares. The defendant, Mr Clayton, did not have to prove his own version of events unless he introduced new facts in response. The outcome depended on whether the claimant could establish his case on the evidence presented to the requisite standard of proof (below).

Standard of proof

The standard of proof in civil cases is based on the "balance of probabilities". In practice, this means that if the judge concludes something is more likely to have occurred than not, it will be treated as having happened for the purposes of the decision. Conversely, if it seems less likely, the court will proceed on the basis that it did not occur. Importantly, the court does not require absolute certainty or scientific precision. Civil litigation is not about proving facts beyond all doubt, it is about persuading the judge that your version of events is more probable than the alternative.

There is no requirement for absolute certainty or for proof beyond reasonable doubt, which is the standard used in criminal cases. The judge's decision is binary: either the claimant has proved his case, or he has not.

Role of the judge

The judge's role in civil litigation is that of an impartial referee rather than as an investigator or detective. Judges do not investigate or seek out evidence themselves. Instead, they decide the case based solely on the evidence and arguments presented by the parties. Material intended to be relied upon by a party should follow a "cards on the table" approach and therefore be disclosed upfront. Attempting a trial ambush by introducing evidence late is strongly discouraged, as any advantage gained is outweighed by the unfairness to the other party.

Each side is responsible for gathering and presenting its own case – eg its evidence and legal submissions. The judge ensures the process is fair and that both parties have the opportunity to present their case

Evidence: documents vs memory

When there is various documentary evidence available and witnesses rely on memory, which can be unreliable, civil judges today often place greater weight on documentary evidence; courts are well aware of how recollections fade and become distorted – and distortion can occur in the process of creating a witness statement and giving evidence.

Documents are generally considered more objective, especially when significant time has passed since the events in question, and witnesses fail to remember all the details. Documents enable dates and times of various events to be fixed with accuracy.

However, the judge must also consider oral and written witness testimony to assess credibility and truthfulness. Therefore, judges will still consider both witness testimony and documentary evidence combined, however while keeping in mind the inherent fallibility of human memory and relative objectivity of the documentary evidence available.

Reasons for judgment

Judges are required to give reasons for their decisions, setting out the main points and explaining how they reached their conclusions. While they do not need to address every argument or piece of evidence, they must provide enough detail for the parties to understand why the case was decided as it was. This transparency helps ensure that the decision-making process is clear and fair.

Failure to call evidence or witnesses

If a party fails to call a relevant witness or produce important evidence that was available, the judge may draw adverse inferences, assuming that the missing evidence would not have supported that party's case. Drawing an adverse inference from the absence of a witness should not be treated as a technical legal issue. Instead, it is a matter of rationality and common sense. Judges should decide whether the absence is significant based on the facts and circumstances.

Factors to consider include whether the witness was available, what evidence they could reasonably have given, what other evidence exists on the same point, and how important that point is to the case overall.

On the other hand, if documents are available to a party and they fail to disclose these in accordance with a disclosure obligation the court may draw an appropriate inference against that party.

The key takeaways for participants in litigation

- Judges are not superhuman and they are not investigators and/or detectives – they make decisions based on evidence and legal argument. If the parties do not put something in front of them, it is unlikely to be taken into account – be realistic, the court will not seek out evidence for you.
- Decision making is based on a balance of probabilities – this inevitably means that judges will on occasion make factual decisions with which either party (or on occasion both parties) disagree. Litigation is for this reason (and many other reasons) therefore inherently uncertain.
- Expect practical reasoning from judges – common sense prevails.
- Witness recollections can be unreliable/prone to bias and distortion and fade over time; judges know this and will place more weight on documentary evidence. Preserve documents and keep thorough records to provide accuracy.

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