Guildhall CHAMBERS

Newsletter

PROPERTY NEWS SUMMER 2011

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EDITORIAL

Recent cases have brought some significant developments in the law of real property, probate and claims for provision under the *Inheritance (Provision for Family and Dependants) Act 1975*. This newsletter seeks to offer a comprehensive review of those developments.

Most practitioners will have now recognised the growing importance of the office of the Adjudicator to HM Land Registry under the *Land Registration Act 2002*. Indeed, the Adjudicator has arguably become (or at least is becoming) the primary tribunal for resolving disputes over registered land. With that in mind, Ewan Paton offers a timely and practical review of references under the 2002 Act with particular emphasis on recent cases on adverse possession.

William Batstone looks back on the first decision in *Phillips v Davies*, a significant decision on bad husbandry, in light of the same parties' most recent round of litigation, this time following a reference to the Land Adjudicator under the 2002 Act. The article is required reading for anyone concerned with adverse possession claims involving tenants.

I offer some observations on Inheritance Act claims by adult children in light of the Court of Appeal's recent decision in *Ilott v Mitson*. Some commentators have suggested that it markedly erodes testamentary freedom and will open the floodgates to such claims. I suggest that it does nothing of the sort and is arguably no more than a welcome clarification of the law finally laying the heresies of *Re Coventry* to rest after more than a quarter of a century.

Finally, Henry Stevens offers a fascinating review of the law of chancel repair liability reminding the astute conveyancer of the continued need for vigilance even as the *Land Registration Act 2002* takes full effect.

In this newsletter we have omitted our usual review of recent decisions under the *Trusts of Land and Appointment of Trustees Act 1996*. Readers will recall that in the last newsletter I provided an update following the controversial Court of Appeal decision in *Kernott v Jones* [2010] EWCA 578. The Supreme Court is due to deliver judgment in that case shortly and if it is as far reaching as the last time the issue of co-ownership and constructive trusts was before the House of Lords in *Stack v Dowden* we can expect it to be of considerable importance. We intend to report on that case as soon as possible. It should be appreciated, however, that some commentators have suggested that practitioners should not now be advising on the issues raised in that case (as to which see our last newsletter) pending the imminent clarification of the law.

If you have any feedback or questions with regards to this newsletter please email me at tim.walsh@guildhallchambers.co.uk

Tim Walsh, Editor

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Adverse possession

Forms, reasonableness and mistakes: recent cases on adverse possession and Adjudicator references under the *Land Registration Act 2002*.

The *Land Registration Act 2002* has now been in force for over seven years. In that time, the office of the Adjudicator to HM Land Registry created by the Act has become the principal specialist 'court of first instance' for a wide range of property disputes involving registered land. Anecdotal evidence suggests that the very large number of references of disputed applications – including disputed rights of way asserted by unilateral notice, determination of precise boundaries, and disputed applications for possessory title – came as something of a surprise, resulting in the appointment of over 30 Deputy Adjudicators drawn mostly from the ranks of the Chancery bar.

A welcome consequence of this has been the practice of the Adjudicator's office publishing a large number of decisions on its website where *"they contain a statement of law or practice that is of general interest...or...they decide points of law which have not, so far as the Adjudicator has been able to ascertain, been the subject of any other decision or...they are in some other way of general importance"*. These decisions are now a valuable source of authority on a number of property law and registered land points not yet determined by the higher courts. While not having the strict ***stare decisis*** effect of higher court decisions, they must be of strong persuasive authority, so that an Adjudicator herself or a County Court judge would need a good reason to depart from a decision on the point in issue.

They can be searched by subject matter and sub-category under "Decisions" at http://www.ahmlr.gov.uk/.

Of particular interest to me, and (one hopes) to many readers, is the developing body of law and practice on applications for possessory title. Some decisions have illuminated a number of uncertainties arising from the legislation.

i) Which form and which procedure?

If it is your client's case that s/he, either alone or aggregated with the prior possession of others, accrued twelve or more years of possession prior to 13th October 2003, then you should not be using Schedule 6 of the 2002 Act, and its prescribed application form ADV1, at all. Such a claim falls to be dealt with under the 'old' law and the transitional provisions of Schedule 12 paragraph 18 of the Act. The claim would be that the opponent's registered title was already barred, and the statutory trust of the former section 75 LRA 1925 imposed, before the 2002 Act came into force. In such a case, the entirely different form AP1 should be used: see Land Registry Practice Guide No. 5, February 2011 edition, para.5.2.

If you mistakenly use the Schedule 6 2002 Act form ADV1 in such a case, then on the face of it you are invoking the far more limited provisions of that Act, and thus giving the proprietor the chance to veto and defeat the application by giving a counter-notice and invoking Schedule 6 paragraph 5 (see below). However:

a) In some decisions on applications brought under Schedule 6, Adjudicators who have found on the facts that there was actually twelve years or more adverse possession prior to 13/10/03 – so that it was really a Schedule 12 para. 18 case - have then simply decided the case on that basis: see e.g. *Tarr v Ahmed* (Ref. 2008/1085, decision 26/6/09, Owen Rhys: *"..although the Applicants' claim is made under the new adverse possession regime, I cannot ignore the evidence..."*). In some such cases they may direct that the Applicant, for formality's sake, undertakes to file a separate AP1 application at HM Land Registry, who will then (on the back of the Adjudicator's findings of fact just made on pre-2003 possession) grant the application: *Walton v Kerguelen Investments*, (Ref. 2008/0321, decision February 2010, Sara Hargreaves – currently unreported case in which the writer appeared).

b) It is nevertheless best to apply on both bases at the outset if the claim *may* come into either category, depending on the findings on the evidence. The Adjudicator can then hear both applications together on all the evidence: see *Parkland v MCC & Mohindra*, Ref. 2008/1668, decision 30/11/09, Michael Mark, preferring this approach to the Land Registry Practice Guide suggestion of the applications being made and heard separately.

ii) Schedule 6 application response: ticking all the boxes

One potentially catastrophic pitfall to be avoided lies in the response form NAP which the proprietor must fill in when faced with an application under Schedule 6 of the 2002 Act. The central change wrought by the 2002 Act was the abolition of automatic limitation-barring of registered title. The Applicant can apply based on adverse possession for ten or more years (where twelve years had not accrued prior to 13/10/03), but the proprietor's objection will defeat the application under Schedule 6 para. 5(1), unless the Applicant can then argue that he falls within one of the three exceptional cases in Schedule 6 paragraph 5(2) to 5(4). For the proprietor to be sure to avail himself of that presumption that the application will fail he must, however, tick the correct box on form NAP entitled *"I require the Registrar to deal with the application under Schedule 6 paragraph 5 to the Land Registration Act 2002"*. It may not be enough if he merely ticks the third box *"I object to the registration on the grounds stated in panel 6"*, even if he then pleads his case in full in panel 6 on the form, referring in doing so to paragraph 5.

Sounds obvious? Well, in two previous reported Adjudicator decisions – *Cooper v Gick* (Ref. 2007/0103, decision 25/3/08, Michelle Stevens-Hoare) and *Dickenson v Longhurst Homes* (Ref. 2007/1276, decision 31/7/08, Michael Mark) – the proprietor failed to tick the Schedule 6 para. 5 box, and made the mistake described above. The writer has also come across this in cases in which he has been involved. In those cases, it was held that the proprietor had lost the Schedule 6 para. 5(1) presumptive 'veto' on the application, and that the application could only then be contested on the factual issue of whether the Applicant could show ten years' or more adverse possession. The reason given in those cases was that there was no relief or right to 'amend' the NAP form – the right to invoke the para. 5(1) veto was a creature of statute, and if not utilised in the prescribed period for the NAP response (currently 65 days) it is lost forever. That strict view was softened recently by Vos J in *Hopkins v Beacon* (Ch. D, ex tempore, Lawtel, 13/4/11) who held that a failure to tick the box would not automatically remove the right to invoke paragraph 5. Rather, applying the *Mannai Investment* objective test, it would depend on whether a "reasonable Registrar" looking at the form

and statement together would have thought that the objector intended to invoke paragraph 5. On the facts, however, it was held that this test would not have been satisfied, so the Adjudicator's refusal to apply paragraph 5 was upheld.

iii) What does Schedule 6 paragraph 5(4) actually mean?

If the proprietor does tick the right box, the Applicant then has to argue himself within one of the three 'exceptions' in Schedule 6 paragraph 5. Of these, by far the most significant yet troubling is paragraph 5(4). Paragraph 5(2) on estoppel was intended to mirror the general law on that topic, while paragraph 5(3) ("the applicant is for some other reason entitled to be registered as the proprietor of the estate") remains somewhat obscure and was not fully explained even in the Law Commission's 2001 report.

Paragraph 5(4) requires that the land to which the application relates is adjacent to other land of the Applicant [5(4)(a)], that the title to the subject land was registered more than one year prior to the application [5(4)(d)], that there has not been an 'exact boundary' determination between the registered titles under s60 LRA 2002 [5(4)(b), and most importantly that:

"for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him.." [5(4)(c)].

When I gave seminars on the then Land Registration Bill in 2001, I highlighted what I saw as the fundamental tension within this provision. By definition, such applications relate to someone else's registered title. This means that the disputed land is demonstrably within that registered title and the filed plan accompanying it. Since the proprietor's registered title was at all times a public and inspectable document, and since the applicant's own registered title (again, by definition) does ***not*** presently include it, how can a "mistaken belief" as to its ownership be "reasonable"? If the paper title position is apparent from the relevant filed plans, then on one view the Applicant only had to look at them. If he did not, but claims that he soldiered on with a mistaken (i.e. wrong) belief for over ten years, why should he be rewarded for his inadvertence or wilful ignorance?

One answer might be that this provision is only really intended to apply to 'uncertain boundary' cases involving relatively small margins, where

the *precise* paper title position cannot be gleaned from the filed plans showing general boundaries only. In such a case, the 'true' paper title position might only emerge after detailed consideration and application of pre-registration deeds and surveying evidence. The possessor might then say in such a case 'but in all that time, my fence was ***there*** and I believed that was the boundary of my land; even though you now tell me with surveyor's evidence that the deed boundary is 4 feet further east'. That is the intent behind the provision gleaned from the Hansard debates on it in 2001 (see Baroness Scotland, 626 HL Official Report (5th Series) col. 1622-1623, 17/7/01, quoted in Jourdan, *Adverse Possession*, para. 22-58: *"..it is simply unreasonable that someone who has enjoyed territory through a mistake which was no fault of his or her own should not be able to apply to have the position regularised"*).

Where one is concerned with a much larger chunk of land - perhaps a whole area of garden, or a field – the point does not apply with the same force. The same Deputy Adjudicator has considered the "reasonableness" of a mistaken belief as to ownership in two cases, with differing results.

In *Tarr v Ahmed* (supra), the Deputy Adjudicator (Owen Rhys) held that paragraph 5(4) was satisfied in relation to two areas of garden land. The Applicants had actually believed when they made their application that they already owned these areas within their registered title, so that their application initially related only to a third area. When the proprietor objected they realised that they did not already own those two areas, so their application was extended to them as well. The Deputy Adjudicator accepted, having inspected the site, that the areas were within the current proprietor's registered title, but held that the Applicants' mistaken belief to the contrary was "reasonable". He so held, apparently, because while "..a careful study of the filed plan would have revealed the discrepancy..", nevertheless they had been told by their vendors that this land was part of the land being sold, it was cultivated and used as part and parcel of their overall garden up to a line of conifers, and the true title position was "..not immediately apparent on the ground" although it could have been ascertained by reference to the position of houses on the adjacent road (paragraph 12, decision).

A few months later, in *Lory v Harpserve Limited* Ref. 2008/1530 (Decision 11/11/09, Owen Rhys), he reached a different conclusion on different facts. He noted that there was no judicial case law on paragraph 5(4), and stated, fairly obviously, that the word "reasonable" connoted an objective test on all the circumstances of the case. On the facts of this case he held that the possessor's belief as to ownership was ***not*** reasonable, because a "cursory glance" at the relevant transfer and contract plans would have revealed that the disputed land was excluded. This was so despite the fact that he had been renting the disputed land prior to its purchase, and the vendor had not specifically told him that this rented land was excluded from the sale:

"The boundaries of the plot as shown on the plans were not in any way obscure, and left no room for doubt with regard to the Disputed Land. He was buying the land by reference to the plan, and he must have some responsibility to check that he was actually buying that which he believed." It appears that the question must be one of degree on the facts of each case, although the decision in *Tarr* seems quite generous to the Applicants – elsewhere in the report it was noted that "the land currently enclosed within the apparent rear garden of the property is perhaps three times the size of the rear garden shown on the [Applicants'] title plan" so that the ".disputed land ..consists of a large section of the Applicants' rear garden" (paragraph 3, decision).

iv) Rectification as a backstop: *Baxter v Mannion* in the Court of Appeal

It may happen that a registered proprietor, on whom an ADV1 possessory title application is served, misses the boat and fails to serve a counter-notice of objection within the presently prescribed period of 65 days. On a strict reading of Schedule 6, one might have thought that the way was then clear for the Applicant to succeed, subject only to the Land Registry being satisfied with his evidence of possession for ten or more years. If the Land Registry are so satisfied, and grant the Applicant the title he sought, is there any way back for the former proprietor?

In *Baxter v Mannion* [2011] EWCA Civ. 120, the Court of Appeal, upholding Henderson J. (who had upheld the decision of the Deputy Adjudicator Ann McAllister) confirmed that there was. The proprietor can contest the registration of the possessory title via a claim for rectification of that title under Schedule 4 of the 2002 Act, "for the purpose of correcting a mistake" on the basis that the evidence of possession ought not to have been accepted.

B had applied for possessory title under Schedule 6 on form ADV1, although his evidence appears to have been that he had been in possession since 1985 (which if accepted would have made it a Sch. 12 para. 18 case – see above). The proprietor M had failed to serve a counter-notice in time, because of various personal difficulties and the matter being passed between different solicitors. The Registrar granted B his title, but then subsequently told M that he could apply for rectification under Schedule 4, which he duly did. The Deputy Adjudicator then heard the application, including the evidence of both sides, held that B had not in fact been in sufficient possession at the relevant time, and ordered rectification. The High Court judge on appeal upheld the decision, on the additional ground that rectification ought to be granted even though B was himself now in possession of the land, because under the Schedule 4 paragraph 6(2) proviso "it would be unjust not to.." rectify the register.

B appealed, twice, on the basis that there was no "mistake" within the meaning of Schedule 4 of the 2002 Act. It was argued that "correcting a mistake" meant something tantamount to correction of a procedural or formal defect on the register, or possibly an entry obtained by fraud or forgery, and did not allow the re-opening of the evidence in an originally uncontested and otherwise regular application.

The Court of Appeal rejected these arguments. Jacob LJ, in inimitable style, gave some indication of where the decision was going when he framed the issue thus in his first paragraph:

"Does the machinery of the Land Registration Act 2002 allow a party to take someone else's land by operation of a bureaucratic machinery which trumps reality?"

He held that "correcting a mistake" was not intended to have a limited ambit. Someone who, on the evidence once considered, had not actually been in sufficient adverse possession was not entitled to be registered as proprietor, so their registration as such was therefore "mistaken" and thus amenable to rectification. There was no difference of principle, for these purposes, between a fraudulent application and one which was 'innocent' but in respect of which the evidence was, once considered, simply not sufficient. He held that Parliament, whose overall policy had been to make it *more* difficult for a registered proprietor to lose his title, should not be taken to have intended that title could be lost in these circumstances by procedural default. He was fortified in this conclusion by the view on this very point expressed by Mr Charles Harpum, "the architect of the Act", in a footnote to a 2004 book which he co-authored.

The decision provides a useful backstop in a case either where a proprietor failed to serve a counter-notice in time, or where another interested party who was not even notified of the application in the first place wishes to re-open and test the evidence by which the title was obtained. Where a party is served with an ADV1 application, the primary response should, however, always be objection on form NAP and ticking of both the 'paragraph 5' and general 'objection' boxes.

Ewan Paton

PHILIPPS V DAVIES (NO. 1) AGRICULTURAL LAND TRIBUNAL (WALES) (ALT6209) 7.2.07. *PHILIPPS V DAVIES* (NO. 2) ADJUDICATOR TO HM LAND REGISTRY (REF/2007/0487) 17.3.11

Bad husbandry and encroaching caravans

There is 38 acres of bare agricultural land owned by Robert and Isobel Philipps just east of Amroth in Pembrokeshire that slopes gently down to the seashore which lies across the Pendine Road. This is the holding. Immediately behind and adjoining the holding, furthest away from the sea, there is a defined enclave of only about 300 square metres which has had caravans stationed on it since the early 1960s. This is the disputed land. With its spectacular views to the south out to sea and an established use certificate permitting the stationing of two caravans, the disputed land has considerable value. No doubt holiday makers have paid and will in future pay good money to stay there. This may explain the fact that the recent reference to the Adjudicator is the second time in 4 years or so that a dispute between Mr and Mrs Philipps and their former tenant Mr Robert Davies has had to be adjudicated upon.

The first adjudication was by the Agricultural Land Tribunal (Wales) and it caused something of a stir in the agricultural holdings world. When in 2005 Mr and Mrs Philipps acquired paper title to the holding, and what estate and interest their vendor, the estate of Mrs Ena Bodimeade, had in the disputed land, they saw that Mr Davies did not appear to have been observing the rules of good husbandry and applied to the Tribunal for a certificate of bad husbandry. The Tribunal held a 4 day hearing starting with half a day's site inspection on 2 November 2006, at which people paid little attention to the two empty static caravans stationed on the disputed land above them as it was the holding they had come to inspect. The question for the Tribunal, set by section 11(1) of the *Agriculture Act 1947*, was whether Mr Davies was *"maintaining a reasonable standard of efficient production, as respects both the kind of produce and the quality and quantity thereof, while keeping the unit in a condition to enable such a standard to be maintained in the future"*. As is usual in such cases, on receipt of the application Mr Davies set about doing a lot of work clearing ditches, mending gates, cutting back hedges and getting a Jungle Buster in to cut back the scrub in 10 acres of rough grazing and scrub woodland. But the Tribunal was not impressed with the attempted quick fix. The members could see, for example, the wide borders of dead grass alongside the newly cut hedges and the large butts of plants and they directed themselves to the effect *that the state of husbandry is "a state of affairs" existing at the time, not merely a matter of "instant" physical condition at the time of the hearing*. The Tribunal granted the certificate not only because the enlarged hedges restricted production on the holding but also because a long term dock problem in one field had the same effect, because the 10 acres of rough grazing and scrub woodland had simply been abandoned and so had not seen any production at all and because one field had been used for the dumping of rubbish, including scrap metal, tyres, asbestos sheeting and alkathene piping, some of which Mr Davies had imported onto the holding from his other properties, which the Tribunal found to be *extremely bad husbandry*.

The concern at the Tribunal's decision amounted to a protest against the continued application of the 1947 Act, enacted when memories of the submarine menace restricting food imports were undimmed, with its insistence on agricultural production on all available land unless, pursuant to a relaxation introduced by the Agricultural Holdings Act 1986, the landlord agreed, in the tenancy agreement or otherwise, to areas being taken out of production for purposes such as conservation of flora and fauna. The difficulty for Mr Davies was that, although he claimed to have entered the 10 acres into a Tir Cynnal management agreement, not only did he not have the landlord's consent to do so, so that the Tribunal could not disregard the lack of production, but also the Tir Cynnal required certain land management practices to be observed in return for the payments and the Tribunal found that Mr Davies had simply abandoned the 10 acres.

Mr Davies tried to appeal the Tribunal's decision on the grounds that they focused too much on the abandoned 10 acres and the dumping of waste in a small area and paid insufficient attention to the holding as a whole of which there was no complaint about two-thirds of the pasture land, on which the experts agreed there had been reasonably efficient production, and that they failed to give sufficient reasons. But on 17 May 2007 *Sullivan J* ([2007] EWHC 1395 (Admin)) refused to order the Tribunal to state a case: the question of compliance with the rules of good husbandry was very much one of fact and degree for the Tribunal with its not inconsiderable experience and it was entitled to take into account that the holding as a whole revealed *a belated attempt to catch up on years of neglect*. As for the reasons point, *Sullivan J* said that it was important to bear in mind that the Tribunal was not addressing legal issues in a vacuum but was responding to arguments before it and the fact was that there was no issue between the parties that the Tribunal had to look at the holding as a whole. *Sullivan J* was satisfied that it was sufficiently clear to Mr Davies why the certificate had been granted: *whereas two-thirds of the holding just passed muster … he had allowed about a third of the holding to go to pot and it very definitely did not pass muster.*

The Tribunal was the first respondent to that application and obtained an order for costs against Mr Davies but whereas Mr and Mrs Philipps had been joined as second respondents and had incurred costs in responding to it, albeit not in appearing before the Court, *Sullivan J* refused to order Mr Davies to pay their costs on the basis that in statutory appeals of such a nature with a common interest between respondents it was not usual to order two sets of costs to be paid. On 17 October 2007 the Court of Appeal (CI/2007/1281) gave Mr and Mrs Philipps permission to appeal that decision and Mr Davies subsequently agreed to pay their costs in the sum of £7,000.

"Mr Davies set about doing a lot of work clearing ditches, mending gates, cutting back hedges and getting a Jungle Buster in to cut back the scrub in 10 acres of rough grazing and scrub woodland. But the Tribunal was not impressed with the attempted quick fix."

The certificate allowed Mr and Mrs Philipps to serve a so-called incontestable notice to quit under Case C of Part I of Schedule 3 to the 1986 Act, giving shorter notice than usual in the 3 months specified by the Tribunal, and so Mr Davies' tenancy was terminated on 5 June 2007. But although he had to vacate the holding Mr Davies hoped, together with his wife, Margaret, to retain a foot on the ground in Pembrokeshire pursuant to the registration of possessory title of the disputed land that they had secured on 21 June 2005. It is not clear how they would have gained access lawfully to the disputed land since the only practical means of access was along a track over the holding from the Pendine Road through a gate which Mr Philipps had locked as soon as he gained possession. But in the light of the Adjudicator's decision this problem does not need to be addressed.

The Land Registry took some persuading to register any title to the disputed land in favour of Mr and Mrs Davies and the process lasted from the first application on 2 February 2004, within a year of them learning that Mr and Mrs Philipps had exchanged contracts on 12 March 2003, until the registration was made on 21 June 2005, 3 months after Mr and Mrs Philipps completed their purchase on 24 March 2005. It had taken 2 years for the purchase to be completed because of various disputes relating to claims by Mr and Mrs Davies to title to cliff land south of the Pendine Road. But while they made these claims openly, Mr and Mrs Davies kept quiet about their application to the Land Registry and so Mr and Mrs Philipps were not able to challenge their claim to have possessed the disputed land before the registration was made.

What troubled the Land Registry was that Mr Davies was the tenant of the holding adjoining the disputed land and the doctrine of encroachments would mean that any adverse possession of his would enure for the benefit of his landlord. But Mr Davies told the Registry that he had been in occupation of the disputed land since 1972, when it was gifted to him by an unnamed forestry official, a full 10 years before he succeeded to the tenancy following the death of his father in 1982 (readers should not worry about the consequences of the alleged gift being that possession was by permission and so could not be adverse because the Adjudicator did not need to). It is true that the doctrine of encroachments does not apply if the occupation pre-dates the tenancy and so the Registry appeared to have been satisfied but there were clearly lingering doubts about the quality of title because it was possessory title, the most precarious of the 3 titles to freehold estates, after absolute and qualified, that section 9(1) of the *Land Registration Act 2002* permits, with which Mr and Mrs Davies were registered.

Mr and Mrs Philipps in due course found out about the registration of title to what they thought was their land and on 19 June 2006, with their application to register their title to the holding and the cliff land, which promptly took place, they applied for 'rectification' of the register to substitute themselves

as registered proprietors of the disputed land in place of Mr and Mrs Davies. The application relied principally on the claim that any adverse possession enured for the benefit of Mr and Mrs Philipps as holders of the freehold estate. Mr and Mrs Davies objected on 12 October 2006, in reliance on the claim that Mr Davies had gone into possession in 1972 long before he became the tenant, and so the application was referred to the Adjudicator on 17 April 2007. The adjudication was suspended to allow the Tribunal proceedings and the appeal processes to be concluded and the matter came before barrister Mr William Hansen sitting as a Deputy Adjudicator ('the Adjudicator') for a 2 day hearing preceded by a site inspection on 22 to 24 February 2011.

The Adjudicator was not satisfied that Mrs Bodimeade had acquired paper title to the disputed land as the 1950 conveyance to her was clear and unambiguous that the disputed land was excluded and there was no reliable evidence of the position on the ground to counteract it. Nor was he satisfied that Mrs Bodimeade had herself adversely possessed the disputed land. The evidence showed that her acts of possession were limited to permitting a Mr Harold Kershaw to station his caravan or caravans on the disputed land during the summer months from 1963 at the latest until the late 1970s or early 1980s when Mr Kershaw left what were only ever mobile caravans there all the year round. This was insufficient to establish adverse possession. But it did not matter because the Adjudicator was satisfied that Mr and Mrs Davies had gone into ordinary possession of the disputed land by 1985 at the latest and remained in possession for the limitation period of 12 years. The acts of possession were permitting two brothers named Simpson to station two large static caravans permanently on the disputed land which were connected to water and sewage facilities. The fact that the disputed land was not entirely enclosed did not affect that conclusion: it was sufficiently demarcated from the holding by banks and other boundary features and had the appearance of an enclave. When Mr and Mrs Davies applied for the certificate of established use in their application form dated 31 January 1990 they described their interest in the disputed land as that of an agricultural tenant but the Adjudicator considered, applying *Ofulue v Bossert* [2009] 2 WLR 749, that the fact that they may have believed themselves to be tenants did not prevent their possession being adverse.

But it was the application form dated 31 January 1990 that proved to be the undoing of Mr and Mrs Davies because in that document they stated that Mr Kershaw had had his caravan on the disputed land in 1963 whereas in their evidence to the Adjudicator they claimed that he had had his caravan on a field south of the Pendine Road until he moved it onto the disputed land at their invitation after they were gifted the land in 1972. The Adjudicator was entirely satisfied that this *evidence was untrue and deliberately so* and he also rejected the story about Mr and Mrs Davies having been given the disputed land in 1972 by the unnamed forestry official. The Adjudicator was satisfied that one or more caravans owned by Mr Kershaw visited or were stationed on the disputed land, at the invitation of Mrs Bodimeade, from 1963 until at least 1985 when they were removed and by that year at the latest but not before 1984 Mr and Mrs Davies permitted the Simpsons to put their 2 large static caravans on the land and charged them rent. These findings led the Adjudicator to conclude that Mr and Mrs Davies were not in possession of the disputed land at any time before 1984. Since Mr Davies' own case was that he became tenant in 1982 and the Adjudicator concluded in the absence of a formal succession that the likelihood was that he became tenant by implication of law by the payment and acceptance of rent by no later than Michaelmas 1983, the Adjudicator was satisfied that the presumption of encroachments applied, in particular having regard to the principles of fairness and practicality upon which the doctrine is based which the Adjudicator derived from the judgment of Neuberger LJ in *Tower Hamlets LBC v Barrett* [2006] 1 P&CR 9 at para [109]:

So far as principle is concerned, the doctrine summarised by Parke B in Kingsmill's case appears to be based in part on fairness and in part on practicality. The tenant will normally have been able to encroach on the adjoining land because he was the tenant of his landlord's land: hence the perception that it is just that he should acquire possessory title of the adjoining land for the benefit of his landlord (see e.g. per Willes J in Whitmore's case, cited above). Further, the land to which possessory title is acquired will often be small, will often adjoin the demised land, and will normally have been enjoyed for at least 12 years together with the demised land. Thus, it would normally be much more practical for the freehold of that land to be vested in a person who owns the demised land (i.e. the landlord), rather than in someone who (after the end of the tenancy concerned) has no interest in it (i.e. the tenant).

Mr and Mrs Davies argued that Mr and Mrs Philipps should fail on the issue of encroachment because they together had been registered with possessory title and they were not in law the same person as the tenant, Mr Davies. The Adjudicator did not accept this for 3 reasons. First, the registration of Mr and Mrs Davies together as opposed to Mr Davies alone was a purely administrative act. The application would not have succeeded but for the acts of possession of Mr Davies and he derived his opportunity to encroach from his possession of the holding and there was evidence that he alone was understood to be the owner of the caravans. Second, insofar as Mrs Davies was in possession at all the Adjudicator was satisfied that she was in possession as a licensee of her husband so that it was his possession. Third, the contents of the application form for the established use certificate, with the reference to Mr Davies being the tenant of the disputed land which itself was said to form part of a specified field which was clearly part of the holding, were demonstrable of the fact that Mr Davies *had encroached on the Disputed Land as tenant of the Holding, and not, as he now claims, independently of his status as tenant*.

Thus when, as the Adjudicator found, by no later than 1997 Mr and Mrs Davies had been in possession of the disputed land for the limitation period the possessory freehold title thus acquired was acquired by the landlord who was then Mrs Bodimeade and that title was included in the sale by her estate to Mr and Mrs Philipps that was completed on 24 March 2005. Thus the Adjudicator found that Mr and Mrs Philipps not Mr and Mrs Davies should have been registered as the proprietors of the possessory freehold title on 21 June 2005.

The application notice by Mr and Mrs Philipps used the word 'rectification' in the sense that the word had in the *Land Registration Act 1925* and overlooked the fact that the word is given a special meaning by Schedule 4 paragraph 1 of the 2002 Act being an alteration of the register which *involves the correction of a mistake and prejudicially affects the title of a registered proprietor* as opposed to simple alteration which may be made for the purpose, amongst others, under paragraph 5(2(c)), *of giving effect to any estate, right or interest excepted from the effect of registration*. The estate right or interest that Mr and Mrs Philipps had acquired was excepted from the effect of the 2005 registration by virtue of section 11(7) of the 2002 Act which provides that: *Registration with possessory title has the same effect as registration with absolute title, except that it does not affect the enforcement of any estate, right or interest adverse to, or in derogation of, the proprietor's title subsisting at the time of registration or then capable of arising*. Thus the Adjudicator inclined to the view that this was a case of alteration so that, since he was entirely satisfied that there were no exceptional circumstances which would justify not making the alteration, paragraph 6(3) of Schedule 4 required the alteration to be made. But even if it was a case of rectification, the Adjudicator was satisfied that Mr and Mrs Davies were not entitled to the special protection that paragraph 6(2) gives to a proprietor in possession because they had *substantially contributed to the mistake* of their registration by *insisting quite wrongly* that they gone into possession before the tenancy of Mr Davies began and in any event it would be unjust for the alteration not to be made.

Mr and Mrs Davies have been granted permission to appeal the Adjudicator's decision and so it will be a little while yet before Mr and Mrs Philipps know whether they are able to enjoy the fruits of all of the land that they thought they had acquired in 2005.

William Batstone

Ilott v Mitson

On 31 March 2011 the Court of Appeal handed down judgment in the case of *Ilott v Mitson* [2011] EWCA Civ 346. The facts of the case were that the late Mrs Jackson had died leaving an estate of some £486,000 to a number of charities. The will made no provision at all for the deceased's only child, a married mother of five children who lived in modest circumstances. As an adult child of the deceased, the daughter was eligible to bring a claim for reasonable financial provision under section 1(1)(c) of the *Inheritance (Provision for Family and Dependants) Act 1975* ("the Act") which she duly did. At trial the District Judge had found for the daughter and awarded her a lump sum of £50,000; on appeal Eleanor King J had allowed an appeal by the charities and dismissed the claim. The Court of Appeal allowed the daughter's second appeal without deciding the question of quantum.

The decision of the Court of Appeal has attracted a great deal of interest and comment. Indeed, there appears to be an erroneous view that *Ilott v Mitson* has radically re-cast the law. Arguably, however, the Court of Appeal have simply delivered the killer blow to the lingering heresy that resulted from the first instance decision of Oliver J in *Re Coventry (deceased)* [1984] 1 Ch 461 which has been dying a slow death ever since.

For the practitioner advising an adult child on their prospects of success it was, for a long time, tempting to say that the courts had generally set their face against making awards under the Act. Children are, of course, among that class of applicant under the Act for whom *"reasonable financial provision"* means *"such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance..."*. In *Re Dennis (deceased)* [1981] 2 All ER 140 it was said that "maintenance" connotes *"only those payments which directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him. The provision that is to be made is to meet recurring expenses, being expenses of an income nature"*. In *Re Coventry* Oliver J had stated that *"In order for the court to interfere with and reform those [testamentary] dispositions it must...be shown, not that the deceased acted unreasonably, but that looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant – and that means, in the case of an applicant other than a spouse, for the applicant's maintenance..."*. Crucially, however, he went on to add the following:

"...It cannot be enough to say, 'Here is a son of the deceased, he is in necessitous circumstances, there is property of the deceased which could be made available to assist him but which is not available if the deceased's dispositions stand; therefore those dispositions do not make reasonable provision for the applicant'. There must, as it seems to me, be established some sort of moral claim by the applicant to be maintained by the deceased or at the expense of his estate beyond the mere fact of a blood relationship, some reason why it can be said that, in the circumstances, it is unreasonable that no greater provision was in fact made..."

With respect, this passage never sat comfortably with the language of the Act. If an adult child of the deceased satisfied the requirement that they needed financial provision for their maintenance and the balancing exercise required under section 3 of the Act justified an award, the need for some additional "moral claim" on the deceased was hard to justify.

In the Court of Appeal Oliver J's decision had been upheld (see [1980] 1 CH 459) although Goff LJ had sought to qualify the foregoing passage when he stated: *"Oliver J nowhere said that a moral obligation was a prerequisite of an application under s 1(1)(c); nor did he mean any such thing. It is true that he did say a moral obligation was required, but in my view that was on the facts of the case, because he found nothing else sufficient to produce unreasonableness"*. Whether there was a need for a moral obligation to be established was considered in a number of subsequent cases (including *Re Jennings (deceased)* [1994] Ch 286); in particular, in *Re Hancock (deceased)* [1998] 2 FLR 346 Butler-Sloss LJ had preserved something of the ratio of Oliver J when she stated:

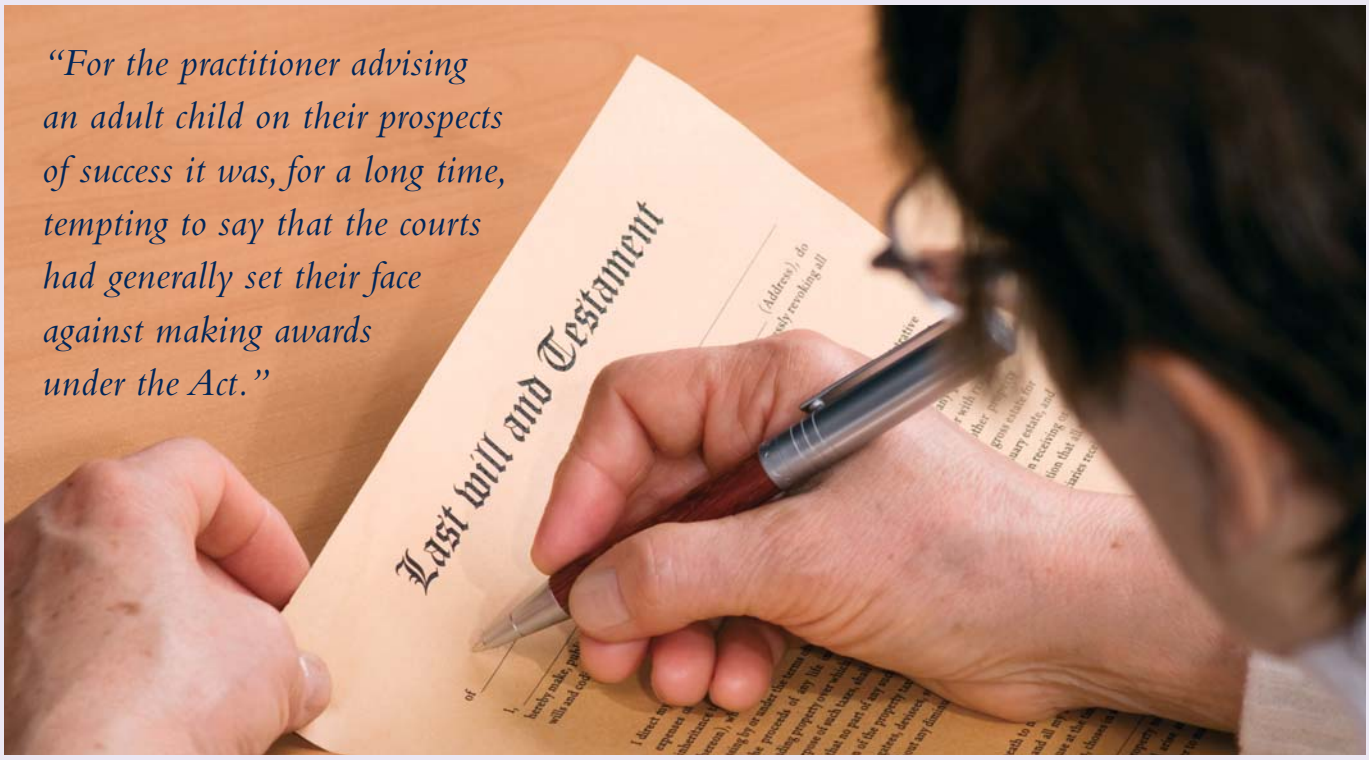
"...the 1975 Act does not require, in an application under s 1(1)(c), that an adult child...has in all cases to show moral obligation or other special circumstances, But on facts similar to Re Coventry and even more so with the comparatively affluent applicant in Re Jennings, if the facts disclose that the adult child is in employment, with an earning capacity for the foreseeable future, it is unlikely he will succeed in an application without some special circumstance such as a moral obligation" [emphasis added].

Even this qualified need to show a moral obligation on certain facts must, however, be questionable. If an applicant needs provision for his maintenance why, it may be asked, should any further hurdle be imposed?

Butler-Sloss LJ returned to the theme in the important decision of *Espinosa v Bourke* [1999] 1 FLR 74. In what may be regarded as a further qualification of (or gloss on) the earlier authorities she stated that:

"...An adult child...is in no different position from any other applicant who has to prove his case. The court has to have regard to s 3(1)(a)-(g) and assess the relevance and the weight to be given to each factor in the list. If the applicant is of working age, with a job and capable of obtaining a job which would be available, the factors in favour of his claim for financial provision may not be of much weight in the scales. As Oliver J pointed out in Re Coventry, necessitous circumstances cannot be in themselves the reason to alter the testator's dispositions..." [emphasis added].

Sir John Knox added that the structure of section 3 of the Act meant that what the judge had to do was put any factor which had weight into the appropriate side of the scale: *"...the court is involved in a balancing exercise among the many factors to which s 3 of the [Act]...requires the court to have regard"*. He added:



"...in Re Coventry...there was placed in the scales a factor of major weight against the proposition that there had been a failure to make reasonable provision and that was that the plaintiff was capable of earning, and was earning, a living. This meant that for the scales to be turned and for the court to find that there had been a failure to make reasonable financial provision for the plaintiff a factor of great weight would be needed in the opposite scale. Typically, the weightiest factor in favour of an applicant seeking to show that there has been some failure to make reasonable financial provision for him or her, is present when there is found to have been a moral obligation on the deceased to make financial provision for the applicant".

Sir John Knox added that the suggestion that a moral obligation on the deceased was necessary to make out a claim by an adult child was only correct to the extent that it meant that there must be some reason for the court to decide that the scales were tipped in the applicant's favour and that *"so limited, the submission is a truism which does not advance the argument".*

In *Ilott v Mitson* the Court of Appeal were faced with a Claimant who, it was asserted, could point to "necessitous circumstances" but nothing else. In fact, the daughter lived in very modest circumstances. She and her husband had lived in rented housing association accommodation since 1984 where they remained with the four youngest of their five children. Aged 50, she had not worked for 25 years. Although there was a possibility she might obtain part-time work in the future she lived in an isolated area and did not hold a driving licence. Her husband worked part-time as an actor taking non-speaking roles and, in all, 75% of the household income was made up from benefits. There were no other applicants under the Act and the only beneficiaries under the will were charities.

Sir Nicholas Wall stressed that the question to be addressed is not whether the deceased had acted unreasonably but whether, on an objective basis, having considered all of the section 3 criteria, the resulting lack of provision was unreasonable. On the facts, he decided that the District Judge had been right to conclude that the claim was made out. The findings made under the section 3 exercise were amply sufficient to enable him to reach the value judgment that the absence of any provision was unreasonable.

Arguably, however, it is the judgment of Black LJ that finally gets to grips with what was left of the *Re Coventry* fallacy that a moral obligation might be necessary where the applicant can point to nothing more than "necessitous circumstances". Having cited the above passage from Oliver J's judgment (endorsed in *Espinosa v Bourke*) to the effect that "necessitous circumstances" are not sufficient to make good a claim, Black LJ made the short but crucial observation that *"A close analysis of the authorities reveals, however, that a bald statement of that kind can be misleading if taken out of context. Necessitous circumstances will never actually be the sole factor from amongst the section 3(1) list to feature in a case".* In her view the Court of Appeal had long since rejected the idea that a moral claim on the deceased was necessary; a moral obligation is just one factor that might tip the scales. Perhaps more importantly, it is implicit that "necessitous circumstances" may well be enough to make out a claim, even where there is no moral claim on the estate or testator, if the other section 3 matters do not tip the scales greatly against an award.

In *Ilott v Mitson* the applicant had a strong basis for saying that she needed an award to help maintain her. The other section 3 factors (e.g. the needs and resources of other applicants or beneficiaries) were absent and the estate was ample. There was, in short, very little to tip the scales against the applicant's daughter. As the Court of Appeal stressed, a dispassionate study of the matters set out in section 3 will not provide the answer alone because section 3 provides no guidance about the relative importance to be attached to each of the criteria in any given case; this therefore requires that the court make a value judgment which should only be disturbed on appeal if "plainly wrong". On that basis, the District Judge was held to have been entitled to conclude that the daughter should be awarded something from her mother's estate.

Alarm has been expressed at the possible ramifications of this decision and it is unlikely to be the final word on the matter. It has been suggested that *Illott v Mitson* makes inroads into testamentary freedom and that the potential for impecunious offspring to make a 1975 Act claim is something that testators should be advised upon in detail. In reality, however, the better view about the impact of *Ilott v Mitson* is that it finally puts the issues of "necessitous circumstances" and the need (or otherwise) for a "moral claim" by the applicant firmly in their proper context. It is unlikely to open the floodgates because many adult children will be capable of maintaining themselves at the standard appropriate to their circumstances. There will be a relatively small class of adult applicant, however, who will be (and should be) more encouraged to bring claims. In particular, those whose means are particularly exiguous or who are sustained by means-tested benefits.

Tim Walsh

Chancel repairs

Chancel repair liability has been branded a "relic of the past"[1] and described by Lord Nicholls as *"… one of the more arcane and unsatisfactory areas of the property law… The very language is redolent of a society long disappeared…anachronistic, even capricious was recognised some years ago by the Law Commission"*[2]

Originally chancel repair liability arose from the alienation and sale of monastic church land during the Reformation. Rectors had traditionally been responsible for the upkeep of the chancel of the church (the west end, aisles and nave were the responsibility of the congregation), and such responsibility was recognised by the setting of the rectorial tithe and the provision of glebe land. As the great religious houses were jealous of their variously acquired advowsons, they placed a deputy or *'vicarius'* in the place of an incumbent (hence vicar). When the houses were dissolved there was no rector for these parishes and where such land passed into private hands the rights and obligations attached to the land passed with the title creating a new class of lay rectors.

The liability for chancel repairs was maintained and imposed because the lay rector took the profits by custom and should therefore have the burden (see *Griffin v Dighton* (1864) 5 B. & S. 93). Prior to the *Chancel Repair Act 1932* the enforcement of chancel repair was a duty of the Ecclesiastical Courts but under the Act the jurisdiction passed to the County Court.

Eventually tithes were commuted to corn rents and rentcharges, and ultimately the *Tithe Act 1936* put an end to tithe rentcharges once and for all. In truth not only does it seem unfair, but it is also remarkably unlucky that any private individual should be faced with a chancel repair liability claim when the present liability has clearly outlasted any notion of profit under a lay rectorship, and where the Parochial Church Councils ("PCC") responsible for the approximately 5200 parish churches have such an erratic approach to identifying their latter-day lay rectors.

However, like the Fat Boy in Pickwick Papers, the insurance industry wants to make your flesh creep. It is telling that there has not been a significant reported case on Chancel Repairs since the final 'quantum' hearing for the Wallbanks case in 2007[3]*. That case is, of course, notorious for the discredit and opprobrium it heaped upon the Chancel Repair Act 1932 and for rejuvenating the bogeyman of chancel repair liability as an insurable risk.*

The Wallbanks have been variously described as victims on the one hand, and authors of their own misfortune. Who, for instance, would take a property (albeit by gift) next to the parish church, called Glebe Farm[4] with an express covenant to repair the Church, and not consider that they might have been liable for chancel repairs? On the other hand, it was also the case that the extent of this particular liability seemed inconceivable in modern times and that the extension of such liability to private householders on behalf of the Church of England must surely be wrong.

As readers will recall, the Wallbanks sought to establish a defence based on the Human Rights Act 1998, and having succeeded in the Court of Appeal, were ultimately unsuccessful in the House of Lords. There it was held, amongst other things, that the PCC was not a public body and as such not vulnerable to a human rights defence. Rather the PCC was a charity and it was charged with a fiduciary responsibility for the Church and parish (the PCCs are fixed with responsibility for the fabric of the church and English Heritage insists that 'all avenues' of funding are exhausted before they will extend funding for a crumbling church).

Whilst *Aston Cantlow v Wallbank* retains certain notoriety it is also clear that the chance of private individuals being fixed with CRL in the same manner and degree is remote. Of course this has not stopped insurers from targeting the anxious homebuyer, and whilst premiums are relatively modest, there is clearly good money to be made.

The effect of the case was to galvanise public debate and in 2003 the *Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003*[5], was published by the Lord Chancellor. The effect of this was that chancel repair liability was to continue as an 'overriding interest' (and thus enforceable though not registered at the Land Registry) for ten years from the coming into force of the *Land Registration Act 2003* on 13th October 2003.

The Order also allows free application to be made for registration of a caution against unregistered land or a notice in the case of registered land which will give PCCs priority over the first registered proprietor or anyone who takes title from a registered owner.

"… the extent of this particular liability seemed inconceivable in modern times and that the extension of such liability to private householders on behalf of the Church of England must surely be wrong."

[1] *Property Law: Liability for Chancel Repairs* (1985) Law Com No. 152.

[2] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 AC 546, per Lord Nicholls of Birkenhead.

[3] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*; Ch D; Times, February 21, 2007.

[4] Ironically of the five classes of potential liability for CRL – proving ownership of Glebe land is regarded as the most difficult and fruitless for PCCs.

[5] SI 2003/2341.

Photo: Phil Draper www.churchcrawler.co.uk

Where an interest has not been registered within the 10 year period, PCCs will still have enforceable rights against owners until those homeowners dispose of their interest and it will still be possible to register an interest by way of caution of notice after the ten year period, albeit for a fee, if land is still in the same hands.

Of course, whether a PCC chooses to register or enforce an interest is a different matter. The Church of England's own legal advice seems fractured on this point, and whereas the fiduciary responsibilities of the PCCs as charitable trustees are brought to the fore, so is the perceived damage to the mission, where the Church is seen to impose a severe impost on an individual or group of private individuals.

Individual Dioceses may well vary in outlook, but most advocate a strict adherence to the task of registering Church interests. With only two years to go before the ten year limit is up it will be interesting to see whether the understandable disinclination of many PCCs to single out individual landowners within their own parishes offsets the desire of the Church to maximise its cover for repairs. For the practitioner, the advice that needs to be given during the conveyancing process about the risks of chancel repair liability remains much the same but will evolve after 2013. In short, for now the risks remain and should probably be legislated for.

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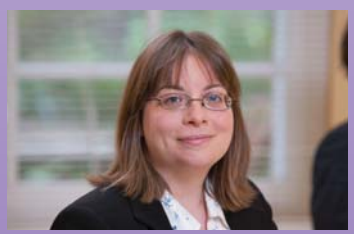

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