

November 2008

Articles Andrew Twigger Kerry Bornman Oliver Hilton Sarah Asplin QC Charlotte Edge



Geoffrey Vos QC

New Junior Tenant

James Weale joined Chambers on 1 October 2008 having successfully completed pupillage with David Lord, Andrew Child and Fenner Moeran. James is spending his first three months as a judicial assistant to the Court of Appeal, and will start full time practice in January 2009.

And some major cases

- > In *Jones v Firkin Flood*, Gilead Cooper QC and Andrew Child successfully removed three of four trustees of a discretionary settlement and set aside an appointment.
- > *Office of Fair Trading v Abbey National Plc and Others*, the bank charges case, I appeared in the Court of Appeal for the Nationwide Building Society. Judgment is awaited.

Yeoman's Row v Cobbe: let the property developer beware

In *Yeoman's Row Management Ltd v Cobbe* [2008] 1 WLR 1752, the House of Lords considered the principles underlying proprietary estoppel. Although the case was concerned with a deal between commercial parties, the decision will have a significant impact on the way in which all proprietary estoppel claims are formulated in the future.

Even in the classic case, where A encourages B to build on A's land and B acts to his detriment in the expectation that he will be entitled to occupy the building as long as he wishes, it will probably be necessary to identify with precision in the Statements of Case the interest in land which B expected to receive and the fact(s) which A is to be estopped from denying. The scope for establishing a proprietary estoppel in cases which do not fit the pattern of previously decided cases may be severely curtailed.

Mrs Lisle-Mainwaring ("Mrs L-M") incorporated the appellant company ("Yeoman's Row") as a vehicle which, in 1998, purchased a block of 13 flats, one of which was her home ("the Property"). In 2001 she began to negotiate with the respondent, Mr Cobbe, who was an experienced property developer. Towards the end of 2002 they reached an oral agreement, which Mr Cobbe regarded as "*binding in honour*". The substance of the agreement was that:

- > Mr Cobbe would, at his own expense, apply for planning permission to demolish the block of flats and build, instead, a terrace of six houses.
- > If permission was granted, the Property would be transferred to Mr Cobbe for an up-front payment of £12 million.
- > Mr Cobbe would develop the Property, sell the six houses and pay Yeoman's Row 50% of the amount by which the gross proceeds of sale exceeded £24 million.

The local Council passed a resolution approving the grant of planning permission on 17 March 2004. The very next day, Mrs L-M told Mr Cobbe that she was no longer satisfied with the financial terms of the agreement they had reached and demanded, amongst other terms, an up-front payment of £20 million.

Etherton J held that Mr Cobbe had established a proprietary estoppel and ordered Mrs L-M to pay him one half of the increase in value of the Property brought about by the grant of planning

permission. The Court of Appeal upheld his judgment, and Mrs L-M appealed to the House of Lords.

The House of Lords allowed the appeal. Their lordships held that no proprietary claim was made out, either on the basis of proprietary estoppel, or on the basis of the kind of constructive trust which arose in *Pallant v Morgan* [1953] Ch. 43 (in which one potential purchaser agreed with another that he would not bid for a plot of land, on terms that if the other subsequently acquired the land, it would be divided between them). Mr Cobbe's entitlement was to a *quantum meruit* only, assessed on the basis of a fee for his services which was appropriate for an experienced developer.

The leading judgment in the House of Lords was given by Lord Scott. In relation to proprietary estoppel, he held that:

- > Proprietary estoppel is a "*sub-species of a 'promissory' estoppel*" and is, in principle, available in relation to claims about personal property as well as real property (this obiter remark, at least, potentially extends the proprietary estoppel doctrine).
- > It is a requirement that there is no lack of certainty about the proprietary interest claimed. There were important terms which remained to be agreed between Mrs L-M and Mr Cobbe, so that this requirement was not satisfied.

> Mr Cobbe's belief that the agreement was binding on Mrs L-M "*in honour*" recognised that it was not legally binding. Even though the words "*subject to contract*" had not been used, Mr Cobbe had taken the risk that Mrs L-M might later change her mind.

> The essence of an estoppel is that there is some fact, or some point of mixed fact and law, which the defendant is estopped from denying. But Mrs L-M could not be estopped from denying that the agreement was complete, because Mr Cobbe never thought it was. Nor could she be estopped from denying that it was legally binding, because Mr Cobbe did not think that was the case either. The fact that Mrs L-M's conduct was unconscionable was not, in itself, enough to entitle Mr Cobbe to a proprietary remedy.

> Although it was not necessary to decide the point, Lord Scott's view was that a claim based on proprietary estoppel cannot be used to overcome the requirement in section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 that an agreement for the acquisition of an interest in land be in writing.

These conclusions assist in clarifying the nature of proprietary estoppel, but in doing so they significantly restrict its scope. For example, if a proprietary



« estoppel claim cannot escape the requirement for a contract relating to land to be in writing, how much room is left for such claims in respect of real property? At first blush, it is only where there is a written contract which is said not to be enforceable, for some reason which the defendant can be estopped from denying, that proprietary estoppel might assist the claimant. (Lord Walker, who also gave a fully reasoned judgment, made an obviously just distinction between commercial claimants and private individuals, who may not have understood that a written contract was required.)

Likewise, if it is not sufficiently clear what interest the claimant thought he was to receive, the claim may fail without

the possibility of the Court fashioning a remedy which will do justice between the parties.

Lord Scott held that Mr Cobbe's claim based on constructive trust also failed. This was because the authorities dealing with parties who have reneged on an understanding as to a joint venture, such as *Pallant v Morgan* (*supra*) and *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch. 372, operate where the joint venture property has been acquired by one party *after* the understanding was reached with the other party. The essence of the equity arising in such cases is, in Lord Scott's view, that the defendant's *acquisition* of the property is affected from the start by the agreement

with the claimant, which the defendant cannot conscientiously ignore.

Yeoman's Row owned the Property long *before* Mr Cobbe came on the scene. Lord Scott considered that Mr Cobbe could only have acquired an interest in it thereafter pursuant to a specifically enforceable contract. It could not be regarded as ever having been "*joint venture property*". In addition, Mr Cobbe did not believe his agreement with Mrs L-M was legally binding and it was an inherently speculative and incomplete agreement, so that there was no basis for imposing a constructive trust.

Thus, whilst every case must depend on its particular facts, Lord Scott's judgment

is a step towards restricting claimants who do not have the benefit of a concluded contract from obtaining the kind of relief which gives effect to their expectations, at least in the commercial sphere.



Andrew Twigger

Cautionary Tales for Trustees

It takes a person of rare character to agree to act as a trustee in family trusts even where harmony prevails at the date of the trustee's appointment. The significant risk of litigation on all fronts is frightening. But what if he or she is ignorant of the heavy burden of trusteeship?

Jones v Firkin-Flood [2008] EWHC 2417 (Ch) is a salutary reminder of the need for trustees to fully inform themselves of their duties, both before taking up office and throughout its term. Mr. Flood was a wealthy man with three adult children (D, L and I) who were variously involved in his business. He died in 2001. His Will appointed his solicitor (J), his son (I) and two friends/employees as his Trustees, set up a discretionary trust in favour of a class of beneficiaries including his children and gave his residue as to 50% to I, 30% to D and 20% to L. The deceased's company shares, mostly held by his Trustees, were sold in January 2008 for £17.4 million and the Trustees undertook not to distribute the cash consideration, subject to undertakings from the beneficiary, for seven years. On the sale, the children were immediately entitled to trust income, I received £1.5 million for his shares, L lost her job, and D lost other income. In February 2008, the Trustees provisionally resolved to distribute the trust fund as to £2.5 million to D, £1.5 million to L and the balance to I.

The Trustees sought the Court's directions, including approval of the 'provisional resolution'. D and L

counterclaimed, amongst other things, the Trustees' removal.

The Judge found not merely a number of isolated breaches of trust but rather a total abdication of their duties:

- 1 at the outset, they failed to appraise themselves of the nature and extent of their duties;
- 2 they failed to prepare estate or trust accounts;
- 3 they failed to meet to consider how to deal with the trust property or whether benefits received by I were appropriate;
- 4 none of the lay trustees asked J for advice and J failed to proffer any;
- 5 the Trustees did nothing to supervise or regulate I's management of the deceased's companies;
- 6 I committed breaches of the self-dealing rule;
- 7 J demonstrated an "*apparently subconscious*" partiality for I as against his siblings;
- 8 the other lay trustees utterly failed to discharge any of their duties albeit by reason of J's failure to advise them; and

9 they failed to pay income as it vested.

It will come as no surprise that the Judge removed J, I and the older lay trustee. Citing *Letterstedt v Broers* (1884) 9 App Cas 371, he found the Trustees guilty of a collective and individual 'unfitness to act'. Although D and L had entirely lost confidence in the Trustees, the Judge commented that it would be a 'rare case' in which failure in that respect will, on its own, lead to the wholesale removal of trustees. He retained the other lay trustee because she was sufficiently independent and it was important that some family connection should be preserved.

Useful consideration is given to *Public Trustee v Cooper* [2001] WTLR 901 and the function of the court when asked by trustees to "*bleed*" a proposed exercise of their discretion. There was no question of surrender of discretion but rather whether the Trustees' opinion was vitiated, e.g. by a conflict of interest or because the trustee (adopting *Re Hastings-Bass decd* [1975] Ch 25) has taken into account considerations which he should not have, or failed to take into account those he ought to have, considered. Objections were made out on the facts which meant the 'provisional resolution'

was vitiated and the Judge remitted it for reconsideration by suitable trustees, considering the matter afresh.

Interestingly, the case raised the question of how far the rule which prohibits trustees from fettering their discretion applies in circumstances where an apparent fetter forms a necessary part of the implementation of a beneficial investment decision. The Court referred to *ATC (Cayman) v Rothschild Trust Cayman Ltd* [2007] WTLR 951 and found that the Trustees had power to fetter their discretion by agreeing not to distribute the Trust Fund unless the beneficiary subrogated the warranty because it was plainly beneficial for them to do so in terms of realising best value for the shares. It was not a breach of trust for the Trustees to have given the undertakings sought by the buyer (who would not otherwise have purchased the shares) nor had they surrendered their discretion, albeit that there were restrictions upon the ambit of those discretionary powers.



Kerry Bornman

Blocks of Flats and New Long Leases

It has now been settled that the head lessee of premises which includes property other than flats is (subject to certain exceptions) entitled to require a new long lease of individual flats within that building as a 'qualifying tenant' under the Leasehold Reform, Housing and Urban Development Act 1993: see *Cadogan v 26 Cadogan Square* [2008] UKHL 44.

Under consideration in *Cadogan* was a normal scheme for the lease of a building containing separate self contained units/flats, under which the freeholder granted a full repairing long lease over the entirety of the building, including common parts and any external car parking to the head lessee, who in turn granted separate under leases of individual units (including rights over the common parts and parking spaces), some of which as residential flats and others as business premises, on terms that he would repair the structure and exterior of the building subject to payment by the under lessee of a service charge. Tenants under residential long leases and business leases have security of tenure in their own right. However, the question was whether the head lessee was entitled as a 'qualifying tenant' to serve a notice on the claimant freeholder for the grant of new individual leases in respect of units let by him under short assured tenancies or which were vacant.

Section 5(1) of the 1993 Act provides that a person is a qualifying tenant of a flat if he is a tenant of the flat under a long lease. The freeholders argued that as a

matter of construction this was a relatively narrow concept, relating only to a lessee of a flat and no other property, and that a head lessee of premises which included not only the individual flat in question, but also a number of other flats, business units and/or common parts could not therefore be a qualifying tenant. Lord Neuberger in the House of Lords disagreed. As a matter both of the proper construction of the 1993 Act and of general property law, Lord Neuberger, with whom the remainder of the Appellate Committee agreed, was of the opinion that 'a tenant of a flat' was a wide notion which extended to the lessee of a property which included, but was not limited to, a flat, and therefore that a lessee of a number of flats can, in relation to each flat, be a 'tenant of a flat' under the 1993 Act.

There are however a number of practical considerations arising out of that conclusion:

a) Care will need to be taken in defining the precise extent of the flat to be subject to the new lease (including any

parking space), since reliance on the existing head lease, being of the whole building and common parts only, is unlikely to be helpful. Section 57(1)(a) of the 1993 Act allows modification of the extent of the demised premises, and if it cannot be agreed LVT members have the ability, experience and qualifications to consider and determine such issues.

b) Consideration will also need to be given to drafting modified terms of the new lease for an individual flats, since it is unlikely that they can merely follow, as would be the usual case, the terms of the quite different head lease. For these purposes, the terms of any other qualifying under lease will probably provide a very good guidance and again LVT members have sufficient experience to deal with such matters.

c) Care should be taken to ensure that on determination of the head lease the grant of the new grant relates only of the demised property subject to the new lease, and that the covenants and rent due under the remaining head lease are apportioned appropriately. The freeholder should be aware that this will lead to a patchwork of ownership, in the sense that the freehold of the block would be subject to two immediately derivative interests.

d) In so far as the head lease consists of a rump of common parts only after the grant of new long leases to all of the

flats, the freeholder should then forfeit and accelerate the end of the head lease.

e) The new lease should contain rights over the common parts. Such rights cannot be granted by the head lessee, because they are one and same person (but as such the new lessee is in possession of the common parts and entitled to use them), but they should be included to become enforceable against the freeholder once the head lease expires. However, the head lessee would need to grant rights over common parts where the new lease is assigned to a third party.

f) The new lease should also provide that the freeholder, upon expiry of the head lease, should repair the structure and exterior of the building, with the lessee responsible for service charges. Until then the lessee would be responsible for those repairs.



Oliver Hilton

Allied Domecq-Contributions and Construction

Allied Domecq (Holdings) Limited v Allied Domecq First Pension Trust Limited & Anor [2008] EWCA Civ 1084, is not for the faint hearted and its dense reasoning and relatively abstruse subject matter may render it an authority which is best avoided unless absolutely necessary.

The intention of this article, therefore, is merely to draw your attention to some of the more interesting and useful conclusions which might otherwise be lost.

Allied Domecq was an appeal from a decision of Blackburne J in proceedings brought by Allied Domecq (Holdings) Limited against the trustees of the two occupational pension schemes of which

it was Principal Company. The issue was as to the proper construction of the contribution rules of both schemes and in particular, whether the rates of contribution payable by the employer were determined by the actuary, (or on his advice), without the agreement of the employer. The question arose as a result of regulations 5(3)(b) and 8(2) (e) and paragraph 9(5) of schedule 2 to the Occupational Pension Schemes (Scheme Funding) Regulations

2005, ("the 2005 Funding Regulations"), which apply if rates of contribution payable by the employer are determined in such a manner. If the schedule and regulations apply, the funding provisions in Part 3 of the Pensions Act 2004 are modified and it is possible that the effect may be that contributions are increased or at least, that the pattern of their payment is altered.

It was accepted that the regulations would apply if the rates of contribution to be made by the Participating Companies collectively were determined by the Actuary or on his advice, without the need for the agreement of the Principal Company, notwithstanding that the agreement of the Principal Company was required to the proportions in which and times at which the Participating Companies individually, were to make contributions.

The decision of the Court of Appeal based on the construction of the particular rules in the Allied Domecq case was that the



◀ regulations and schedule *did* apply and the appeal was dismissed.

However, as I mentioned, some more interesting principles of construction and comments upon the status of both the minimum funding requirement and the funding provisions in Part 3 of the 2004 Act are made along the way.

First, Warren J's conclusion in *British Vita Unlimited v British Vita Pension Fund Trustees Ltd* [2007] EWHC 953 that the contractual provisions of an occupational pension scheme, in the form of the contribution rules, were not displaced by the statutory provisions which underly the minimum funding requirement, except where the provisions are in conflict, was approved. In retrospect, the basis of that conclusion seems relatively obvious: the minimum funding regime contained in the Pensions Act 1995 was just what it said, namely a minimum. It operated as a floor

but did not prevent greater contributions being demanded under appropriate rules.

I should mention that *British Vita* was a case in which the Principal Employer, a publicly listed company which had been the subject of a takeover, funded by a private equity firm, and was subsequently de-listed as an unlimited company, contended that demands for contributions to the scheme in excess of £40m made by the trustees post takeover and calculated on the basis that the fund should be invested in gilts, were invalid. The bases for invalidity included the construction of the contribution rule itself and the purported effect of the 2005 Funding Regulations which the company contended prevented the trustees from being able to exercise their powers under the contribution rules.

Warren J concluded that the demands made under the rules of the scheme were not invalidated by the existence of the new

funding regime in the 2004 Act, but made no finding as to the position had a schedule of contributions been put in place under the new provisions, at the time the demands were made or were due to be met.

To turn back to Allied Domecq, secondly, Sir John Chadwick, who gave the reasoned judgment of the Court of Appeal, went on to consider the manner in which the contribution rules in that case should be construed. Having measured them against the background of the minimum funding requirement in the 1995 Act, he concluded that given that the relevant trust deed was executed in May 2005, it must have been appreciated that they would also have to be construed in the context of the new funding regime in Part 3 of the 2004 Act, due to come into force later that year and any regulations which may be made under it and should be so construed.

He added that a construction which both avoids potential for conflict with statutory provisions and meets a need imposed by those provisions should be preferred.

Despite its technical content, Allied Domecq may be useful therefore, not only when seeking an analysis of the statutory funding regimes old and new, but when seeking aids to construction.



Sarah Asplin QC

When Insolvency Looms: Transaction Avoidance and Advising Company Directors

As the economy drifts towards recession legal practitioners can expect increasing requests for advice from companies facing insolvency.

It is important when advising in this respect to make directors aware of the meaning of corporate insolvency as well as its implications. A company may be wound up if it is unable to pay its debts as they fall due. One factor that directors often find unpalatable is that a company may therefore be simultaneously profitable and insolvent. The first and most obvious advice that a company in difficulties may need is thus from an accountant or other financial advisor: cash-flow solutions such as debt factoring, while expensive, may save a company which is having trouble meeting its creditors' demands in the short term.

However if insolvency is a real possibility it is important that the company is aware of the transaction avoidance provisions of, inter alia, the Insolvency Act ("IA") 1986. There are a number of reasons why directors will need to be advised of such provisions. The potential avoidance of a transaction may affect the directors personally if they are the other party to the transaction: this is a particular danger in small private companies. A director who has caused a company to enter into a voidable transaction may find himself the subject of director disqualification proceedings under the Company Directors Disqualification Act 1986. The avoidance of transactions may irreparably damage future relations with trading partners. Last but not least, it is important for directors to be aware that they owe a fiduciary duty to the company's creditors.

Transaction avoidance provisions fall into three main categories:

- > those which can be brought whether or not insolvency proceedings are brought against the company: directors of small companies should be aware of the provisions of the Companies Act 2006 under which transactions with directors may be set aside (see in particular ss 190 -195);
- > those applicable after insolvency proceedings have been commenced, when companies will need to be advised as to validation orders;
- > the intermediate provisions which kick in after insolvency proceedings have been brought, but which operate to avoid transactions entered into *before* the company was in fact insolvent.

It is this last category that holds a particular trap for unwary directors. The most commonly invoked provisions are contained in ss 238-239 IA 1986: transactions at an undervalue and creating a preference, although attention should also be drawn to s 245 (avoidance of floating charges).

The Court will set aside a transaction made up to two years before the commencement of insolvency proceedings under s 238 IA 1986 if the company received no, or no comparable, consideration. However consideration does not only mean financial gain and a

transaction may be saved under s 238(5) if it was entered into by the company in good faith during the course of business and in the reasonable belief that it would benefit the company.

It is sufficient that the company had reasonable grounds for believing the transaction would be beneficial, and it may be enough, for example, if the directors entered into the transaction on the advice of the company's accountant. However whether a transaction meets the test will be a question of fact, and some payments may be hard to justify. One particular danger is non-contractual payments to employees: while the payment of a performance-related bonus is arguably beneficial to the company in the long term, is a 'golden-handshake' for a departing employee?

Under s 239 IA 1986 the Court may set aside a payment made within "the relevant period" to a creditor with the intention of improving the position of that creditor in a future insolvency. The relevant period differs according to the identity of the creditor paid, but may be up to two years.

The intention to give a preference need not be a dominant but merely an influential motivating factor (*Re MC Bacon Ltd* [1990] BCC 78). However, where the creditor preferred is a connected party (such as a director) the Court will presume an intention to prefer (s 239(6)). While some transactions will present an clear s 239 problem, directors may thus face difficulties in far less obvious

situations. Where, for example, a director wishes to inject cash into a business by purchasing an asset, and accounts for part (though not all) of the purchase price by notionally repaying a previous loan, he may find it difficult to overcome the presumption in s 239(6).

Where the creditor paid is a trading partner directors have more leeway. Creditor pressure is a common circumstance where the company's intention is arguably not to confer a preference. Equally, where the payment is particularly crucial to the business it may be saved: see for example *Re Lewis's of Leicester* [1995] BCC 514.

The *Lewis's of Leicester* case is one which should be borne in mind. Directors of companies on the edge of insolvency should consider the dispositions they make with care and be well aware of the potential pitfalls. But transactions should always be vetoed. A payment that is crucial to the company or in its best interests may for that very reason be justified. "Safety first" will not always be the best advice.



Charlotte Edge