Chancery & Commercial

Case Law Update

Summer 2015

Cobden House Chambers
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Members of the Department

We are pleased to announce that Robert Sterling (1970) and Lucy Wilson-Barnes (1989) have recently joined the Department. They are both highly respected practitioners with considerable experience and expertise and we wish them well for their future at Cobden House.

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.

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.


Richard Oughton
(Head of Department)


Colin Green


Stephen Pritchett


Paul Whatley


Sam Keeling-Roberts


Arron Walthall


Katherine Ballinger


Gary Lewis


Iris Ferber
(door tenant)


Matthew Kime
(IP specialist – door tenant)

Plus new members:

Robert Sterling (1970)
Lucy Wilson-Barnes (1989)

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Landlord and Tenant

Akerman-Livingstone (Appellant) v Aster Communities Limited (Respondent) [2015] UKSC 15

On 11th March 2015, the Supreme Court issued its much-awaited judgment in the case of *Akerman-Livingstone v Aster Communities Limited*, which concerned the approach to be taken by County Courts where defendant-tenants to claims for possession under the accelerated procedure rely upon defences under the discriminatory provisions of the Equality Act 2010 ("EA 2010").

At its heart, the question before the Supreme Court was whether the proportionality jurisdiction under the provisions of the EA 2010 was the same as that under Article 8 of the European Convention of Human Rights ("ECHR"). If the answer to that question were 'yes' – as indeed the Court of Appeal had previously held ([2014] EWCA Civ 1081) – then such defences would fall to be decided summarily in accordance with the principles established by the Supreme Court in *Manchester City Council v Pinnock* [2010] 3 WLR 1441 as later refined in *Hounslow LBC v Powell* [2011] 2 WLR 287. If the answer were 'no', then the Court was invited to provide guidance as to the jurisdiction and the approach to be taken by County Courts.

In answering 'no' and declaring that the approach to a defence under the EA 2010 is different to that under the ECHR, the Court held that a tenant's rights secured by the EA 2010 are different to those secured by the ECHR and are much wider and stronger in scope. Unlike a defence under the ECHR, it cannot be taken as a given that the aim of vindicating a landlord's property rights will almost always make eviction proportionate. A burden rests firmly with the landlord to demonstrate that there would be no "less drastic" means available to it. Accordingly, while summary disposal may still be appropriate in some EA 2010 cases, it will be far less so than in ECHR cases given that disclosure and expert evidence will be required.

The immediate fall-out from the judgment would go some way to suggesting a significant victory for tenants whilst ensuring that landlords have a much greater hurdle to overcome in securing possession using the accelerated procedure.

Gary Lewis

Costs Budgeting and Indemnity Costs

Excelerate Technology Ltd -v- Cumberbatch & Others [2015] EWHC 204 (QB)

One of the stated principles of costs budgeting is that the recoverable costs of the winning party will be assessed in accordance with that party's approved budget. What is unclear is how that principle applies in situations where a successful party seeks indemnity costs; such an award not being contemplated by CPR 3.18.

In *Elvanite Full Circle Ltd -v- AMEC Earth & Environmental (UK) Ltd* [2013] EWHC 1643 (TCC), the unsuccessful claimant had to pay the defendant's costs, which had been

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approved in the sum of £264,708 at a costs and case management hearing approximately a year before trial. A month before trial, the defendant sent an amended budget in the sum of £530,000. The claimant objected to the increase, but the defendant did not make an application to have its budget increased.

Following trial, three questions arose: whether the defendant was entitled to indemnity costs; the relevance of the existing costs management order; and whether the defendant could recover more than those costs approved by the costs management order. As to the first question – having noted that the pilot scheme (as now codified by CPR 3.18(b)) states that when assessing costs on the standard basis *"the court will not depart from the last approved budget unless satisfied that there is good reason to do so"* – Coulson J found that indemnity costs were not appropriate, but, *obiter*, that an award of indemnity costs might be a *"good reason"* to depart from an approved budget. In answering the second and third questions, Coulson J found that a party who seeks to increase its approved costs budget must make a formal application *"immediately [once] it becomes apparent that the original budget costs have been exceeded by more than a minimal amount"*; and that the Practice Direction required such an application before trial (there being no provision for application post-trial in the Rules). In the circumstances, there was unlikely to be any good reason to depart from the approved budget.

In *Kellie & Another -v- Wheatley & Lloyd Architects Ltd* [2014] EWHC 2886 (TCC) – another case where indemnity costs were argued for, but not awarded – HHJ Keyser QC disagreed with the approach of Coulson J, and held that *"costs management orders are designed to set out the probable limits of costs that will be proportionately incurred"*; not to reflect what Coulson J said was *"the relevant starting point for an assessment of costs on an indemnity basis as well as for an assessment on the standard basis"*. HHJ Keyser QC held that *"the costs management regime is not intended to give litigants an expectation that they will not incur a liability for disproportionate costs pursuant to an order for costs on the indemnity basis"*. As such, a party liable to pay indemnity costs is never protected by an approved costs budget, which is not intended to reflect indemnity costs.

Finally, in *Excelerate*, HHJ Simon Brown QC accepted that he had no jurisdiction to increase a budget post-judgment (accepting Elvanite), but endorsed the Court file with a *"recording"* that additional costs sought by the successful claimant were *"reasonably incurred and proportionate"* for the purposes of any detailed assessment. He considered that these additional costs were properly incurred and were not remotely foreseeable in the ordinary course of litigation, and that it was not viable to apply to increase the budget or agree the same with the defendants (who became litigants in person shortly before trial), effectively finding a *"good reason"* for departing from the budget and permitting the claimant to claim further costs at the detailed assessment.

As such, although the Court of Appeal has yet to consider the conflict between *Elvanite* and *Kellie*, the case law appears to be developing towards allowing successful parties to recover costs in excess of their approved costs budgets in a number of ways.

Sam Keeling-Roberts

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Wills & Trusts

King v Chiltern Dog Rescue [2015] EWCA Civ. 581

The decision of the Court of Appeal in *Sen v Headley* [1991] Ch 425 that a donatio mortis causa of land was possible had the effect of taking the esoteric doctrine of donatio mortis causa out of students' textbooks and back into everyday litigation. Disputes about the ownership of motor cars and the contents of accounts at the Post Office Savings Bank were not worth litigating, but disputes about the ownership of houses invited litigation.

An example of such a case was *Re King*. In this case the deceased was a divorced lady with no children. The major asset in her estate was her house worth £350,000. She had made a will leaving her estate to animal charities. Before her death, she allowed her nephew in his fifties to live with her. He gave evidence that the deceased handed over the title deeds to the house about 4 to 6 months before she died with the words *"this will be yours when I die"*. After her death, the nephew:

(a) claimed that she had made a donatio mortis causa of the house;

(b) alternatively applied for provision out of her estate under s1(1)(e) Inheritance (Provision for Family and Dependants) Act 1975 as a person financially dependent upon the deceased immediately before her death.

Both claims succeeded. In a careful judgment (sub nomen *King v Dubey* [2014] EWHC 2083(Ch); [2014] W & TLR 1411) Mr Charles Hollander QC sitting as a Deputy Judge of the Chancery Division allowed both claims, holding that there had been a valid donatio mortis causa of the house and, in the alternative, awarding £75,000 under the Inheritance Act.

With the unwillingness to accept defeat, which in recent years we have come to expect from animal charities, they appealed to the Court of Appeal. The Court of Appeal (Jackson, Patten and Sales LJJ) (sub nomen *King v Chiltern Dog Rescue* [2015] EWCA Civ. 581) allowed the appeal in relation to the donatio mortis causa, but dismissed appeals by both sides in relation to the quantum of the award under the Inheritance Act.

The leading judgment was given by Jackson LJ who took the opportunity to restate the law on donatio mortis causa. The appeal was allowed principally upon the ground that there was no evidence that the deceased contemplated her impending death. Between 4 and 6 months elapsed between the delivery and her death. The deceased was aged 81 years at the date of the delivery and not suffering from any specific illness. This was incompatible with the requirement for a donatio mortis causa. In this context reference might be made to the life-expectancy tables in At A Glance, which give the life-expectancy of a woman aged 81 years as 10.5 years. In doing so, the Court of Appeal expressly over-ruled the decision of Mr Jonathan Gaunt QC sitting as a Deputy Judge of the Chancery Division in *Vallee v Birchwood* [2013] EWHC 1449 (Ch); [2014] Ch 271. In truth *Vallee v*

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Birchwood was distinguishable in that the deceased in that case was in poor health and said to the donee in August that he might not live until Christmas.

Jackson LJ stated that it was a requirement that, *"the donor makes a gift which will only take effect if and when his contemplated death occurs. Until then the donor has the right to revoke the gift"* (para 50(ii)). He held that the words *"this will be yours when I die"* did not imply a gift conditional on death, but simply an ineffective will, a matter supported by the deceased's subsequent ineffective attempts to make a will in favour of the nephew (para 71). This is a highly questionable holding. The concept of a donatio mortis causa is difficult for lawyers to articulate and is much more so for laypeople close to death. In the past, Courts have inferred the requisite intention from the surrounding circumstances and there was no good reason why the Court of Appeal should not have done so in this case.

The nephew had a chequered past and the charities raised the important issue of the requirement of corroboration for claims against an estate. In the end the Court of Appeal did not find it necessary to rule upon the point, but each of the three Judges indicated a slightly different approach (para 62-65, 96, 97). With respect, the point should never have arisen in the Court of Appeal since the trial Judge correctly found that the unsigned will was sufficient corroboration.

In relation to the quantum of the award under the Inheritance Act, the trial Judge paid regard to the shortness of time during which the deceased maintained the nephew and the relatively low level of the maintenance by the deceased. He specifically rejected a claim for £100-£150,000 with which the nephew could buy a small flat.

The decision of the Court of Appeal upon the need for strict compliance with the requirements of impending death and the conditionality of the gift will lead to much fewer successful donationes mortis causa. Further, all the reported cases on gifts of land have involved unregistered titles. It was thought that the delivery of a Land Certificate would suffice for registered land, but Land Certificates were abolished by the Land Registration Act 2002. With the spread of registered title and the abolition of Land Certificates, the scope for donatio mortis causa will be very much reduced. Further, bank passbooks are being phased out and many investments are held electronically. Unless the Courts hold that the delivery of PIN numbers, plastic cards, keys to electronic signatures and the like can constitute symbolic delivery, which seems unlikely, the scope for finding a donatio mortis causa will be further reduced. The result might be that *Sen v Headley* has been relevant to practical legal situations for less than 25 years.

Richard Oughton

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Wills & Trusts

Mills v Mills [2015] EWHC 1522 (Ch)

Mills v Mills is a useful case because it addresses whether the Court can retrospectively approve a transaction that is contrary to the rule against self-dealing.

The facts involved land in Enfield that was held on trust by Alwin Mills (who had since died), his wife Pauline and their two sons, David and Richard. The trust was intended to tie up the land for a considerable period and its main terms were as follows:

- 60% of the land was to be held for Alwin and Pauline as joint tenants;
- 40% of the land was to be held by David and Richard as joint tenants;
- On the death of both parents, their 60% share would be added to David and Richard's share (or pass to their issue as the case may be);
- If either David or Richard died with issue, their joint tenancy would be severed and the deceased's share would be held on trust for any of his issue who survived him and reached 18 years of age.

There was also provision for if either son, or both sons, died without issue.

In 1993, the trustees sold a small corner of the land to David and his wife Pauline, who built a house on it. At the time, the parties overlooked the fact that David was a trustee and that trustees cannot purchase trust property without the consent of all the beneficiaries (the rule against self-dealing). Even though the rest of the family had agreed to the sale, the class of beneficiaries included David and Richard's as yet unborn issue and so it was not possible to obtain all of the beneficiaries' consent. As a result, the sale breached the rule against self-dealing and was at risk of being overturned in future by a potential, unborn beneficiary.

After the problem was recognised, David and Pauline applied to the Court for an Order approving the sale. Although the Court can approve a transaction in advance (provided that it is in the interests of the beneficiaries and at the proper price) there was some doubt as to whether it could give its approval retrospectively. After considering the matter, David Cooke HHJ found there was no reason in principle why permission could not be given retrospectively, particularly as the rule against self-dealing was not absolute. He also found support from the case of *Holder v Holder* [1968] Ch 353, in which the Court refused to impeach a sale of estate assets to an executor who had renounced his executorship but had already intermeddled with the estate.

Nevertheless, the Judge found that the test for retrospective permission had not been satisfied. In doing so, he considered the same factors that would have been taken into account if the matter had been brought before the Court for prospective permission, namely the requirement for a valuation to prove that the proper price had been paid and evidence that the sale was desirable in the interests of the beneficiaries and the trust as a whole. In this instance, there was no evidence of the land value in 1993 and conflicting evidence as to what had been paid. Moreover, whilst the family business benefitted by

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having a manager living on-site, the trust did not benefit from the family business (that was allowed to use the site without paying rent). Fortunately for the parties, the Court found a solution by approving a proposed sale of the entire site, including any claim to the area on which David and Pauline had built their home.

This is a useful case because it confirms that the Court has the power to retrospectively approve sales of trust property that are contrary to the rule against self-dealing. It is also a helpful reminder that solid evidence is required whenever applying for the Court's approval.

Arron Walthall

Articles in this edition have been provided by Richard Oughton, Sam Keeling-Roberts, Arron Walthall and Gary Lewis