Chancery & Commercial

Case Law Update

Autumn 2012

Cobden House Chambers
19 Quay Street, Manchester, M3 3HN
Tel: 0161 833 6000 Fax: 0161 833 6001
DX: 14327 Manchester

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Insolvency - *Hunt v Aziz* [2011] EWCA Civ 1239

The appellant wished to pursue a claim but she had been made bankrupt and her cause of action was vested in her trustee in bankruptcy. The trustee issued proceedings but later decided to discontinue due to difficulties obtaining ATE insurance. The appellant therefore applied for an order setting aside the notice of discontinuance and obliging the trustee to assign the claim. The Court allowed the application with the following qualification: *"*[The trustee] *may reject any offer ... on terms that all or any part of the net proceeds of a successful claim will be paid to him or applied for the benefit of the creditors on the grounds that the purchaser would in pursuing the claim after sale be acting as the mere nominee or delegate of the* [trustee] *who would accordingly continue to be at risk of liability for costs."* The appellant appealed. She argued that the Judge was wrong to include this qualification in his order - he should instead have decided that there was no risk of the trustee being liable for costs if the claim were assigned to her, she pursued it and it failed.

The Court of Appeal rejected the appellant's argument. Where a trustee transfers a claim to an impecunious assignee on terms that the trustee will receive a substantial proportion of the proceeds if successful, it would be wrong in principle and unfair on the defendant if he were precluded in advance from arguing that the trustee should be liable for costs. However, the qualification was still deleted - the Court should not have ordered that the trustee was entitled to reject certain offers before their existence, number, provenance and terms were known.

Professional Negligence - *Green v Eadie* [2011] EWHC B24 (Ch)

The claimant issued proceedings against her previous solicitors for failing to check the boundaries of a property she purchased in 2003. The claim was issued more than 6 years after exchange of contracts but less than 6 years after completion. The Court had to decide as a preliminary issue whether or not her claims in negligence and for breach of retainer were statute barred under the Limitation Act 1980.

As regards the claim in negligence, the Court held that the claimant would have suffered more than trivial loss when she exchanged contracts to buy the property. Consequently, her cause of action crystallised on exchange of contracts and was statute barred. As regards the claim for breach of retainer, any breach would have occurred before exchange of contracts. Even if the solicitors failed to remedy the breach thereafter, their failure would not have created a fresh cause of action. Accordingly, the claim for breach of retainer was also statute barred.

Wills and Trusts - *Lilleyman v Lilleyman* [2012] EWHC 1056 (Ch)

The claimant in a claim for reasonable provision under the Inheritance (Provision for Family and Dependants) Act 1975 failed to beat the defendants' Part 36 offer at trial. Normally, she would have been liable for all legal costs incurred by both sides after the offer was made.

The Court, exercising its discretion, disallowed 20% of the defendants' costs. A full recovery would have been unjust because the defendants had pursued the claim in a 'no holds barred' way, arguing that the will made reasonable provision from start to finish (which was *"an entirely unrealistic stance"*), disputing the claimant's account with no real ammunition and introducing irrelevant matters of personal criticism. While it may be that a 'no holds barred' approach to certain types of litigation is entirely appropriate, it is not in the context of claims under the Inheritance Act, where, even in

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a big money case, the costs form an ever-increasing part of the subject matter of the dispute until it is the costs burden alone which prevents settlement. The Court expressed a real sense of unease at the remarkable disparity between the costs regimes in Inheritance Act cases and in financial relief proceedings arising from divorce.

Landlord & Tenant - *Telchadder v Wickland (Holdings) Ltd* [2012] EWCA Civ 635

On 16th May the Court of Appeal handed down its judgment in a possession claim arising out of the occupation of a mobile home pursuant to a licence agreement. Amongst other things, Pinnock proportionality arguments were raised in defence to the claim, in response to which the Court of Appeal underlined the exceptionally high threshold to be met for the arguments to succeed.

Possession was sought as a result of various allegations by fellow occupiers of nuisance and anti-social behaviour on the part of Mr Telchadder. An order for possession was made despite a finding that Mr Telchadder was disabled for the purpose of the Disability Discrimination Act 1995 and/or the Equality Act 2010 and that his disability caused him to act in the manner alleged and despite related human rights arguments being raised (founded upon Article 8(2) of the Convention and the guidance of the Supreme Court in Pinnock) as to whether it was reasonable to make such an order in the circumstances.

The Court of Appeal upheld the decision to make a possession order. Delivering the leading judgment Lord Justice Mummery concluded at paragraphs 55 – 59 that, in assessing the reasonableness criterion, the Judge had properly taken account of disability discrimination, equality law and human rights (in accordance with Pinnock) and had arrived at the correct conclusion as those factors were outweighed by the repetitious nature of Mr Telchadder's behaviour and, significantly, the rights of other occupiers as regards respect for their homes and their private life.

Real Property - *Hughmans v Central Stream Services Ltd* [2012] EWHC 1222 (Ch)

The applicant firm of solicitors had acted for a Mr Davidson in litigation with Central Stream, which was compromised by a Tomlin Order that provided that on a sale of Mr Davidson's property, after payment of the mortgage, the first £100,000 was to be paid to Central, with any balance to be used to pay other debts, including his legal fees. The applicant subsequently obtained judgment against Mr Davidson for their fees, and a charging order over his beneficial interest in the property, protected by a unilateral notice.

The property was sold (by agreement), but after payment of the mortgage, less than £100,000 remained. The applicant solicitors and Central disputed who took priority: was it Central under the terms of the Tomlin order (which it was found created a beneficial interest in the property) or the solicitors by virtue of their charging order? The general rule is that equitable interests rank in the order of their creation. There is an exception to this rule under s. 29 of the Land Registration Act 2002, so that a later interest has priority if it is registered, but only if that interest is a disposition for valuable consideration. It was held – following *United Bank of Kuwait plc v. Sahib* [1997] Ch. 107 – that on the making of a charging order, the debtor receives no consideration from the judgment creditor, so that a charging order is not obtained for valuable consideration. As a result, priority was according to the order of creation, and Central was entitled to the balance of the net proceeds of sale.

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Real Property - *Thomson v Hurst (2012)*

Where property is purchased in joint names, there is a legal presumption that beneficial ownership follows, and that the registered proprietors' ownership is as beneficial joint tenants, and – if the joint tenancy is severed – as tenants in common in equal shares. As recognised in *Stack v Dowden* [2007] UKHL 17, the presumption only applies absent an express declaration of trust, usually contained in form TR1.

What is the position where the parties intended to purchase in joint names, but in fact the purchase is in the name of one only? Some guidance is provided by the recent decision of the Court of Appeal in *Thomson v Hurst* (2012). In that case, a couple had intended to purchase a property in their joint names, but had not done so on a mortgage advisor's advice, having regard to Mr Thomson's poor and inconsistent employment history, so that Miss Hurst obtained the mortgage solely in her name. The District Judge found that they had only been able to purchase the property at all because of Miss Hurst's financial discipline; that she was solely responsible for payment of the mortgage and outgoings; and that Mr Thomson would sometimes contribute up to £100 a week for the children and housekeeping. It was held that the parties had a common intention that Mr Thomson would have a beneficial interest in the property, but that they had not given thought to what the apportionment of that interest should be. The judge declared that Mr Thomson had a 10 per cent beneficial interest and that Miss Hurst had a 90 per cent beneficial interest in the property.

Mr Thomson appealed, and contended that since the parties had intended to purchase in their joint names – but had failed to do so due to the mortgage advisor's advice – the court should apportion beneficial ownership as if they had purchased in their joint names, and were therefore be entitled to equal beneficial interests. In other words, the purchase should be treated as one to which the *Stack v Dowden* presumption applied. The Court of Appeal rejected such an approach. It could not be assumed that, had the parties purchased in their joint names, they would have agreed to be joint beneficial owners as well as joint legal owners having regard to the facts of the case, so that there was no scope for the presumption that they had intended to be both legal and beneficial joint tenants. The correct approach in the absence of any agreement as to the size of the shares was that adopted by the District Judge, and the Court of Appeal would not interfere with his apportionment.

Professional Negligence - *Bowling v Edehomo [2011] EWHC 393(Ch)*

In 1989 a husband and wife purchased a house in joint names and were registered at the Land Registry as joint proprietors. In 2002 the husband and someone impersonating the wife (who was presumably not living in the property) instructed Bowling & Co. to act upon a sale of the property to innocent third parties. Contracts were exchanged on 21st November 2002 and the sale was completed on 2nd December 2002, with the impostor wife forging the wife's signatures on the contract and transfer. The net proceeds of sale were paid to the husband. Eventually the wife discovered the fraud and issued proceedings against the solicitors on 1st December 2008 (within the 6th year of the date of the transfer, but more than 6 years after the contract).

Roth J (reversing Judge Hand QC in the County Court) held that the claim was out of time, time starting to run from exchange of contracts and not completion. In doing so he followed previous authority and in particular the decision of the Court of Appeal on similar facts in *Nouri v Marvi [2010] EWCA Civ. 1107*.

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The decision on limitation is unexceptional (and may illustrate a subconscious hardening of attitude by the Judges after the enactment of the *Latent Damage Act 1986* which should deal with most "hard cases"), but what is more interesting are the two matters not discussed in the judgment.

Firstly, the solicitors' insurers (as did the solicitors in *Nouri v Marvi*, although the facts were slightly different and less stark than those in *Bowling & Co v Edehomo*) chose to fight the case purely on limitation and did not address the issue of whether the solicitors did owe a duty of care to the wife. It was accepted by the wife that because the solicitors had no contractual relationship with the wife, on general contractual principles with cases of mistake as to the contractual party either there is no contract or a contract with the impostor (*Shogun Finance Ltd v Hudson [2003] UKHL 62; [2004] 1 AC 919*). Solicitors owe few duties of care in tort where there is not also a contractual relationship, at least in inter vivos cases (for example, see *Hemmens v Wilson Browne [1995] Ch 223* where the successful Counsel for the solicitors was Mr Peter Roth). In his judgment Roth J did discuss the possibility of a duty of care in tort arising from a breach by the solicitors of money laundering regulations. However, it is not clear that a breach of money laundering regulations gives rise to an action by a defrauded party. On a more general level, the courts have laid down strict rules upon the imposition of liability as a constructive trustee, which require knowing assistance or knowing receipt, rules which refuse to impose liability for mere negligence and for good policy reasons are particularly protective of solicitors (e.g. *Carl Zeiss Stiftung v Herbert Smith [1969] Ch 276*). It would be quite wrong to circumvent these rules by imposing strict or negligent liability through a breach of money laundering legislation.

Secondly, the judgment did not reveal whether the wife had attempted to rectify the registered title of the innocent purchaser, in which action she may or may not have succeeded, or why she did not claim an indemnity from the Land Registry, for which she would appear to have a cast iron claim. In *Nouri v Marvi* the owner who had lost his title due to forgery failed as a matter of discretion to rectify the register against innocent purchasers, but went on to claim an indemnity from the Land Registry.

Professional Negligence - *Guy v Mace & Jones [2012] EWHC 1022 (Ch)*

The factual situation of this case has twice reached the Court of Appeal, before it came on for an 11 day trial before Sir William Blackburne. Mr Guy had acquired 47 acres of potential development land at Newton Heath, Manchester. He was friendly with Shaid Luqman, who was subsequently found to be dishonest. Mr Guy wished to sell the land to one of Mr Luqman's companies ("TAL") for £15 million, part of the consideration being a release of the land from borrowings owed to another of Mr Luqman's companies. Mr Guy's case was that while he signed the transfer to TAL, TAL obtained the transfer by fraud, or, possibly, if there was a valid transfer, TAL did not pay the consideration. Suffice it to say that TAL was registered as proprietor of the land and subsequently charged the land to Barclays Bank. Needless to say Mr Luqman disappeared.

Mr Guy applied to the Chancery Division to rectify the registered title against Barclays Bank, but failed at first instance. An application for permission to appeal was refused by the Court of Appeal in a fully reasoned decision (*Barclays Bank v Guy [2008] 2 EGLR 74*) which has become one of the leading authorities upon the scope of rectification against a successor in title under *the Land Registration Act 2002*. This

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decision has been the subject of much discussion among commentators and Land Registry Adjudicators. An attempt to persuade the Court of Appeal to revisit its previous refusal of permission to appeal in *Barclays Bank PLC v Guy (No 2) [2010] EWCA Civ. 1396; [2011] 1 WLR 681* failed upon the unexceptional ground that the Court of Appeal will not exercise its jurisdiction to revisit its previous decision merely because a difficult point of law could be decided differently.

Having failed in his rectification claim against Barclays Bank, Mr Guy (now acting in person) turned his attention to the one firm of solicitors who acted for him in the transaction and the two firms who successively acted for TAL. In a judgment running to 183 paragraphs (in which many other Manchester firms of solicitors and London Counsel had walk-on roles), the Judge:

> (a) Rejected the claim against the solicitors whom Mr Guy had instructed because the retainer had terminated at the critical time and because of Mr Guy's unusual instructions;
>
> (b) Rejected the claim against the solicitors acting for TAL upon the basis that a solicitor in a conveyancing transaction would only owe the other party a duty of care if there was an express assumption of liability. (Mr Guy did not allege dishonesty.)

The decision of Sir William Blackburne upon the obligations owed by a solicitor to the other party in a conveyancing transaction is welcome. The only possible liabilities which a solicitor can owe the other party to a conveyancing transaction are:

> (a) Liability under an undertaking;
> (b) A duty of care expressly undertaken;
> (c) Liability for deceit;
> (d) Liability as a constructive trustee, which requires dishonesty or knowledge of a breach of trust.

In the present case, had Mr Guy continued to instruct solicitors and given those solicitors orthodox instructions, he would have been protected by undertakings requested of the solicitors acting for TAL. Liability under an undertaking is freely given and both parties know where they are.

The instructions which Mr Luqman gave TAL's solicitors, in which Mr Guy may or may not have concurred, were that the consideration was to be satisfied by a release of a mortgage over the land and a payment of £5 million directly to Mr Guy. Conveyancing solicitors might consider it prudent not to act for clients where a large consideration passes directly between the parties.

Sir William Blackburne also found that the "true price" payable under the sale was £10 million and the reference in the documentation to the price being £15 million was to deceive a subsequent lender (not Barclays Bank). The Judge stated that this illegality would have barred any claim for negligence. This decision is to be contrasted with the decision of Mr Richard Snowden in *Scullion v Bank of Scotland PLC trading as Colleys [2010] EWHC 572 (Ch); [2011] PNLR 68* where a deliberate over-statement of the purchase price by 15% in the purchaser's mortgage application was held not to prevent the purchaser from suing the mortgagee's surveyors. In the Court of Appeal Lord Neuberger MR commented that the surveyors' decision not to appeal this point of

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legality was *"realistic"* (*[2011] EWCA Civ. 693, at para 23; [2011] 1 WLR 3218H*). In the circumstances neither decision can be regarded as the last word on the subject.

Wills and Trusts - *Drakesford v Cotton [2012] EWHC 114(Ch)*

The cases of *Drakesford v Cotton* and *Musson v Bonner [2010] W & TLR 1369* involved remarkably similar facts. Both involved families living in the Coventry and Nuneaton area, where the family home was held under an express declaration of trust. Both involved bank accounts held in joint names by an elderly mother and one only of her several children. In each the monies in the account had been solely contributed by the mother, for whose benefit withdrawals were solely made before death. In *Musson v Bonner* Judge David Grant sitting as a Judge of the Chancery Division in Birmingham held that after the death of the mother, the account was held upon a resulting trust for the mother's estate and hence divisible amongst all her children. In *Drakesford v Cotton* Morgan J likewise sitting in the Chancery Division in Birmingham held that after the death of the mother, the surviving account holder became solely beneficially entitled.

Why did remarkably similar facts give rise to completely different outcomes? In *Musson v Bonner* Judge Grant was not convinced on the evidence that the mother intended to make a gift of the monies in the account to the account holder, and held that the monies in the account were held upon a resulting trust for the estate. He was fortified in this conclusion by a finding that the deceased was on good terms with all her children. In *Drakesford v Cotton* Morgan J found that the monies in the account were held upon a *Young v Sealey [1949] Ch 278* trust, that is, the monies belonged solely to the deceased during her life-time, but on her death passed to the survivor absolutely. Morgan J came to this conclusion on the evidence of express statements by the deceased as to the intended ownership of the account and found support in the deceased being on very bad terms with one of her other children. A slight difference between the two cases was that in *Musson v Bonner* the account was more of a current account, whereas in *Drakesford v Cotton* the account was a deposit account.

In *Musson v Bonner* there was considerable discussion of the difficult issue of whether the presumption of advancement could apply to gifts to mature children, but in *Drakesford v Cotton* neither Counsel wished to venture down that difficult road. In *Drakesford v Cotton* Morgan J held that initially the account was held upon a resulting trust for the mother, but she subsequently declared a *Young v Sealey* type trust. This was not an assignment of a beneficial interest (which would have to be in writing to satisfy *s53(1)(c) Law of Property Act 1925*), but a declaration of trust of an existing beneficial interest in personalty which did not require writing and could be quite informal.

While the correct decision was reached in each case, one does wonder why it was necessary for two relatively poor families to expend large sums of money on resolving a relatively common-place dispute. Both accounts had mandates, but such mandates typically only regulate the position before death and their principal purpose is to protect the bank. It should not be too difficult for the mandate to have a series of alternative declarations of trust, which the parties can tick. The number of disputes about the beneficial ownership of land was significantly reduced when the Land Registry made the completion of a declaration of trust obligatory when executing a transfer on sale. A similar approach to joint accounts could save much by way of legal costs and family discord.

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Civil Procedure - *Hayer -v- Hayer [2012] EWCA Civ 257*

The Claimant brought a claim against his father (the Defendant) for an order for sale of a property transferred from the Claimant's grandfather to the Defendant in 1996, relying on a deed of trust by which the Defendant held the property on trust for himself and the Claimant in equal shares. The Defendant denied that he had signed the deed of trust, and alleged that his signature had been forged. During the trial, the Judge encouraged the Defendant to make an application under CPR 17.3 to amend his defence to argue that – if the deed of trust was found to be genuine – the Defendant had been the subject of undue influence by the grandfather in 1996. The Claimant opposed the amendment, but the Judge granted the application and found that although the Defendant had signed the deed it should be set aside for undue influence.

The Court of Appeal allowed the Claimant's appeal, holding that (1) the amendment was very late, made without satisfactory explanation and the Judge did not take into account all the relevant considerations; and that it should not have been allowed; (2) the Defendant would not have made the application to amend if the Judge had not encouraged it, and it resulted in an entirely different alternative case being put forward; (3) having allowed the amendment, the Judge should have granted the Claimant's application to adduce further evidence.

Accordingly, the Court of Appeal re-exercised its discretion under CPR 17.3 to refuse the application to amend; and noted that if a Judge suggested in any way how a party should run its case, he would be going beyond his function.