Cobden House
CHAMBERS

Chancery & Commercial

Case Law Update

Winter 2015

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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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Trusts of Land

Bagum v Hafiz & Hai [2015] EWCA Civ 801

In this case, the Court of Appeal explored the types of order that can be made under section 14 of the Trusts of Land and Appointment of Trustees Act 1996.

The facts involved a residential property owned by Mrs Bagum and her two adult sons, Mr Hafiz and Mr Hai, as tenants in common in equal shares. Mrs Bagum and Mr Hafiz lived in the property, whereas Mr Hai lived elsewhere.

The dispute arose as a result of Mr Hai's desire to release funds by letting, remortgaging or selling the property. Despite wanting to remain, Mrs Bagum and Mr Hafiz eventually agreed to a sale. The property was marketed and an offer was received. At that point, Mr Hai changed his mind; he refused to sign the transfer document and instead insisted on purchasing the property himself.

After a period of inaction, Mrs Bagum contacted Mr Hai to suggest a possible solution – if they obtained a valuation, Mr Hafiz would be willing to purchase Mr Hai's share. When this suggestion was not accepted, she issued proceedings under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 for an order obliging Mr Hai to sell his interest to Mr Hafiz or, alternatively, for an order for sale.

At first instance and on appeal, the Court held that it had no jurisdiction under section 14 to order a beneficiary to sell his or her beneficial interest. This is because section 14 permits the Court to make orders relating to *"the exercise by the trustees of any of their functions"* and it is *"no part of the functions of trustees to deal with, or dispose of, beneficial interests"*.

Nevertheless, the Court managed to achieve a similar outcome by ordering a sale on terms that gave Mr Hafiz the exclusive right to buy the property for a 6-week period. Although Mr Hai objected to the order on the grounds that it had the same effect as a compulsory transfer of his beneficial interest, the Court of Appeal rejected his criticisms. A trustee's functions undoubtedly include the power of sale, even if the purchaser is one of the beneficiaries. Moreover, section 14 gives the Court *"the widest discretion",* provided it takes into account the list of considerations set out in section 15 (the intentions of the person who created the trust, the purposes for which the property is held, the welfare of any minor and the interests of any secured creditor). This discretion, which is "*substantially wider… than might be enjoyed by the trustees themselves"* and which "*departs from the general rule of equity which requires the trustees single-mindedly to advance the interests of the beneficiaries as a class, without preferring some of them over others"* enabled the Court to favour Mr Hafiz in this instance.

Bagum v Hafiz & Hai is interesting because it provides a reminder that the Court can be creative when formulating orders in TOLATA cases and because it helpfully clarifies the

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limits of what can be achieved. It is also an important authority to remember when advising property owners who have fallen into dispute.

Arron Walthall

Contractual Penalty Clauses

Beavis v ParkingEye Limited [2015] UKSC 67

On 4th November 2015, the Supreme Court issued its much awaited judgment in the case of *Beavis (Appellant) v ParkingEye Limited (Respondent)* which concerned the enforceability of parking charges both at common law and under the Unfair Terms in Consumer Contracts Regulations 1999 ('the Regulations').

By way of brief background, ParkingEye Limited had agreed with the owners of the Riverside Retail Park to manage its car park. In doing so, it displayed a number of notices throughout the car park which confirmed to users that a failure to comply with the two hour parking limit would result in a charge in the sum of £85. Mr Beavis had overstayed the limit and ParkingEye sought payment of the £85 charge. Mr Beavis had been unsuccessful both at first instance and before the Court of Appeal in alleging that the £85 charge was unenforceable at common law as a penalty and/or that it was unfair and unenforceable under the Regulations. He therefore appealed to the Supreme Court.

In dismissing the appeal by a majority (Lord Toulson dissenting), the Supreme Court confirmed that the correct common law test for a penalty was whether the clause *"is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation"* (Lord Neuberger and Lord Sumption at paragraph 32). This test requires consideration as to whether any and, if so, what legitimate business interest is served and protected by the clause and, if so, whether the provision made for that interest is *"extravagant, exorbitant or unconscionable"* (Lord Mance at paragraph 152). While the doctrine is not not limited to cases requiring the payment of money on breach, a clause fixing a level of damages payable on breach will only be a penalty if there is an *"extravagant disproportion"* between the stipulated sum and the highest level of damages that could possibly arise from the breach (Lord Hodge at paragraph 255).

In applying the test to the instant case and declaring the parking charge to be lawful both at common law and under the Regulations, the majority considered that the charge had two legitimate interests, namely the management of the efficient use of parking spaces for landowners and the generation of a profit for ParkingEye. Further, the sum of £85 was not extravagant, exorbitant or unconscionable in light of, inter alia, the practice in the United Kingdom as indirectly regulated by the British Parking Association's Code of Practice and the clear wording of the notices. Finally, while the charge fell within the description of those

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terms that were potentially unfair under the Regulations, it did not fall within the basic test for unfairness so as to be 'contrary to the requirement of good faith' for the same reasons.

It follows that, in refusing to abolish or indeed extend the penalty rule, the Supreme Court has underlined the high hurdles that will be faced by those contracting parties who seek to avoid the contractual remedies that arise on breach of primary contractual obligations.

Gary Lewis

Real Property

Malory Enterprises Ltd v Cheshire Homes (U.K.) Ltd [2002] EWCA Civ. 151
Fitzwilliam v Richall Holdings [2013] EWHC 86 (Ch)
Swift 1st Ltd v Chief Land Registrar [2015] EWCA Civ. 239
MacLeod v Gold Harp Properties Ltd [2014] EWCA Civ. 1084

The decision of the Court of Appeal in *Malory Enterprises Ltd v Cheshire Homes (U.K.) Ltd [2002] EWCA Civ. 151; [2002] Ch 216* was one of the most difficult and controversial decisions concerning registered land in the last quarter century. The author was Counsel for Cheshire Homes (U.K.) Ltd, the Defendant, at the trial and Junior Counsel in the Court of Appeal.

To the Doors of the House of Lords

What is little known is that the Defendant appealed the decision of the Court of Appeal to the House of Lords and that such an appeal was settled on terms favourable to the Defendant. As is customary, the Court of Appeal refused leave to appeal. The Defendant petitioned the House of Lords directly and the Appellate Committee consisting of Lords Nicholls of Birkenhead, Hoffmann and Rodger of Earlsferry, indicated upon reading the Petition that they were minded to give leave. Consequently there was no attendance by any party at the hearing on 14th October 2002 when permission was granted (*[2002] 1 WLR 3016*).

The principal grounds of the Defendant's appeal were as follows:

(a) Despite the forged transfer to the Defendant, the fact of registration was sufficient to vest both the legal and beneficial interest in the Defendant. This argument was advanced upon both the technical wording of the Land Registration Act 1925 and the wider argument that the effect of registration was to confer "immediate indefeasibility" as opposed to "deferred indefeasibility" i.e. registration conferred good title on the proprietor as opposed to the mere ability to pass good title to a purchaser. Reliance was placed upon articles by *Rouff*, *Palk* and *Smith* and the decision of the Privy Council in *Frazer v Walker [1967] AC 569* (Viscount Dilhorne,

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Lords Denning, Hodson and Wilberforce and Sir Garfield Barwick) adopting immediate indefeasibility for the Torrens system. Reliance was placed upon the insurance element of land registration in that both the Claimant and the Defendant had paid fees to the Land Registry which were in part premiums for a State Guarantee. The House of Lords was invited to either overrule or distinguish *Attorney-General v Odell [1906] 2 Ch 47* or hold that it had been overruled by s69 and s83(4) of the Land Registration Act 1925.

(b) A right to rectify the register could not be an overriding interest within s70(1)(g) of the Land Registration Act 1925.

(c) Alternatively, the Claimant was not in "actual occupation" of the land at the relevant time.

(d) Rectification of title could not be retrospective and hence the Defendant could not be liable to the Claimant for the partial demolition of the half-completed buildings on the land.

(e) In any event the Defendant was entitled to an indemnity from the Land Registry.

The Defendant's Printed Case (which was almost entirely the work of Junior Counsel) can be viewed as a PDF document on Chambers' Website (www.cobden.co.uk). Counsel for the Claimant produced a characteristically extremely thorough Printed Case in opposition, although the emphasis was more upon the facts and the wording of the legislation as opposed to wider principles.

The case was listed for hearing before the House of Lords for four days in March 2004. About three weeks before the hearing, the Land Registry proposed a compromise whereby in summary it paid all the costs of both the Claimant and the Defendant and gave both parties an indemnity. The terms (which were not confidential) were embodied in a Tomlin Order. The terms were very attractive to the Defendant in that it had a limited budget for litigation, which had led to it dispensing with Leading Counsel for the House of Lords. Further, while the legal advisers of the Defendant were confident of winning on the majority of issues, it was doubtful whether the Defendant would succeed on all issues with a consequent effect on costs. The motives of the Land Registry in offering the compromise were unclear - unlike the Claimant and the Defendant, it had an interest in clarifying the law, although it might have thought that any decision only affected the Land Registration Act 1925 which had been replaced by the Land Registration Act 2002 and that the expenditure of money on points of only historic interest was not wise.

Clarification of the Law in the Last Two Years

The compromise of the appeal to the House of Lords left the decision of the Court of Appeal as an apparently binding precedent, but the law in a state of uncertainty. Two questions arose:

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(a) Was the decision of the Court of Appeal correct?

(b) Did it (a decision under the Land Registration Act 1925) apply to the Land Registration Act 2002?

Most (but not all) commentators took the view that the decision of the Court of Appeal was wrong. There were a significant number of cases in which *Malory v Cheshire* issues arose but where the Courts did not address the status of *Malory v Cheshire*. This has now changed with a series of three cases that have now served to clarify at least some of the issues.

The facts of *Fitzwilliam v Richall Holdings [2013] EWHC 86 (Ch); [2013] 2 P & CR 21* (which deserves to be more widely reported) were gloriously straightforward. An imposter forged the signature of a registered proprietor who was not in occupation on a transfer to an innocent purchaser, who was duly registered. The original owner then applied for the title to be rectified and to be restored as proprietor at the expense of the innocent purchaser. Newey J held that:

(a) A registration procured as a result of a forgery was a nullity following *Malory v Cheshire.*

(b) In this respect the Land Registration Act 2002 was the same as the Land Registration Act 1925.

Accordingly rectification was ordered as a matter of course. The Judge did not go into the wider issues canvassed in the appeal to the House of Lords or address the issue of an indemnity from the Land Registry.

The next case was *Swift 1st Ltd v Chief Land Registrar [2015] EWCA Civ. 239; [2015] 3 WLR 330* and had equally straightforward facts. An imposter forged the signature of a registered proprietor upon two charges, which were duly registered. The registered proprietor succeeded in rectifying the registered title and the chargee applied to the Land Registry for an indemnity under paragraph 1(1)(a) of Schedule 8 to the Land Registration Act 2002 in respect of loss caused by a forged disposition. The Land Registry defended the claim upon the basis that the registered proprietor was in actual occupation and hence had an overriding interest under para 2 of Schedule 3 to the Land Registration Act 2002 which, following *Re Chowood's Registered Land [1933] Ch 574*, would defeat a claim for registered land. Mr Richard Sheldon QC sitting as a Deputy Judge of the High Court found for the chargee (*[2014] EWHC B26*) and the Court of Appeal (Moore-Bick, Patten, Tomlinson LJJ) dismissed an appeal by the Land Registry (the sole judgment was given by Patten LJ).

The Court of Appeal could have chosen to deal with the appeal solely upon the construction of para 2 of Schedule 3 to the Land Registration Act 2002, but instead chose to deal with the wider issue of the effect of registration of title. Intriguingly it was Counsel

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for the Land Registry who argued that *Malory v Cheshire* was wrongly decided where it was held that a forged transfer only conveyed the bare legal estate with the beneficial interest remaining with the original proprietor. Patten LJ, following most commentators and the general approach of the Law Commission in its two reports leading to the Land Registration Act 2002, inclined to the view that a forged disposition should convey the full beneficial and legal interest. He said,

> *....the policy of both the 1925 Act and the LRA 2002* [is] *that it is registration rather than the quality of the prior disposition which creates and constitutes the proprietor's title to the registered estate or charge, see s58(1) LRA 2002.*
>
> (*para 26; [2015] 3 WLR 251B-C*)

Accordingly Patten LJ needed a reason not to follow *Malory v Cheshire*. He refused to hold that the wording of the 1925 and 2002 Acts was sufficiently different to justify holding that *Malory v Cheshire* did not apply to the current Act. Instead he found two reasons for holding that the decision was *per incuriam*, namely:

(a) Remarks of Slade LJ in *Argyle BS v Hammond (1985) 49 P & CR 148 at 156* that s69 of the Land Registration Act 1925 vested good title in a proprietor even if he claimed under a forged instrument. *Argyle BS v Hammond* was referred to in the judgment of Arden LJ, but not on this point (*para 45; [2002] Ch 228H*).

(b) The Court of Appeal was not referred to s114 of the Land Registration Act 1925 which provided as follows: "*Subject to the provisions in this Act contained with respect to an indemnity and to registered dispositions for valuable consideration, any disposition of land, or of a charge, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner*".

Patten LJ stated that, if Arden LJ had considered s114, she would have held that s20 of the Land Registration Act 1925 included a forged disposition (*para 44; [2015] 3 WLR 258B*), but query whether this would indeed have affected her decision that a forged disposition was not "a disposition" for any statutory purpose. In *Attorney-General v Odell [1906] 2 Ch 47* s98 of the Land Transfer Act 1875 (the predecessor of s114 of the Land Registration Act 1925) figured in the judgment of Kekewich J, which was overruled, and in argument before the Court of Appeal, but was not mentioned in any of the judgments in the Court of Appeal.

Accordingly Patten LJ held that *Malory v Cheshire* should not be followed and held that a forged disposition upon registration vested both the legal and beneficial interest in the registered proprietor. *Fitzwilliam v Richall Holdings* was in effect overruled.

It has to be admitted that s114 of the Land Registration Act 1925 escaped the attention of all Counsel in *Malory v Cheshire* at first instance and in the Court of Appeal and the Printed Cases of Counsel for the Claimant and the Defendant (and almost all textbook writers). It is an important provision which should have been put before the Courts, but it is doubtful whether, by itself, it would have affected the result in the Court of Appeal.

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In relation to an indemnity under para 2 of Schedule 3 to the Land Registration Act 2002, Patten LJ proceeded upon the basis that a right to rectify could be an overriding interest for a person in actual occupation, but held that the express provisions of para 2 of Schedule 3 to the Land Registration Act 2002 were an exception to *Re Chowood's Registered Land* which held that an indemnity was not available where rectification was to give effect to an overriding interest. The Land Registry did not reveal that it had in effect conceded this point when it compromised the appeal to the House of Lords in *Malory v Cheshire*.

The question of the extent to which rectification of the registered title could have retrospective effect was one of the issues in *Malory v Cheshire*, where the Claimant sought to make the Defendant liable in damages for partially demolishing half-completed buildings at a time when the Defendant was still the registered proprietor.

Freer v Unwins [1976] Ch 288 was a decision under the Land Registration Act 1925. Here a restrictive covenant was not noted against a registered title when a purchaser completed his registration and consequently the purchaser took free of the covenant. Subsequently the registered title was rectified to note the restrictive covenant and the covenantee sued for an injunction. Walton J dismissed the claim upon the basis that rectification could not adversely affect the title of a purchaser for value who had purchased free of an incumbrance. In part he relied upon the unregistered authority of *Wilkes v Spooner [1911] 2 KB 473* that notice of an equitable interest after purchase did not make the purchaser subject to the interest.

In the Court of Appeal in *Malory v Cheshire*, Arden LJ, in reliance upon *Freer v Unwins*, held that rectification could not be retrospective, but still found on obscure grounds that the Defendant was liable for damaging buildings when it was the registered proprietor. These grounds would have been vigorously contested in the House of Lords. The other two members of the Court found it unnecessary to be drawn on the issue.

Paragraph 8 of the Fourth Schedule to the Land Registration Act 2002 provides as follows:

> *The powers under this Schedule to alter the register, so far as relating to rectification, extend to changing for the future the priority of any interest affecting the registered estate or charge concerned*

It has always been thought that this is a statutory enactment of *Freer v Unwins*, but the language of this provision has proved difficult to understand and apply.

In *MacLeod v Gold Harp Properties Ltd [2014] EWCA Civ. 1084; [2015] 1 WLR 1084* the Court of Appeal had to consider whether rectification of the registered title could prejudicially affect a purchaser who had taken free of unregistered interests. The purchaser argued that rectification could not be retrospective and relied upon paragraph 8 of the Fourth Schedule to the Land Registration Act 2002. The Court (Richards, Sullivan, Underhill LJJ) in a judgment given by Underhill LJ held that rectification could adversely

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affect a purchaser who had taken free of an unregistered interest and in effect overruled *Freer v Unwins*. In relation to *Malory v Cheshire*, he said that the issue of retrospectivity was concerned with damages when the Defendant was still the registered proprietor (*para 52; [2015] 1 WLR 1265E-F*) and that Arden LJ was entirely correct in holding that one could not be liable in damages for any acts done prior to rectification (*para 96; [2015] 1 WLR 1283C*).

A lesson from *MacLeod v Gold Harp Properties Ltd* is the importance of objecting to applications for rectification of the registered title. Most examples of rectification are effected by the Land Registry (usually to correct its own errors) and not by the Court and involve only perfunctory notice to a registered proprietor. It is important to have up to date registered addresses for service and to attend to any notification of a proposed rectification promptly.

Richard Oughton
(who appeared for Cheshire Homes (U.K.) Ltd)

Civil Procedure: Service on a Scottish Company

Ashley v Tesco Stores [2015] EWCA Civ 414

Mrs Ashley was one of approximately 70 claimants in an action concerning the Tesco Superstore in Toxteth, Liverpool. The claim was principally in nuisance and it alleged that during the course of construction of the superstore there had been a nuisance caused by noise, vibration, dirt, dust, vermin and excessive lighting for which Tesco, the developer Santon Group Developments, and the builder David Patton & Sons were answerable.

The appeal, which, unusually, was a second appeal, was limited to a procedural issue between Mrs Ashley and Santon. Santon was a Scottish registered company. On the very last day of the 4-month period after the claim had been issued, Santon's English solicitors gave notice to Mrs Ashley's solicitors that they were authorised to accept service on Santon's behalf. The notice was sent by fax and did not reach the solicitor having conduct of the case until after the expiration of the 4-month period.

Mrs Ashley's solicitors served the proceedings on Santon at its registered address in Scotland within 6 months of the claim being issued. Service was effected in accordance with section 1139(1) of the Companies Act 2006.

Santon disputed the validity of service on the ground that the claim form was served out of time. Evidentially, Santon relied upon having a place of business in England and argued that the claim form should have been served within the jurisdiction at Santon's place of business in accordance with CPR 6.9 or on Santon's solicitors under CPR 6.7(1). Most importantly, they contended that the time for service was merely 4 months.

The time limit for service became an issue on a strike out application, first before the District Judge and then on appeal to Patterson J. On both occasions Mrs Ashley was

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unsuccessful. She was fortunate to obtain permission from the Court of Appeal to bring a second appeal. The ground relied upon by her was a matter of important principle and practice.

In the unanimous judgment of the Court of Appeal, the time limit for service on Santon, as a Scottish registered company, was 6 months provided that service was in accordance with section 1139 notwithstanding that Santon had a place of business in England and its solicitors had given notice that they were nominated solicitors within the 4-month period.

The reasoning of the Court of Appeal was simple and succinct: section 1139 was a true alternative method of service to those modes of service permitted by the CPR. The alternative method was expressly provided for at CPR 6.3(2): *"(2) A company may be served – (a) by any method permitted under this Part; or (b) by any other methods of service permitted under the Companies Act 2006"*.

Santon, however, identified CPR 6.9 and 6.40 as rules that required service in accordance with CPR 6.9 as a primary method of service that had to be exhausted before service under section 1139 was sanctioned. However, the Court of Appeal overcame this argument by underlining that by CPR 6.40(2) the claim form for service on a party in Scotland *"must be served by a method permitted by Section II"*. Section II of Part 6 included CPR 6.3(2) so that both service in accordance with the CPR and service in accordance with section 1139 were permitted and, if they were permitted, it meant that service under section 1139 was an alternative method of service.

The importance, therefore, of section 1139 is not to be forgotten or overlooked. It also overcomes any practical difficulty caused by a Scottish company having a place of business in England and a claimant having to make enquiries as to the precise nature, extent and whereabouts of that business. The outcome also deftly sidestepped the recurring problem of late nominations by defendants' solicitors, where those nominations only come to the attention of the other side after the expiration of the 4-month time limit.

Robert Sterling
(who appeared for the successful appellant)

Articles in this edition have been provided by Richard Oughton, Robert Sterling, Arron Walthall and Gary Lewis