Chancery & Commercial

Case Law Update

February 2014

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Members of the Department

The Chancery and Commercial Department at Cobden House provides expertise in every area of Chancery and Commercial law, including company law, construction, contract, insolvency, landlord and tenant, private client taxation, probate and family provision, property, partnerships, professional negligence and trusts.

For complex intellectual property matters, Matthew Kime (door tenant), is a leading junior who is happy to attend conferences in London, at Cobden House or at any solicitor's office in England and Wales.

The Department prides itself on delivering accurate legal analysis, practical advice and a high standard of advocacy. Members can also deliver CPD accredited seminars at solicitors' offices on request.

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Civil Procedure – "Plebgate"

Mitchell -v- News Group Newspapers Ltd [2013] EWCA Civ 156

The Claimant (a Member of Parliament) brought a claim against the Defendant seeking damages for defamation, after the Sun newspaper reported that he *"raged against police officers at the entrance to Downing Street in a foul mouthed rant shouting "You're f…ing plebs"*.

The court listed a case management and costs budget hearing for 18th June 2013. The practice direction for defamation cases required the parties to *"exchange and lodge with the court their costs budgets in the form of Precedent HA not less than seven days before* [the hearing]". The Defendant did so on 11th June. The Claimant only did so in the afternoon of 17th June 2013. At the hearing, the Defendant's solicitor stated that his firm had not had any opportunity to consider the Claimant's budget. The Claimant's counsel submitted that the delay was *"to do with the pressure of litigation elsewhere in the firm on another case"*. The judge held the failure to be a breach of the Practice Direction and of the overriding objective. CPR 3.14 provides an automatic sanction that *"any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees"*. The Master (applying CPR 3.14 by analogy) made an order to that effect.

The Claimant made an application for relief from sanctions, which the Master heard on 25th July. The key submission was that the sanction imposed was far too harsh. The Master dismissed the application. She held that the time allowed for filing the budgets was sufficient; that it was not an onerous task; and that the likely effect would not be to preclude the Claimant from bringing his claim.

The Court of Appeal then dismissed the Claimant's appeal, reiterating the importance of the overriding objective, and highlighting the differences between the original and amended CPR 3.9. It also held that the sanction originally imposed was proportionate.

The CA stated that *"it will usually be appropriate to start by considering the nature of the non-compliance"*, and that *"if this can properly be regarded as trivial* [or insignificant]*, the court will usually grant relief provided that an application is made promptly"*; but that *"if the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief"*. Most importantly, it stated: *"If there is a good reason for* [the default]*, the court will be likely to find that relief should be granted* […] *but mere overlooking a deadline, whether on account of overwork or otherwise is unlikely to be a good reason"*.

Practitioners should note the following key points highlighted by the CA:

- *"Solicitors cannot take on too much work and* […] *fail to meet deadlines."*
- *"The need to comply with rules, practice directions and court orders is essential."*

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- *"Applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event."*
- *"Well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial."*

Sam Keeling-Roberts

Landlord and Tenant: Section 21 Notices

Spencer v Taylor [2013] EWCA Civ 1600

On the 9th December 2013 the Court of Appeal delivered a key judgment relating to the service of notices under Section 21 of the Housing Act 1988.

By way of a brief factual background, on the 6th February 2006 the landlord granted an assured short-hold tenancy for a fixed term of 6 months with rent to be paid weekly on the Monday of each week. At the end of the fixed term the tenant held-over in possession as a statutory periodic tenant. The period of the tenancy was therefore Monday to Sunday. On the 18th October 2011 the landlord served a notice upon the tenant in accordance with Section 21(4)(a) of the Housing Act 1988 to expire on the 1st January 2012. This date was a Saturday.

Prior to the judgment of Lewison LJ, this was a settled area of law (see, for example, *Fernandez v MacDonald* [2003] EWCA Civ 1219). That is to say, where a notice was served during the fixed term of the tenancy Section 21(1)(b) of the Housing Act 1988 applied so that written notice need not be in a prescribed form and need only provide 2 months' notice expiring on any date (including a date after a statutory periodic tenancy had arisen) whereas, where a notice was given after the commencement of a statutory periodic tenancy – as in the case before the Court – Section 21(4)(a) required at least 2 months' notice after the last day of a period of the tenancy.

It followed that, on the law as it then stood, the notice was defective. However, the Court of Appeal departed from this position. Section 21(2) of the Housing Act 1988 provides that a notice under Section 21(1)(b) "may be given before or on the day on which the tenancy comes to an end". The Court concluded that the language of the sub-section permitted service of a notice under Section 21(1)(b) after the expiry of the fixed term. Further, as the notice also included the usual 'saving provision', the tenant argued that this rendered the notice defective because it gave more than one date on which possession was required. That is to say, a fixed date and a date ascertainable by reference to the formula. The Court also dismissed this argument and held that, if the reasonable reader of a notice would understand that one date is the primary date and the other is a fall back date, the fact that there were two dates would not be sufficient to find that the notice was invalid.

The net result of the Court of Appeal judgment appears to be that, for assured short-hold tenancies granted for a fixed term, the mere giving of 2 months' notice in writing will be

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enough to bring the tenancy to an end even if it later becomes a periodic tenancy. Needless to say, this judgment has been met with some disappointment by tenant-lawyers who take the view that it has gone some way to preventing defences being raised to possession in reliance upon technical defects to Section 21 notices.

Gary Lewis

Insolvency / Landlord & Tenant / Debt

Sacha Helman v John Lyon [2014] EWCA Civ 17

In the case of *Sacha Helman v John Lyon*, the Court of Appeal addressed an interesting, but ultimately straightforward, argument relating to issues of personal insolvency and leasehold enfranchisement.

The claim centred upon a 99-year lease of a house in Maida Vale that the tenant had mortgaged to the sum of £2.5 million. Shortly thereafter, the lender granted a sub-charge to Bank Leumi (UK) plc (the "bank") on terms that allowed the appointment of a receiver under the Law of Property Act 1925. Some years later, the tenant was adjudged bankrupt and a trustee in bankruptcy was appointed. This prompted the bank to appoint receivers, following which the trustee disclaimed the lease as "onerous property" under section 315 of the Insolvency Act 1986. On 7 December 2011, the receivers agreed to sell the lease to the Claimant. Moreover, at the Claimant's request, the receivers served a notice to acquire the freehold under Part 1 of the Leasehold Reform Act 1967. The Claimant purchased the lease and the receivers assigned the benefit of the notice to the Claimant.

The matter came before the Court because the Defendant, who owned the freehold, alleged that the receivers' notice was invalid as a result of the tenant's bankruptcy or, in the alternative, the trustee's disclaimer. At first instance, Her Honour Judge Deborah Taylor rejected this argument on the grounds that *"the receivers' right to serve a notice in* [the bankrupt's] *name, like their power of sale under the sub-charge, were unaffected by the bankruptcy and disclaimer"* [paragraph 25].

The decision was overturned on appeal, with Lord Justice Rimer summarising the Defendant's *"simple"* and *"formidable"* submission as follows: *"The receivers' notice claiming the freehold was given in the name of* [the bankrupt]*, for whom the receivers acted as agents. By the time of the notice,* [the bankrupt] *was no longer the tenant of the house as his tenancy had, upon the prior appointment of his trustee in bankruptcy, vested in the trustee by operation of law, and so by then the trustee was the tenant: sections 306 of the 1986 Act and 27(5)(a) of the 2002 Act. The trustee was not yet qualified to give a notice under the 1967 Act, nor anyway did the receivers' notice purport to be given on behalf of the trustee, for whom the receivers were not agents. The result was that, as the notice was given on behalf of someone who was neither the tenant nor had been for 'the last two years', the enfranchisement condition prescribed by section 1(1)(b) of the 1967 Act was not satisfied and the notice was a nullity."*

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In reaching its decision, the Court of Appeal attributed no weight to the fact that the bankrupt was still the registered owner of the lease at the time of the notice. It also rejected the argument that the right to enfranchise must have survived the bankruptcy even though the bankrupt no longer qualified under the 1967 Act: "*Why* [the bankrupt] *and* [the lender] *were thought to be capable, by arrangements made exclusively between them, of binding the landlords to suffer the acquisition of their freehold in circumstances other than those prescribed by the 1967 Act is something* [the Claimant's counsel] *did not explain."*

In essence, the Court of Appeal cut through the confusion of the tenant's bankruptcy and the trustee's disclaimer to reach the simple conclusion that individuals who are not tenants and have not been tenants for the 2-year period prior to notice do not qualify under the 1967 Act. The clarity of the Court's reasoning and the simplicity with which it came to its decision should help practitioners deal with cases where these issues of insolvency, landlord and tenant and debt enforcement converge and could easily confuse.

Arron Walthall

Rectification of Defectively Executed Wills

Marley v Rawlings [2014] UKSC 2

The facts of *Marley v Rawlings* might be thought to come from a Specsavers advertisement than a decision of the United Kingdom Supreme Court. Mr and Mrs Rawlings instructed their solicitor to draw up wills in mirror form leaving their estates to the survivor and upon the death of the second to die to their foster son. The solicitor duly drew wills and supervised their execution. Unfortunately Mrs Rawlings executed her husband's will and vice versa. This error was not spotted by three people - Mr and Mrs Rawlings and their solicitor. (*"Should have gone to Specsavers! Special discounts for 'his and hers purchases'… and for members of the legal profession!"*)

The problem was only realised upon the death of Mr Rawlings, who survived his wife, and involved a contest between the natural son of Mr and Mrs Rawlings, who took on intestacy, and their foster son who would take under the intended wills.

The case of the foster son was financed by the solicitor's insurers (and not by a national chain of opticians!). At first instance Proudman J *[2011] EWHC 161 (Ch); [2011] 1 WLR 2146* found for an intestacy, holding, inter alia, that the power to rectify a will under s20 Administration of Justice Act 1982 did not extend to curing problems of execution of a will. This decision was affirmed by the Court of Appeal (Thomas P, Black, Kitchen LJJ) *[2012] EWCA Civ. 61; [2013] Ch 271*. The impressive leading judgment was given by Black LJ who reasoned that the power to rectify only applied where there was a valid will, and in the present case there was not a valid will of Mr Rawlings. On 5th July 2012 Lords Walker of Gestingthorpe, Dyson and Sumption JJSC granted the foster son permission to appeal to the Supreme Court.

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The Supreme Court allowed the appeal on 22nd January 2014 *[2014] UKSC 2*. The judgment was delivered by Lord Neuberger PSC with whom Lords Clarke, Sumption and Carnwath JJSC agreed. A separate judgment by Lord Hodge dealt solely with matters of Scottish law. (Lord Hodge is not to be confused with the Manchester Specialist Chancery Judge, H.H. Judge David Hodge QC, whose role in the case was as author of a book on rectification which was cited with approval.) The judgment of Lord Neuberger was of unusual clarity and contains important insights on matters outside the strict ambit of s20 Administration of Justice Act 1982.

Firstly, in paragraphs 17-26 Lord Neuberger PSC stated what many practitioners and some authors had long believed, that the modern principles of interpretation set out in a series of judgments of the House of Lords exemplified by Lord Hoffmann's speech in *Investors Compensation Scheme Ltd v West Bromwich BS [1998] 1 WLR 896* applied equally to wills as to contracts and other legal documents. What Lord Neuberger should have mentioned, but did not, was that the full context of a professionally drawn will included the habits of draftsmen and previous decisions of courts.

Secondly, in paragraphs 34-42 Lord Neuberger PSC addressed the argument of the foster son based upon "rectification by interpretation". This argument is based upon there being such an obvious mistake that the written text should be interpreted to mean the exact opposite of its literal meaning, in other words that "black" means "white". In the present case this involved putting the wills of Mr and Mrs Rawlings side by side, observing that there was an obvious mistake and that accordingly the text of the will signed by Mrs Rawlings should be taken to be the text of the will signed by Mr Rawlings. One of the widest statements in favour of "rectification (or correction) by construction" is in the speech of Lord Hoffmann in *Chartbrook v Persimmon Homes Ltd [2009] 1 AC 1101*, but Lord Neuberger noted that this approach had been forcefully criticised extra-judicially by two members of the Court of Appeal (Sir Richard Buxton and Lewison LJ). Ultimately because the appeal could be allowed on other grounds, Lord Neuberger preferred not to come to any conclusion on this issue, but his judgment does indicate that future courts are unlikely to accede to arguments that as a matter of interpretation the text can be read to result in the complete opposite of the literal (and normal) meaning.

Thirdly, in paragraphs 43-49 Lord Neuberger PSC addressed the argument of the foster son that the will signed by Mr Rawlings should be admitted to probate, but with the substantive provisions not admitted to probate upon the basis that Mr Rawlings did not know and approve of them. Once there was a valid will, albeit a blank piece of paper, except for the testimonium and attestation clauses, it could be rectified under s20 Administration of Justice Act 1982. Lord Neuberger rejected this wholesale deletion of words as going too far and because the deletion entirely altered the sense of the remaining words.

Fourthly, in paragraphs 55-67 Lord Neuberger PSC held that for s20 Administration of Justice Act 1982 a "will" did not necessarily mean a valid will, but could extend to an invalid will which became valid as a result of the rectification. It is entirely unclear how far this decision goes. It certainly blurs the traditional division of jurisdiction as to validity and

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interpretation of wills. On one view it would allow many defects in execution to be cured by rectification and means judicial adoption of legislation in certain Commonwealth and American jurisdictions which allows the courts to waive defects in execution - legislation which English law reform bodies have rejected. At paragraph 65 Lord Neuberger says *"it appears to me that the reference to a will in s20, means any document which is on its face bona fide intended to be a will, and is not limited to a will which complies with the formalities."* On the other view it would only allow defects in the body of a will to be rectified and would still require the three valid signatures. In this context Lord Neuberger's reliance (at paragraph 67) upon rectification being possible in cases where there was no compliance with s40 Law of Property Act 1925 and the Statute of Frauds is significant. In these cases the court will only act if there is a valid signature, and rectification cannot be used to add a signature. Contentious probate lawyers might be in for some interesting work.

Fifthly, in paragraphs 68-85 Lord Neuberger PSC considered the meaning of s20 (1) (a), (b) Administration of Justice Act 1982. S20 does not give the Court an unlimited jurisdiction to rectify, but only in cases of:

(a) a failure to understand…. instructions; or
(b) a clerical error

Whereas a failure to understand instructions has given few problems (and might actually apply in the present case), judges and practitioners have grappled with the meaning of *"a clerical error"*. Lord Neuberger stated that the choice was between:

(a) a *"narrow meaning"* which *"would be limited to mistakes involved in copying or writing out a document"*; or
(b) a *"wider meaning"* which include *"a mistake arising out of office work of a relatively routine nature, such as preparing, filing, sending, organising the execution of a document (save, possibly, to the extent that the activity involves some special expertise"*.

Lord Neuberger preferred the wider meaning on policy grounds and upon the ground that the relevant report of the Law Reform Committee did not explain the meaning or justification for *"a clerical mistake"*.

An interesting issue which was not dealt with in any of the courts is that all the judges were prepared to deal with probate issues and claims for rectification under s20 Administration of Justice Act 1982 at the same time. S20(2) provides that an application under s20 can only be made within 6 months of the date upon which representation is first taken out to the estate of the deceased without the permission of the court. S20(2) is clearly based upon s4 Inheritance (Provision for Family and Dependants) Act 1975. Under the Inheritance Act there were conflicting authorities upon whether a claim could be issued before a grant of representation (compare *Re Searle [1949] Ch 73* with *Re McBroom [1992] 2 FLR 49*). It is to be hoped that *Marley v Rawlings* is to be taken as authority for the ability of courts to deal with probate and Inheritance Act claims at the same time, rather than requiring the Inheritance Act claim only to be commenced after the conclusion of the probate claim.

Richard Oughton